IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ELLA J. MONTGOMERY and
MARGARET C. BOWERS,
PLAINTIFFS BELOW,

Appellees,

v. **No. 08-071**

WILLIAM H. CALLISON, JR., AND
CECIL G. CALLISON,
DEFENDANTS BELOW,

Appellants.

APPELLANTS' BRIEF

Appellants herein and defendants below, submit the following brief in support of their request for reversal of the judgment below as reflected in the final order entered herein by the Circuit Court of Greenbrier County.

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EXHIBITS

1. Defendants' Notice of Transactions Between Themselves and Their Deceased Parents — P. 17

2. Order in the Circuit Court of Greenbrier County Ruling of Dead Man's Statute Issues — P. 17

3. Pre-Trial conference direct submissions relating to potential witnesses: — P. 23

   (a) May 29, 1998 – from then counsel for defendants below Jesse O. Guills, Jr.

   (b) October 26, 1998 – same as above

   (c) June 2, 2003 – Defendants' Disclosure of Fact Witnesses

   (d) May 14, 2004 – Defendants' Case Summary

   (e) October 1, 2004 – Defendants' Pre-Trial Information

   (f) August 19, 2007 – Defendants' Witness and Exhibit Lists with Transmittal letters to counsel and court

4. March 9, 2000 – Affidavit of Vane Warner regarding the intentions and Direct evidence of delivery deeds — P. 24

5. February 2, 2001 – Letter from counsel for defendants to Vane Warner Enclosing a copy of changes in his depositon — P. 24

6. Opinion in Holland v. Cedar Creek Min., Inc., 198 F. R. D.651 S. D. W. Va. 2001 — P. 26

1. KIND of PROCEEDING and RULING in the LOWER TRIBUNAL

A civil cause of action was filed on February 11, 1998, in the Circuit Court of Greenbrier County by appellees as plaintiffs below therein against appellants as defendants below therein seeking to set aside two recorded deeds each of which conveyed farm properties to appellant William H. Callison, Jr., from the parents of all the parties and another deed to a separate tract to petitioner Cecil G. Callison from his father after the death of his mother. The basis for the suit was the allegation that the respective deeds had never been delivered to either appellant as a grantee during the lifetime of the grantors. By responsive pleading, appellants denied the failure of delivery and issue was joined. After many substantial procedural delays, the case was tried before a jury resulting in a verdict for appellees on August 27, 2007. A judgment upon the verdict was entered on September 7, 2007.

Appellants, as defendants below, filed a Motion for a Judgment as a Matter of Law and for a New Trial. After a hearing held October 1, 2007, on the issues raised, the court denied the motion by order entered February 12, 2008. A timely request for a transcript of the proceedings below was ordered. When the transcript was not produced, Appellants obtained a two month extension, for the filing of this petition from the trial court below.

Additional extensions to the deadline for filing this petition were granted by this court by orders entered August 15, 2008 and March 13, 2009 allowing Appellants until April 24, 2009 to perfect this appeal which is from the denial of the court below of the post judgment motion.

By order of this court entered September 3, 2009 and received by appellants'

counsel on September 8, 2009, the petition for appeal was granted allowing a period of thirty days from the receipt of the order for the filing of appellant's brief.

2. STATEMENT of the FACTS of the CASE

William H. Callison, Sr., was a farmer and businessman in and near the rural setting of Renick in Greenbrier County. He and his wife, Gladys M. Callison (herein "Gladys") were the parents fo four children, the parties to this action. In addition to operating a mill, William H. Callison, Sr., (herein "Senior") accumulated substantial realty and valuable shares of stock. Three properties are the subject of the issues in this action:

(1) Home Place – this is a 142 acre tract were Senior and Gladys established their residence and raised the four children. It was along U. S. Route 219 and was the site of Senior's mill.

(2) Robinson Place – this 254 acre farm tract lies across U. S. Route 219 from the Home Place.

(3) Taylor Place – this 264 farm acreage is distant from the other parcels in that it is across the Greenbrier River in a different geographic section of the valley.

The four children, all parties herein, were raised on the Home Place. William H. Callison, Jr., (herein "Billy") remains a lifelong resident of the area having retired from service as a state employee. Cecil G. Callison (herein "Cecil") served in the armed forces and returned to the same area. Ella J. Montgomery (herein "Ella") lives with her husband in the same vicinity.

Margaret C. Bowers (herein "Margaret") lives in Pennsylvania.

Senior and Gladys engaged a local attorney, C. Al McHale, to draft a deed to the Home Place conveying their interest to Billy. That deed was executed and acknowledged on January 15, 1968. The same lawyer wrote a deed from Senior and Gladys conveying their interest in the Robinson Place to Billy on October 15, 1973. Neither of these deeds was given to the possession of Billy at the time of their execution.

On August 15, 1977, Gladys died intestate and Senior administered her estate with the assistance of the same lawyer, C. Al McHale. The Home Place and the Robinson Place appear on the appraisal of her estate.

The next month after Gladys' death, on September 23, 1977, Senior and Billy went to the Ronceverte National Bank where they jointly rented a safe deposit box, signed a rental agreement for it and were issued a key to the box for each of them. The two deeds to the Home Place and the Robinson Place were placed in the box by Senior together with other papers.

Attendant to the rental, the bank opened a form that disclosed each time a specific renter opened the box for any purpose. The form also notes changes in the rental arrangement by the addition of other persons authorized by the original renters to enter the box.

Almost seven years later, Senior engaged Mr. McHale to write a deed conveying the Taylor Place to Cecil which was signed and acknowledged on May 11, 1984.

On the same day, Senior executed his will, again drafted by Mr. McHale. Both documents were later recovered from the safe deposit box.

Four months later, on September 7, 1984, Senior signed a codicil to his will taking away a specific gift to Ella and placing her, instead, into the residuary clause of his will. On that

same date, Senior made a gift to Ella by paying $60,000.00 to a Kathleen McClure for the sale of a parcel of property to Ella directly which became her home and was the subject of a gift tax return filed by Senior.

Nine years later, on September 19, 1995, Senior and Billy went to the Ronceverte bank together where they added Cecil's name to the safe deposit box. On that same day, Senior gave his key to the safe deposit box to Cecil which he retained until the box was closed after Senior's death on February 17, 1997.

On February 25, 1997, all the parties together went to the Ronceverte bank where the safe deposit box was opened and its contents inventoried by Margaret.

Two days later, February 27, 1997, Billy and Cecil recorded the deeds to the respective parcels (Home Place and Robinson Place to Billy, Taylor Place to Cecil) with the Greenbrier County Clerk's Office.

