

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**ELLA J. MONTGOMERY and  
MARGARET C. BOWERS**

**Appellees,**

v.

**No. 08-071**

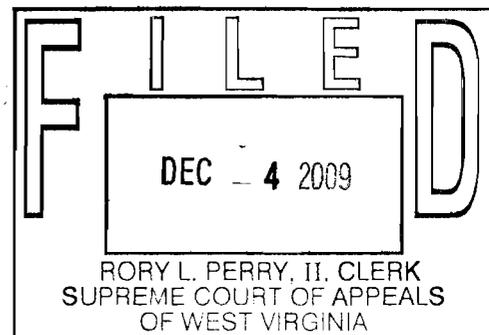
**WILLIAM H. CALLISON, JR. and  
CECIL G. CALLISON,**

**Appellants.**

**APPELLEES' RESPONSE TO APPELLANTS' BRIEF**

Appellees herein and Plaintiffs below, Ella J. Montgomery and Margaret C. Bowers, by counsel, Barry L. Bruce and Mark J. Jenkins, of Barry L. Bruce and Associates, L.C., do hereby respectfully submit Appellees' Response to Appellants' Brief, and move this Honorable Court to uphold the February 12, 2008, Order, from the Circuit Court of Greenbrier County, West Virginia, and herein states the following in support thereof.

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**Appellees,**

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**WILLIAM H. CALLISON, JR. and  
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**Appellants.**

**APPELLEES' RESPONSE TO APPELLANTS' BRIEF**

Appellees, Ella J. Montgomery and Margaret C. Bowers, by counsel, Barry L. Bruce and Mark J. Jenkins, of Barry L. Bruce and Associates, L.C., do hereby respectfully submit Appellees' Response to Appellants' Brief, and herein state the following:

**I. KIND OF PROCEEDING AND NATURE OF THE RULING**

A civil action was filed on February 11, 1998, in the Circuit Court of Greenbrier County, West Virginia, by Appellees, as Plaintiffs, against Appellants, as Defendants. Said Complaint sought to set aside three recorded deeds, each of which conveyed farm properties to the Appellants. The basis for the suit was the allegation that the respective deeds had never been delivered to the Appellants as grantees during the lifetime of the grantors, being the parents of the parties herein.

After considerable delays, the case was brought before a jury, and a verdict was entered for the Appellees on August 27, 2007. A judgment upon said verdict was entered on September 7, 2007.

Subsequently, on September 18, 2007, Appellants filed a Motion for a Judgment as a Matter of Law and for a New Trial. After a hearing was held on October 1, 2007, on the issues raised in the Appellants' Motion for a Judgment as a Matter of Law and for a New Trial, the Circuit Court of Greenbrier County, denied the motion by order entered February 12, 2008.

Appellants timely filed their Petition for Appeal on April 24, 2009, after receiving several extensions to the deadline for filing its petition. Appellees, by order dated May 18, 2009, were given until June 24, 2009, upon which to file its Response to the Appellants' Petition for Appeal.

After consideration of the Appellants' Petition, and the Appellees' Response to the Appellants' Petition, this Honorable Court, on September 3, 2009, granted the Appellants' Petition for Appeal.

## **II. STATEMENT OF THE FACTS OF THE CASE**

The Appellants and the Appellees are the children and sole heirs at law of William H. Callison, Sr., and Gladys M. Callison. Throughout their lives, William H. Callison Sr., and Gladys M. Callison, accumulated considerable realty. Said realty is described below as:

- (1) **Home Farm**-this is a 142-acre tract, along U.S. Route 219.
- (2) **Robinson Property**-this is a 254-acre tract that lies across U.S. Route 219 from the Home Place.

(3) **Taylor Property**-this is a 264-acre tract located next to the Greenbrier River in a different section of Greenbrier County, as the Home Place and the Robinson Place.

Prior to their deaths, William H. Callison, Sr., and Gladys M. Callison created a deed, dated January 15, 1968, naming the Appellant, William H. Callison, Jr., as grantee, as to the tract of real estate previously described as the Home Farm. Additionally, prior to their deaths, William H. Callison, Sr., and Gladys M. Callison created a deed, dated October 15, 1973, which named the Appellant, William H. Callison, Jr., as grantee, as to the tract of real estate previously described as the Robinson Property.

Gladys M. Callison died on or about August 15, 1977. Mr. Callison, Sr., was named the Administrator of the Estate of Mrs. Callison. Pursuant to Mrs. Callison's Last Will and Testament, dated February 17, 1954, all of her property, both real and personal, were to be devised unto her husband, Mr. Callison, Sr. (See Exhibit 1 Attached).

In order to determine what property was included in the Estate of Mrs. Callison, an appraisal of her assets was conducted pursuant to West Virginia Code Section 44-1-14, and under the supervision of Mr. Callison, Sr., the Administrator of the Estate of Mrs. Callison.