Billy was named and performed as the executor of Senior's will with the counsel of Mr. McHale. All the proceedings connected with this relative large and complex estate were performed without complaint. Billy occupied and used both the Home Place and the Robinson Place while Cecil facilitated the use of the Taylor Place. The substantial stock was divided, taxes paid and other assets distributed.

The case below as instituted by Ella and Margaret on February 10, 1998 almost a year following Senior's passing.

After discovery and substantive filings, the presiding judge, Frank Jolliffe, granted

plaintiffs' (below) a summary judgment which was later set aside[1]

Further discovery was accomplished and hearings on motions in limine were held, significantly:

(a) Plaintiffs below moved to exclude any discussions between defendants below and Senior concerning the issue of delivery of the deeds basing the motion on the Dead Man's Statute (W. Va. Code 57-3-1). Judge Jolliffe required present counsel for defendants below to identify any perceived prospective discussions which may come within the purview of the limiting statute. That submission was made, briefs applied and a ruling on each submitted item was rendered all over the objection of defendants below. A motion to reconsider those rulings was denied by Judge Jolliffe.

(b) The deposition of a long time friend and associate of Senior, Vane Warner, was taken. After its completion, pursuant to the W. Va. Rules of Civil Procedure 30(e) changes were submitted to his testimony. Some years after his testimony and after the deponent's death, challenges to the changes and the entire deposition were requested by plaintiffs below. Judge Jolliffe granted those challenges and prohibited the use of the "amendments" to deposition at trial, all over the objections of defendants below.

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[1]The case was initially assigned to Judge James J. Rowe; however, he reassigned the case to Judge Jolliffe because of his previous association with the then counsel for defendants below.

(c) Deposition of another associate of Senior, Gene Turner, was taken by plaintiffs below. Since the case began in 1998 until the eve of the trial, he was listed repeatedly as a fact witness by counsel for defendants below in the various pre-trial submissions. At trial his testimony was excluded by Judge Rowe.

Following Judge Jolliffe's retirement the case was re-assigned back to Judge Rowe upon his assurance that the impediment that led to his original disqualification had been cured by the retention of new counsel by defendants below.

Defendants' motion to reconsider the rulings of Judge Jolliffe on the evidentiary issues of the Dead Man's Statute and Vane Warner's deposition were denied by Judge Rowe and the respective prohibitions allowed in place.

Trial of the case began on August 21, 2007. Al C. McHale had died and a reading of his deposition was to be provided to the jury. Defendants below moved to exclude references to the Home Place and Robinson Place in the estate administration documents based upon this court's decision Walls v Clink, 209 W. Va. 627, 550 S. E. 2d 605 (2001). That motion was denied. Further, the court refused to allow Gene Turner to testify because his name was left off the pretrial order authored by counsel for the plaintiffs below and entered the day the trial began.

Many exhibits were stipulated and the testimony was adduced from all four parties and a business associate of both Senior and Billy as to his transactions concerning the three tracts before and after Senior's death.

Following arguments and instructions the jury returned a verdict for plaintiffs below. Defendants' (below) Motion for Judgment as a Matter of Law and New Trial were

denied permitting this appellate process.

3. ASSIGNMENTS of ERROR and RULINGS in the LOWER TRIBUNAL

Appellants assert the following errors by the trial court:

(1) The court erred by its failure to grant a directed verdict in favor of appellants (defendants below) and to set aside the jury verdict (and judgment upon which it was predicated) and thereby allowing a judgment in favor of defendants below reflecting that a delivery of the three deeds to Appellants respectively had been accomplished prior to death of Senior.

(2) The trial court erred by prohibiting (under the auspices of the Dead Man's Statute) the testimony of Appellants as to the displayed and overt intent of Senior and Gladys in delivering the respective deeds.

(3) The trial court erred in denying the Appellants' motion to allow testimony it perceived to be barred by the Dead Man's Statute after appellees waived any such rights at trial.

(4) The trial court erred by refusing to allow the testimony of Gene Turner in behalf of Appellants.

(5) The trial court erred by refusing to allow the testimony of Vane Warner in behalf of Appellants.

(6) The trial court erred by not granting Appellants' motion in limine to exclude testimony concerning the listing of the three properties in the estate documents of Gladys and Senior as well as the claim of a homestead exemption of the Home Place tract.

(7) The court erred in not giving an instruction to the jury allowing it to consider

aspects of dominion and control of the respective deeds during Senior's lifetime.

POINTS and AUTHORITIES;
DISCUSSION of LAW

(1) The court erred by its failure to grant a directed verdict in favor of Appellants (defendants below) and to set aside the jury verdict (and judgment upon which it was predicated) and thereby allowing a judgment in favor of defendants below reflecting that a delivery of the three deeds to Appellants respectively had been accomplished prior to death of Senior.

The centerpiece of this protracted case is the issue of the delivery of the three deeds of conveyance – two to Billy and another to Cecil. The disposition of that issue as a matter of law and fact and was the basis for Appellants' motion at trial for a directed verdict and the post judgment motion both of which were denied by the trial court.

There is no dispute:

(a)That each deed was drawn up by attorney C. Al McHale at the direction of Appellants parents or parent in the case of Cecil's deed to the Taylor tract.

(b) That the deeds to the Home Place and the Robinson Place were placed in the safe deposit box when Senior and Billy first rented it on September 23, 1977.

(c) That the deed to the Taylor Place was placed in the safe deposit box before Senior's death.

(d) That all three deeds were in proper order, signed by the grantees (Senior and Gladys in the case of the deeds to Billy and Senior alone in the conveyance to Cecil), and those

signatures acknowledged.

(e) That two keys were issued by the Bank of Ronceverte when Senior and Billy opened the box on September 23, 19771, shortly after Gladys' death in August. One key was given to Billy who kept it until the box was closed after Senior's death. The other was kept by Senior until he gave it to Cecil after he added Cecil's name to the safe deposit box title on September 19, 1995 – some one year and five months before his death.

(f) No other keys were ever issued allowing access to the safe deposit box.

(g) That prior to Senior's death, Billy exercised control of the Robinson Place.

(h) That all three parcels were listed as assets by Senior in the administration of Gladys' estate.

(i) That the rental agreement on the safe deposit box signed by both Senior and Billy contained the following language:

> "A rental contract, signed by two or more lessees, constitutes a separate rental to each, and either of them shall have access, free from liability on the part of the lessor for misappropriating any of the contents thereof. Either may appoint a deputy to have access to or to surrender the box. In all cases of joint lessees it is hereby declared that <u>each of them has such interest in the entire contents of said box as to entitle him or her to possession thereof</u>, without liability to the lessor for misappropriating same, and lessor is not bound to take notice of the content of said box or insolvency of either of lessees." (Emphasis provided)

(j) That after opening the box with Billy on September 23, 1977, Senior visited

the box several times until September 15, 1987 – some ten years. Then there was no access to the box for eight years until September 19, 1995 when Cecil was added to the rental and Senior gave up his key to the box to Cecil.

In addition to the express language contained in the safe deposit box rental agreement referred to above, West Virginia statutory provisions support the appellant's contention that delivery was established as a matter of law in the proceeding below. In Dorsey v. Short, 157 W.Va. 866, 205 S.E.2d 687 (1974), the Court held that W. Va. Code § 31A-4-33 ". . . as amended, creates, in the absence of fraud, mistake or other equally serious fault, a conclusive presumption that the donor depositor of a joint and survivorship bank account intended a causa mortis gift of the proceeds remaining in the account after his death to the surviving joint tenant." Id., *Syl. pt.* 2. At *Syl. pt.* 3, the Court further observed that "Prior to the death of a donor depositor, a rebuttable presumption exists under the provisions of Code, 1931, 31A-4-33, as amended, that the ownership of the funds is joint, a presumption which may be overcome by competent evidence."

A number of jurisdictions have held that placing items of value in a safe deposit box held jointly and with rights of survivorship by the owner and another constitutes a delivery sufficient to support the conclusion that the owner intended a gift. See, e.g., Malek v. Patten, 208 Mont. 237, 678 p.2d 201 (1984) [gift recognized even though non-owner tenant had no key to the box] Steinhauser v. Repco, 30 Ohio St. 2d 262, 285 N.E.2d 55 (1972) [intervivos gift] Miller v. Black, 271 F. Supp. 822 (1967) [causa mortis gift]; Hendrecks v. Grant County Bank, 1963 OK 50, 379 P.2d 693 (1963) [gift established by joint tenancy in safe deposit box and statement of intent by grantor]; In re King's Estate, 387 Pa. 119, 126 A.2d 463 (1956) [Inter vivos gift]; Livingston v.

Powell, 257 Ala. 38, 57 So.2d 521 (1952) [placing money in jointly held safe deposit box constitutes gift to survivor]; Nelson v. Spotts, 114 Colo. 72, 162 P.2d 224 (1945) [delivery proved by joint tenancy in safe deposit box together with evidence of intent to make gift]; Sullivan v. Hudgins, 303 Mass. 442, 22 N.E.2d 43 (1939) [joint tenancy in safe deposit box together with documentary evidence of intent established delivery]; Smith v. Commissioner, 59 F2d 533 (CA 7th, 1932) [joint tenancy in safe deposit box together with statement of intent by grantor established delivery]; Re Peterson's Estate, 239 Mich 452, 214 N.W. 418 (1927) [joint tenancy in safe deposit box and statement of intent by grantor established that grantor had relinquished dominion and proved delivery].

The actions of William H. Callison, Sr. in procuring and executing the deeds to the appellants, placing the deeds in a safe deposit box in which both appellants were ultimately were joint tenants with rights of survivorship and the unequivocal expressions of his intent to give the real estate to William, Jr. and Cecil which was manifest in the proffered testimony of the appellants, Gene Turner and Vane Warner combine to conclusively demonstrate an effective delivery of the real estate.

The jurisprudence on delivery is replete with diverse factual settings to enable a conclusion of a grantor's intention to deliver a deed. The fact that the deeds were never recorded is of no consequence on this issue as most cogently stated in Harrell v. Allen, 183 Va. 722, 33 S.E. 2d 222 (1945): "the fact that the deed was not recorded or intended by the grantee to be recorded does not show a lack of legal delivery by grantor or a lack of acceptance by the grantee. As we have just seen, recordation of a deed is for the purpose of giving constructive notice to lien creditors and subsequent purchasers. It is not necessary to a legal delivery of the instrument."

With the established, uncontroverted facts adduced below: that the grantor(s) hired a lawyer to write up the deeds, executed them with acknowledgments, retained them for a period before placing them in a safe deposit box the contents of which were contracted to be the property of renters (Senior, Billy and eventually Cecil) together with the surrender of the key by the grantor to Cecil on the very day he was added to access to the box – all develop the full intent to deliver the deeds.

This court's holdings in Walls v. Clink, 209 W. Va. 627, 550 S.E. 2d 605 (2001) is of direct application to the present case. There a jury verdict was overturned because the intention to deliver the deeds was manifest. In that case a safe deposit box was opened only by the son of a grantor and a deed placed in it. The grantor did not have access to the box but retained dominion over the property including using it as collateral for a loan and claiming a homestead exemption.

The court reviewed the extensive holdings on this subject and held that the "Element of Effective Delivery" includes "actual or constructive delivery" and such can be "express or implied." Combined "effective delivery of a deed must include (1) transfer of possession of valid deed satisfying all required formalities, and (2) intent of the grantor to divest himself of title." Citing precedent the case goes on to hold "no particular form of delivery is required. A deed may be manually given by the grantor to the grantee, yet this is not necessary. The real test of delivery is, did the grantor, by his acts or words or both, intend to divest himself of title? If so, the deed is delivered." (Emphasis added)

The case goes on to establish that the placing of the deed by a grantee in a safe deposit box constitutes "possession" which is prima facie evidence of delivery.

In this case, Senior placed the deeds to Billy in a box with which he acknowledged Billy's ownership. While he retained a key to the box, he later placed in the same box the deed to Cecil. On that same day, he gave his key to Cecil thereby relinquishing any control over the box. Clearly this is an act of granting possession to grantees if any had ever been retained.

Possession having gained a presumption of delivery, the court in Walls addressed the efforts to rebut it, which is of significance in the present case. There the grantor "continued management and involvement with the properties . . . collecting rent . . . paying bills and obtaining a loan on the basis of ownership of properties . . . Also received his homestead exemption for his interest in the property upon which he resided and continued to declare the income and expenses generated from the properties on his personal income tax returns." The opinion went on to assert that such activities were not inconsistent with a delivery when the grantor "wanted to manage the properties . . . while he was living" pointing out that "while initially attractive, those arguments (concerning subsequent control) are extraneous to the primary issue posed (delivery)."

In this present case, the acts of Senior can only be interpreted as a delivery of the deeds to Appellants. Such a circumstance, as in Walls, requires the setting aside of the jury verdict and granting judgment for Appellants.

(2) The trial court erred by prohibiting (under the auspices of the Dead Man's Statute) the testimony of Appellants as to he displayed and overt intent of Senior and Gladys in delivering the respective deeds.

In addressing the in limine motion of plaintiffs below to prohibit defendants

below from eliciting testimony in contravention of the Dead Man's Statute, (W. Va. Code 57-3-1) counsel was directed to declare what specific items were anticipated to be the subject of the issue. In compliance, nine separate potential scenarios were submitted (Exhibit 1). The trial court's ruling on each is reflected in an order by Judge Jolliffe entered August 25, 2004 (Exhibit 2).