Interestingly, the two tracts of property that the Appellants contend were devised onto William Callison, Jr., prior to the death of Mrs. Callison, being the Home Farm and the Robinson Property, were both included as assets of Mrs. Callison, during the appraisal of her properties.

Mr. Callison, on September 23, 1977, rented a safety deposit box at the Ronceverte National Bank, in Ronceverte, West Virginia. (See Exhibit 2 Attached). From

the time the safety deposit box was initially rented, in 1977, until his death, Mr. Callison, Sr., was the only individual who ever opened the safety deposit box. (See Exhibit 2 Attached).

Following the death of Gladys M. Callison, William H. Callison, Sr., created a deed, dated May 11, 1984, naming the Appellant, Cecil G. Callison, as grantee as to the real estate previously described as the Taylor Property.

On May 11, 1984, William H. Callison, Sr., created his Last Will and Testament. (See Exhibit 3 Attached). Mr. Callison's Last Will and Testament provided that:

SIXTH: I give, devise and bequeath all of the remainder of my property, **real**, personal or mixed, wherever situate, to my four (4) children, namely, CECIL G. CALLISON, WILLIAM H. CALLISON, JR., ELLA JANE MONTGOMERY and MARGARET ANN BOWERS in equal proportions, share and share alike.

On September 7, 1984, William H. Callison, Sr., created a Codicil to his Last Will and Testament dated May 11, 1984. The Codicil did not change or alter the language cited above. Hence, at the time of Mr. Callison's death, according to his Last Will and Testament and the Codicil thereto, Mr. Callison's four children, being the Appellants and the Appellees herein, were supposed to receive a  $\frac{1}{4}$  interest in Mr. Callison's remaining property, real, personal or mixed. At the time of his death, the subject three parcels of property were the only pieces of real property Mr. Callison, Sr., owned.

On or about February 17, 1997, William H. Callison, Sr., passed away. The Last Will and Testament of William H. Callison, Sr., dated May 11, 1984, together with a Codicil thereto, dated September 7, 1984, were presented for probate in the Clerk of the County Commission of Greenbrier County, West Virginia, on March 18, 1997.

Following the death of William H. Callison, Sr., the deeds executed by William H. Callison, Sr., and Gladys M. Callison, naming William H. Callison, Jr., and Cecil G. Callison, as grantees, to the Home Farm, Robinson Property and the Taylor Property, were discovered in the safety deposit box owned and exclusively controlled by William H. Callison, Sr., at the Ronceverte National Bank, in Ronceverte, West Virginia.

It is important to remember, that from the date the safety deposit box was initially rented, being September 23, 1977, until his death, on February 17, 1997, Mr. Callison, Sr., was the only individual who opened the safety deposit box. (See Exhibit 2 Attached). Additionally, Mr. Callison, Sr., paid the rental fee for the safety deposit box from the date it was initially rented until his death. (See Exhibit 2 Attached).

After discovering the deeds in the safety deposit box, the Appellants caused the deeds to be recorded in the Greenbrier County Clerk's Office, on or about February 27, 1997.

Thereafter, Appellees as Plaintiffs, filed a Complaint against the Appellants as Defendants, alleging the above described deeds had never been delivered, and as such, they should be set aside. At trial, the jury, upon the evidence and the instructions of the Court, found that:

- (1) The deed dated January 15, 1968 from W.H. Callison and Gladys M. Callison to William H. Callison, Jr., which relates to the property referred to in the evidence as "The Homeplace" was not delivered and did not result in an effective conveyance of the real estate described in the deed;
- (2) The deed dated October 15, 1973 from W.H. Callison and Gladys M. Callison to William H. Callison, which relates to the property referred to in the evidence as "the Robinson property" was not delivered and did not result in an effective conveyance of the real estate described in the deed.
- (3) The deed dated May 11, 1984 from W.H. Callison, widower of Gladys M. Callison to Cecil G. Callison, which relates to the property referred to in the

evidence as “the Taylor property” was not delivered and did not result in an effective conveyance of the real estate described in the deed.

### **III. RESPONSE TO APPELLANTS’ ASSIGNMENTS OF ERROR AND DISCUSSION OF LAW**

Hereafter, the Appellees, respectfully respond to the arguments made by the Appellants, as to the errors committed by the trial court.

**(1) Appellants are precluded from challenging the trial court’s denial of their motion for directed verdict. Additionally, the facts and circumstances of the instant matter demonstrates that sufficient evidence was presented during the trial of the instant matter to make the jury’s decision reasonable**

The Appellants are precluded from challenging the trial court’s denial of their motion for a directed verdict. The Appellants made two motions for directed verdict. First, after Appellees presented their case-in-chief, the Appellants made a motion for a directed verdict, which was denied by the trial court. Secondly, the Appellants made a post judgment motion for a directed verdict, which was also denied by the trial court, as the trial court found that a reasonable jury, viewing all of the evidence presented, could have reached the same conclusion as the jury did in the instant matter.

The important fact to illuminate is that the Appellants make a motion for a directed verdict after the Appellees presented their case in