Testimony as to the opening of the safe deposit box and the addition of Cecil to access were to be allowed, but all other instances were denied because they involved a "business transaction" changing the relationship between the parties.

Reference is made in the order to Justice Cleckley's opinion rendered in Meadows v. Meadows, 196 W. Va. 56, 468 S.E. 2d 309 (1996) wherein distinctions were carved from the previous holdings of this court on the issue of defining a transaction. Testimony as to the mental acuity of a decedent would be permitted to enable a determination of capacity. Such a concept is not distant from the issue of intent to deliver a deed. Certainly the displaying of the deed to Billy without more could hardly be described as a transaction.

But the Meadows case redefined "transaction" to a more liberal meaning. Yet the order prohibited Billy from testifying about Senior's intention to deed the Taylor property to Cecil and, likewise, barred Cecil from testifying that Senior had stated his intention to have the executed deed to the Home Place to give ownership to Billy.

Neither had any interest in the property of the other. Each should have been enabled to testify as to what they knew about the delivery issue and were prohibited by the court's ruling.

In his cogent analysis in Meadows v. Meadows, 196 W.Va. 56, 468 S.E.2d 309

(1996), of the history and scope of operation of the current iteration of the dead man's statute, W.Va.Code, § 57-3-1, Justice Cleckley observed:

> "W.Va.Code, 57-3-1, created a change whereby the competency of witnesses became the general rule and incompetency the exception. It is obvious that the first part of W.Va.Code, 57-3-1, is in derogation of common law; nevertheless, to the extent that it removes the disqualification of a witness because of interest, it should be construed liberally as a remedial statute. (Citation omitted)
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> "By adopting the first part of the statute, the Legislature intended to expand the opportunities to use testimony which previously had been excluded. This availability is consistent with the general rule announced in Rule 601. We believe that the exclusion of the testimony of a party merely because of interest more likely will result in widespread injustices than would a rule of admissibility subject to the traditional adversarial testing. (citations omitted)
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> "On the other hand, to the general rule of witness competency, W.Va.Code, 57-3-1, makes one exception-the Dead Man's Statute. This exception is a limitation on the remedial aspects of the statute because it restricts the testimony of an interested party. Therefore, the language of the Dead Man's Statute should be strictly construed and limited to its narrowest application." (citation omitted)

With this background, the Court in Meadows held that (1) the statute did not operate to prevent an interested person from testifying about observed facts and (2) that the term " 'transaction' imports a mutuality or concert of action. In our judgment, the word 'transaction'

includes a business deal where the legal relationship of the parties is altered. * * * [W]e construe the term 'personal transaction' as requiring something in the nature of a negotiation or a course of conduct or a mutuality of responsibility resulting from the voluntary conduct of opposing parties." Notwithstanding the clear evidence that the deeds by William Callison, Sr. to his two sons constituted a unilateral gift to family members and that testimony of the sons had nothing to do with a negotiation or business, the trial court precluded the testimony of the sons based on its conclusion that the "conveyance of title to property is a business deal where the legal relationship of the parties would be altered." August 25, 2004 order, p.4. This decision was an obvious and prejudicial error by the court.

(3) The trial court erred in denying the Appellants' motion to allow testimony it perceived to be barred by the Dead Man's Statute after appellees waived any such rights at trial.

At trial, counsel for plaintiff below elicited testimony from his clients concerning numerous transactions between them and their deceased parents, all involving the overall intention of the decedents to distribute their considerable resources between their children by deeds, will and otherwise.[2] Appellants assert that the dead man's statute has no effect on the

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[2]Testimony of appellee Ella J. Montgomery, offered on her own behalf, which operated as a waiver of the dead man's statute:

Described the three parcels of property (Tr., pp. 130-133)

Testified that her father handled her mother's estate. (Tr., p. 133)

Testified that her father listed the three parcels of property as a part of her mother's estate. (Tr., pp. 134-135)

Identified her father's signature on estate document. (Tr., p.136)

Testified that her father gave her a house and the real estate that it was a gift during his

transactions between the parties and their parents concerning the making of gifts of real estate under this Court's decision in Meadows. Nevertheless, the testimony of both appellees constitute a waiver of the statute. It is a fundamental rule that the incompetency of witness under dead man's statute is waived when a protected party testifies on his own behalf as to the transaction or communication. Martin v. Smith, 190 WVA. 286, 438 S.E.2d 318 (1993). See also, Moore v. Best, 180 WVA. 78, 375 S.E.2d 549 (1988); In re Estate of Tacker, 152 WVA. 455, 164 S.E.2d 301 (1968). Then defendants below (Appellants here) were called as adverse witnesses and questioned about similar matters. Appellants contended that by doing so, plaintiffs below waived their rights under the Dead Man's Statute and could not object to testimony between the defendants below and the decedents.

Holland v. Joyce, 155 W. Va. 535, 185 SE 2d 505 (1971) was cited for this proposition of waiver. In the fact the Holland case involved the issue of the delivery of a deed. Mrs. Joyce was claiming delivery of a deed from her deceased mother in contravention to the

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lifetime and that the gift was made at the same time as her father changed the terms of a previous will. (Tr., pp. 146-147)

Testified that her mother and father gave her brother (William, Jr.)real estate to build his house on. (Tr., pp. 147-148)

Testified that her mother and father gave her brother (Cecil) a house to live in (Tr., p. 149)

Testimony of appellee Margaret Ann Bowers, offered on her own behalf, which operated as a waiver of the dead man's statute:

Testified in detail about her parent's character and her relationship with them. (Tr., pp. 152-154, 160-161)

Testified that her parents did not give her any land during their lifetime. (Tr., p. 154)

interests of her siblings as here. She was called as a witness by the adverse party and examined about various communications. The court held "The plaintiffs (below) waived their right to object to such testimony by calling her as a witness in her own behalf."

In the present case, plaintiffs below were permitted to give extensive testimony about the general disposition of the assets of Gladys and Senior. However, when it came to any discussion concerning the delivery of the deeds, the Dead Man's Stature was invoked. This disparity in the admission of evidence became especially clear when counsel for plaintiffs below stated to Cecil that he (Cecil) never had a key to the safe deposit box and obtained the response indeed he had one since 1995 being two years before his father's death.[3] When Cecil's own

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[3]Cecil Callison testified in direct examination when called by counsel for the appellees, the following transpired:

Q You never had a key to that [safe deposit] box did you?
A Yes, sir. I did.
Q When did you get a key to that box?
A In '95.
Q You never opened that box though, did you?
A No, sir.
(Tr., p. 185)

Thereafter, in cross-examination by appellants' counsel, the following occurred:

Q Well, Cecil, how did you get the key to the box that you had in 1995? How did you get that?
A From my dad.
Q Where?
A He gave it to me.
Q Where?
A At his home.
Q What were you doing there?
A I just stopped to visit.
Q Did he tell you what the key was for?
A Yes, he said it was for the safe deposit box.
Mr. Richardson [counsel for the appellees] Your honor, I'm going to object and ask

counsel asked him about what his father had told him the key was for, the court sustained plaintiffs' (below) objection and instructed the jury to "disregard" his answer that the key was for the safe deposit box. By asking Cecil the critical question concerning the key to the safe deposit box and eliciting the response that Cecil did, in fact have a key, appellees counsel invited an explanation and effectively waived the statute. Holland v. Joyce; 155 WVA. 535, 185 S.E.2d 505 (1971); Odin v. First Nat. Bank, 103 WVA. 665, 138 SE 376 (1927). Of course this was the most critical evidence in the case to establish that Senior had given up any possible avenue to enter the box where the three deeds remained and this allowing for completed delivery.

(4) The trial court erred by refusing to allow the testimony of Gene Turner in behalf of Appellants.

Gene Turner was a central and critical witness for Appellants. Their first lawyer listed him in his first submission of May 29, 1998 as a fact witness. His name was repeated in every pre-trial listing as a fact witness by defendants below being October 26, 1998, June 2,2003, May 14, 2004 and October 4, 2004. Plaintiffs below took Gene Turner's deposition on October 27, 2003. With the trial scheduled to begin August 21, 2007, on August 7, 2007 counsel for plaintiffs below, authored a pre-trial order listing witnesses only for the plaintiffs below side of the case and omitting Gene Turner with the provision that the parties exchange "final witness lists no later than August 17, 2007." On Friday, August 17, 2007, plaintiffs below forwarded their "final witness list" by mail to counsel for defendants below in Charleston. Upon noting the absence of Gene Turner's name on the list, defendants below counsel faxed his request for

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that this be stricken.
[Tr., pp. 185-186]

Turner's inclusion to the list to both counsel for plaintiffs below and Judge Rowe on Sunday, August 19, 2007. The pre-trial order had not been entered when Judge Rowe acknowledged that he received the addition of Gene Turner on Monday, August 20, 2007. On the morning of the trial, Judge Rowe entered the pre-trial order authored and submitted by counsel for plaintiffs below which did not included Gene Turner's name. In voire dire, jurors were asked about any association with Gene Turner. (Trans. 8/21/07, p. 32-33). Counsel for defendants below was incredulous at this turn especially when plaintiffs' (below) counsel declared he would be prejudiced by this surprise witness ignoring the repeated submissions in Exhibit 3. (p.69- 73) Then Judge Rowe announced that he had received the listing of Gene Turner on Monday, August 20, 2007 and that the submission was "not timely" thus "he (Turner) cannot be called as a witness." Immediately, Judge Rowe made the following proposal: "If either side feels that there is unfairness here and wishes to pay for the cost of the jury, we can go back and restart. It's your choice." (p. 97)

Defendants' below counsel immediately accepted the proposal and agreed to payment. Then counsel for plaintiffs below objected to the proposal (given to "either side") and Judge Rowe "denied" his own proposition. Defendants' below counsel requested an avowal of the Gene Turner's testimony which was set out in the record (p. 114-116). That would have been the single live testimony not barred by the court's Dead Man's ruling to reveal the intent of Senior in conveying all three tracts. Gene Turner would have spoken of first hand personal knowledge of the full intent to deliver all the deeds. The witness list submissions are attached as Exhibit 3 together with the faxing to Judge Rowe. When Judge Rowe entered the pre-trial order on the day of the trial, August 21, 2007 he had before him defendants below counsel's request for

the inclusion of Gene Turner as a witness. Notwithstanding that fact, he entered the order, prohibited the witness' crucial testimony, then offered a mistrial to either party and when accepted by defendants below but objected to by plaintiffs below, reneged upon the offer.

(5) The trial court erred by refusing to allow the testimony of Vane Warner in behalf of Appellants.

Vane Warner was an intimate friend to Senior. He made an affidavit on March 9, 2000 in support of defendants' below (Appellants here) motion to set aside the entered summary judgment (attached as Exhibit 4). He possessed critical testimony on the issue of delivery being directly involved in the decisions by Senior connected with the three deeds.

A deposition of Vane Warner was taken on December 29, 2000. At the beginning of the questioning he was informed of his right to review the transcript of his testimony "to make sure everything there is correct" and the last words in the transcript are from plaintiffs' (below) counsel: "You can have her (the court reporter) show you this and you can review it if you like and then see if - - whatever changes you want to make on it."

Following the deposition, Vane Warner's wife who was present during the deposition contacted counsel for defendants below stating her husband would like to make some changes in his testimony because it varied substantially from the affidavit. Defendants' below counsel wrote down the changes in his deposition and timely filed them with the court reporter in accordance with W. Va. Rule of Civil Procedure 30 (e). A copy of counsel's correspondence is attached as Exhibit 5. Counsel for plaintiffs below was, of course, copied. The court reporter properly appended changes to the completed transcript.

No new deposition of Vane Warner was set. Instead some two years and eight

months later, counsel for plaintiff filed a motion in limine to prohibit the introduction of the amended transcript of deposition of Vane Warner. In the body of the motion, counsel states that after the deposition changes were filed, he was informed by Mrs. Warner that her husband was unable to participate in any further depositions – a situation not shared with the defendants' below counsel. Hearing on the motion was held on January 7, 2004 shortly after the death of Vane Warner. An order granting a motion was entered April 17, 2006 directing the alterations be inadmissable.

In comportment with R. C. P 30(e), Mr. Warner stated the reasons for the changes in his deposition and executed the Deponent's Certificate before a notary.

The United States District Court for the Southern District of West Virginia addressed the issue of substantive changes in a deposition as declared by Rule 30(e) in Holland v. Cedar Creek Min., Inc., 198 F. R. D.651 (S. D. W. Va. 2001) (copy attached as Exhibit 6) The altered deposition scenario was cogently stated that such a deponent simply faces the prospect of being cross examined concerning the changes in the same manner as any witness who modifies his testimony at trial from that of an earlier deposition. Unlike the present case, the witness in Holland simply failed to satisfy the rule's directive that the reasons for substantive alterations in the final transcript be clearly stated.

The impact of Vane Warner's testimony would have been dynamic of the central issue of Seniors intent to deliver the deeds in question to Appellants.
behalf of Appellants.

(6) The trial court erred by not granting Appellants' motion in limine to exclude testimony concerning the listing of the three properties in the estate documents of Gladys and

Senior as well as the claim of a homestead exemption of the Home Place tract.

Defendants below made a motion in limine to prevent testimony that the properties had been listed by Senior in his administration of Gladys' estate as well as an assertion of a homestead exemption on the Home Place. That motion was predicated upon the statement in the Walls case, supra, that such dominion has no impact upon the issue of delivery. The court denied the motion and plaintiffs' (below) counsel made the inclusion a major point in his summation to the jury.

The failure to grant defendants' below motion allowed the false notion to the jury that such an inclusion had an impact on the issue of delivery.

(7) The court erred in not giving an instruction to the jury allowing it to consider aspects of dominion and control of the respective deeds during Senior's lifetime.

During the instruction conference, counsel for defendants below tendered "Defendants Jury Instruction No. 4" which stated in relevant part:

> "If you find when William H. Callison Sr., and William H. Callison, Jr., together rented a safe deposit box on September 23, 1977, and the deeds to William H. Callison, Jr., were placed in that box, and by such act William H. Callison, Jr., came into possession of those deeds, there arises a presumption of delivery of such deeds. The burden of overcoming that presumption rests with the plaintiffs below to present proof that is certain and reasonably conclusive."
>
> [Additional language in the instruction similarly instructed the jury with respect to the deed to Cecil Callison.]

The language in this instruction is predicated on the holding in Evans v. Bottomlee, 150

W. Va. 609, 148 S. E. 2d 712, (1966) and Walls v. Clink, 209 W. Va. 627, 550 SE 2d (2001) that "Possession of a deed executed and acknowledged with all formalities is prima facie evidence of delivery. See also, Heck v. Morgan, 88 W. Va. 102, 106 SE 413 (1921).

The Court ruled that it would not give the instruction. Thereafter, while saving an objection to the ruling, defendants below tendered "Defendants Jury Instruction Nol 4A" which added the word exclusive to the previously offered instruction, as follows:

> "If you find when William H. Callison, Sr., and William H. Callison, Jr., together rented a safe deposit dox on September 23, 1977 and the deeds to William H. Callison, Jr., were placed in that box, and by such act William H. Callison, Jr., came into **exclusive** possession of those deeds, there arises a presumption of delivery of such deeds. The burden of overcoming that presumption rests with the plaintiffs below to present proof that is certain and reasonably conclusive." [Additional language in the instruction similarly instructed the jury with respect to the deed to Cecil Callison.] (Emphasis added).

The defendants below posited that possession, sufficient to permit the complete exercise of dominion and control over the deeds, even to the extent of allowing the recording of the deeds, was given by William H. Callison, Sr., to William H. Callison, Jr., and Cecil G. Callison[4], by his actions in (1) giving his sons joint access and control over the safe deposit box, (2) giving his sons the only two keys provided by the bank to the safe deposit box and (3) by having no access to the box for the ten years prior to his death. Nothing in the language of the Supreme Court's

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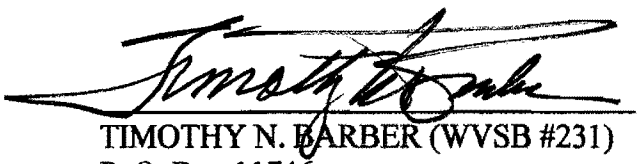
[4]The evidence, had the Court permitted its introduction, was that William H. Callison, Sr., had asked his son, William H. Callison, Jr., to refrain from filing the deeds until after his death.

holdings in Evans, Walls, or Heck require that the possession necessary to giving rise to a presumption be exclusive.

CONCLUSION and REQUEST

For the reasons and grounds assigned, Appellants request this court reverse the final judgment of the court below.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ELLA J. MONTGOMERY and
MARGARET C. BOWERS,
PLAINTIFFS BELOW,

Appellees,

v. **No. 08-071**

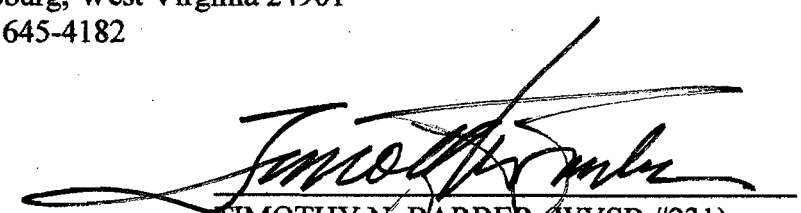
WILLIAM H. CALLISON, JR., and
CECIL G. CALLISON,
DEFENDANTS BELOW,

Appellants.

CERTIFICATE OF SERVICE

I, Timothy N. Barber, counsel for the Appellants herein do hereby certify that I have served a true and exact copy of the forgoing Appellants' Brief on the parties herein by hand delivery to counsel of record this 5th day of October, 2009 as follows:

Barry L. Bruce
Counsel for Appellees
P. O. Box 338
Lewisburg, West Virginia 24901
(304) 645-4182



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Counsel for Appellants

EXHIBIT 1

EXHIBIT 1

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

ELLA J. MONTGOMERY and
MARGARET C. BOWERS

Plaintiffs,

v.

CIVIL ACTION NO. 98-C-31
Frank E. Jolliffe, Judge

WILLIAM H. CALLISON, JR. and
CECIL G. CALLISON,

Defendants.

DEFENDANTS' NOTICE of TRANSACTIONS BETWEEN THEMSELVES AND THEIR DECEASED PARENTS

Pursuant to the court's directives, defendants' prospective testimony involving conversations and transactions between themselves and their deceased parents are:

1. Prior to 1968, William H. Callison, Sr., and his wife, Gladys Callison, both deceased, informed William H. Callison, Jr., and Cecil Callison, defendants, of their intention to convey the title to realty they owned to such defendants.

2. In January, 1968, the parents displayed a deed to William H. Callison, Jr., which disclosed a conveyance of what was known as the "home place" property from them to William H. Callison, Jr. The parents told William H. Callison, Jr., that they were on their way to have the deed acknowledged and that upon doing so the property would be in fact transferred to William H. Callison, Jr. After that meeting in 1968, the parents never farmed the property thereafter and William H. Callison, Jr., was provided exclusive use of the property.

3. In October, 1973, the parents informed William H. Callison, Jr., that a deed to a

property described as the Robinson place had been conveyed to him. After that discussion parents never executed any actual control over the Robinson place.

4. In September, 1977, William H. Callison, Sr., and William H. Callison, Jr., jointly rented a safe deposit box at the then Ronceverte National Bank. Both father and son placed items in the box. William H. Callison, Jr., was aware that the two deeds to him were among those papers. After that deposit William H. Callison, Sr., never exhibited any control over the two deeds.

5. In 1984, William H. Callison, Sr., told William H. Callison, Jr., that he had signed a deed to property called the Taylor property to Cecil Callison and placed it in the safe deposit box.

6. In 1995, William H. Callison, Sr., and William H. Callison, Jr., signed an agreement to add Cecil Callison to the safe deposit box containing all the deeds.

7. William H. Callison, Sr., told William H. Callison, Jr., repeatedly that he had signed a deed to the Taylor property to Cecil Callison and intended it to be his.

8. William H. Callison, Sr., told Cecil Callison he had signed deeds to the home place and Robinson place to William H. Callison, Jr., and intended for him to have those parcels.

9. William H. Callison, Sr., told William H. Callison, Jr., that the deeds in the safe deposit box were not to be recorded until after his death.

_____
DATE

_____
TIMOTHY N. BARBER (WVSB #231)
P. O. Box 11746
Charleston, West Virginia 25339
(304) 343-7676
Counsel for Defendants

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

ELLA J. MONTGOMERY and
MARGARET C. BOWERS

Plaintiffs,

v.

CIVIL ACTION NO. 98-C-31
Frank E. Jolliffe, Judge

WILLIAM H. CALLISON, JR. and
CECIL G. CALLISON,

Defendants.

CERTIFICATE OF SERVICE

I, Timothy N. Barber, counsel for the defendants, do hereby certify that service of the Defendants' Notice of Transactions Between Themselves and Their Deceased Parents, has been made upon the plaintiffs by mailing said true copy thereof to:

Robert E. Richardson
Attorney at Law
P. O. Box 1865
Lewisburg, West Virginia 25901

this the 16th day of January, 2004

DATE

TIMOTHY N. BARBER (WVSB #231)
P. O. Box 11746
Charleston, West Virginia 25339
(304) 343-7676
Counsel for Defendants

EXHIBIT 2

EXHIBIT 2

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

ELLA MONTGOMERY and
MARGARET C. BOWERS,
Plaintiffs,

v. **Civil Action No. 98-C-31**

WILLIAM H. CALLISON, JR. and
CECIL G. CALLISON,
Defendants.

ORDER

This matter is before this Court pursuant to a Motion in Limine to Prohibit Introduction of Testimony or Evidence of Personal Transactions or Communications Between the Defendants and William H. Callison, Sr., or Gladys M. Callison, together with a Motion to Compel Answers To Plaintiffs' Second Set of Interrogatories and Requests for Production of Documents heard by this Court on the 19th day of July, 2004. Specifically, the Plaintiff argues that the Defendants have failed to provide certain tax documents and answers to certain interrogatories relating to this case and that the Defendants should not be allowed to testify to certain statements made by the parties' deceased parents to the Defendants regarding the matter that is central to this litigation. The Motion to Compel was granted by this Court on the day of the hearing. Accordingly, only the Motion in Limine filed by the Plaintiffs shall be considered in this Order.

West Virginia Code § 57-3-1, also referred to as the "Dead Man's Statute", provides that, "No person offered as a witness in any civil action, suit or proceeding, shall be excluded by reason of his interest in the event of the action, suit or proceeding, or because he is a party thereto, except as follows: No party to any action, suit or

proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence: Provided, however, that where an action is brought for causing the death of any person by any wrongful act, neglect or default under article seven, chapter fifty-five of this Code, the person sued, or the servant, agent or employee of any firm or corporation sued, shall have the right to give evidence in any case in which he or it is sued, but he may not give evidence of any conversation with the deceased."

In this case, the Plaintiffs, Ella Montgomery and Margaret Bowers, are sisters of the Defendants, William H. Callison, Jr., and Cecil Callison. At issue is the real estate owned by the parties' deceased parents. The Defendants wish to testify to certain conversations and transactions with their deceased parents regarding the distribution of real estate. Specifically, the Defendants have set out nine transactions between themselves and their deceased parents to which they plan to testify at trial.

In Meadows v Meadows, 468 S.E.2d 309 (1996) at 313, the West Virginia

Supreme Court of Appeals stated that, "The purpose of the West Virginia Dead Man's Statute is to prevent injustice that would result from a surviving party to a transaction testifying favorably to himself or herself and adversely to the interest of a decedent, when the decedent's representatives would be hampered in attempting to refute the testimony by reason of the decedent's death." Further, the Court stated that, "The word "transaction" imports a mutuality or concert of action. In our judgment, the word "transaction" includes a business deal where the legal relationship of the parties is altered." Id.at 315. The Dead Man's Statute does not bar parties from testifying to the decedent's appearance or demeanor. Further, a party may testify to his opinion regarding the decedent's competency if other prerequisites of the West Virginia Rules of Evidence are met.

The Court in Meadows defined "personal transaction" as, "requiring something in the nature of a negotiation or a course of conduct or a mutuality of responsibility resulting from the voluntary conduct of opposing parties. In this view, a "transaction" results when one enters upon a course of conduct after a knowing exchange of reciprocal acts or conversations." Id. at 315.

The West Virginia Supreme Court of Appeals laid out a test in Kuhn & Hoover v Shreeve, 89 S.E.2d 685 (1955) and again in Miami Coal Co., Inc. v Hudson, 332 S.E.2d 114 (1985) at 119, that, "The test generally accepted is to the effect that if a deceased person were alive and testifying, or an insane person were sane and testifying, could the testimony of a witness testifying in opposition to a transaction or communication be disputed by the testimony of the absent witness." The Court in Miami Coal further

found that, "This rule is correct, but must be seen in context as excluding only the testimony of an interested witness as to a fact the knowledge of which is derived dependently from a personal transaction or communication with the deceased or incompetent." Id. at 119.

The Defendants, William H. Callison, Jr., and Cecil Callison, would be considered interested parties in this suit. Both Defendants wish to testify to certain transactions and communications between them and their deceased parents that would allow them to retain ownership of certain properties owned by their deceased parents. The Plaintiffs, otherwise heirs at law to the real estate in question, would be adversely affected by the testimony offered by the Defendants.

The first transaction between the Defendants and their now deceased parents, that the parents informed the Defendants that they intended to convey title to realty they owned to the Defendants, is barred by the Dead Man's Statute. This is a direct communication between the parents and the Defendants. The Defendants' claim of conveyance of title to property is a business deal between the parties where the legal relationship of the parties would be altered. As such, the Defendants would be barred from testifying to this alleged statement made by the Defendants' deceased parents.

The second transaction listed by the Defendants, that their deceased parents displayed a deed disclosing conveyance to William H. Callison, Jr., and further told the Defendants that they were going to have the deed acknowledged, is also a transaction barred by the Dead Man's Statute. This would also be considered a business deal between the parties, having the effect of changing the legal relationship between the

parties.

The Defendants further wish to testify that their deceased parents told William H. Callison, Jr., that a deed to property had been conveyed to him. The Defendant is barred from testifying to this transaction as well. This is a personal transaction between the deceased parties and the Defendant. The Defendant is interested in the outcome of this matter, and his testimony regarding the conversation cannot be refuted by the deceased parties.

The next transaction that the Defendants wish to testify to is the renting of a safety deposit box. The safety deposit box was jointly rented by William H. Callison, Sr., and William H. Callison, Jr. This testimony should be allowed because there is other evidence to support this testimony, including the rental agreement with First National Bank. Although this is a business transaction between the parties, this testimony may be presented.

The Defendants wish to testify that William H. Callison, Sr., told William H. Callison, Jr., that he deeded property to Cecil Callison and placed it in the safety deposit box. This testimony is inadmissible as it violates the Dead Man's Statute. This is a business transaction or communication that changed the legal relationship between the parties.

The Defendants wish to testify that William H. Callison, Sr., and William H. Callison, Jr., signed an agreement allowing Cecil Callison to have access to the safety deposit box. This testimony would be admissible. Even if William H. Callison, Sr., were alive to testify to this transaction, other evidence, such as bank records, could be

introduced to prove the truth of the matter asserted.

The next transaction that the Defendants would testify to is that William H. Callison, Sr., told William H. Callison, Jr., that he had signed a deed conveying property to Cecil Callison and intended for him to have that property. The Defendant may not testify to this personal transaction concerning a change in the legal relationship between the deceased father and the Co-Defendant Cecil G. Callison. The deceased, William H. Callison, Sr., is not available to testify and the Defendants are interested parties.

The Defendants further wish to introduce the testimony of Cecil Callison that William H. Callison, Sr., told him that he had signed deeds to property that he wished William H. Callison, Jr., to have. This communication is barred by the Dead Man's Statute. Were William H. Callison, Sr., alive, it could be possible for him to dispute the truth of this statement.

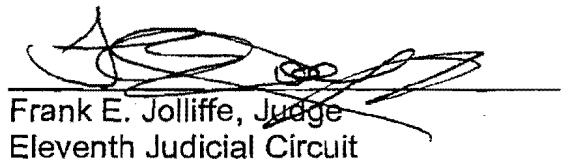
Finally, the Defendants wish to testify that William H. Callison, Sr., told William H. Callison, Jr., that the deeds in the safety deposit box were not to be recorded until after his death. This is another personal transaction between William H. Callison, Sr., deceased, and William H. Callison, Jr. The Defendants may not testify to this transaction.

Accordingly, the Motion in Limine to Prohibit Introduction of Testimony or Evidence of Personal Transactions or Communications Between the Defendants and William H. Callison, Sr., or Gladys M. Callison, is **GRANTED** as to Numbers 1, 2, 3, 5, 7, 8, and 9 of the Defendants' Notice of Transactions Between Themselves and Their Deceased Parents. The Motion in Limine is **DENIED** as to Numbers 4 and 6 of the

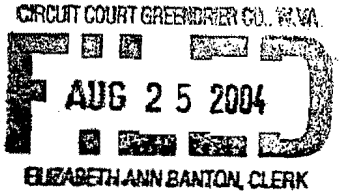
Defendants' Notice of Transactions Between Themselves and Their Deceased Parents.

The Clerk is **ORDERED** to forward a copy of this Order to the counsel of record for both parties at their respective addresses.

Entered this 25th day of August, 2004.



Frank E. Jolliffe, Judge
Eleventh Judicial Circuit



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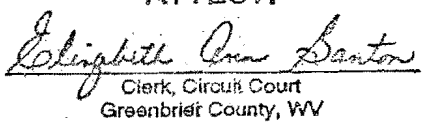


Clerk, Circuit Court
Greenbrier County, WV

By_____
Deputy

EXHIBIT 3

EXHIBIT 3

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

ELLA J. MONTGOMERY and
MARGARET C. BOWERS — PLAINTIFFS

VS. — CIVIL ACTION NO. 98-C-31 (R)

WILLIAM H. CALLISON, JR. and
CECIL G. CALLISON — DEFENDANTS

DEFENDANTS' DISCLOSURE OF FACT WITNESSES

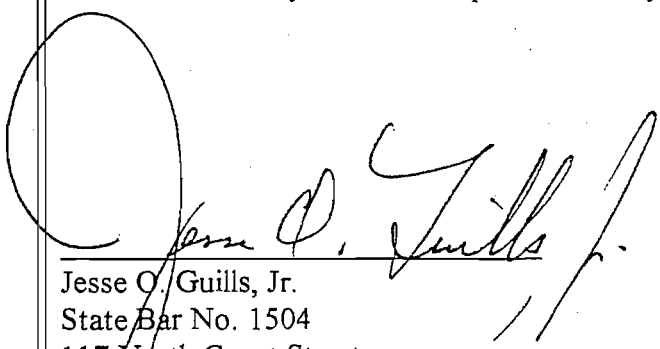
Now comes the defendants, William H. Callison, Jr. and Cecil G. Callison, and state that they may call one or more of the following persons as facts witnesses at trial in this action:

1. William H. Callison, Jr.
2. Cecil G. Callison
3. Ella J. Montgomery
4. Margaret C. Bowers
5. Shirl Montgomery
6. Rubie Gail Gibbs
7. Vane Warner
8. John Robertson
9. Gene Turner
10. Roy Pack
11. The defendants reserve the right to call any persons disclosed as potential witnesses by any other party in this action.
12. The defendants reserve the right to call rebuttal witnesses.
13. The defendants reserve the right to supplement this disclosure and to call any additional

witnesses that may be disclosed prior to trial by further discovery or additional investigation.

WILLIAM H. CALLISON, JR. and
CECIL G. CALLISON

By Counsel



Jesse O. Guills, Jr.
State Bar No. 1504
117 North Court Street
Lewisburg, West Virginia 24901
(304) 645-3313
Counsel for the Defendants

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

ELLA J. MONTGOMERY and
MARGARET C. BOWERS — PLAINTIFFS

VS. — CIVIL ACTION NO. 98-C-31 (R)

WILLIAM H. CALLISON, JR. and
CECIL G. CALLISON — DEFENDANTS

CERTIFICATE OF SERVICE

I, Jesse O. Guills, Jr., counsel of record for the defendants, William H. Callison, Jr. and Cecil G. Callison, do hereby certify that I have served the foregoing **Defendants' Disclosure of Fact Witnesses** on Ella J. Montgomery and Margaret C. Bowers, the within named plaintiffs, by hand delivering a true and exact copy thereof to the plaintiffs' counsel of record, Robert E. Richardson, The Ford Law Firm, 203 West Randolph Street, Lewisburg, West Virginia, 24901, on this the 29th day of May, 1998.

Jesse O. Guills, Jr.

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE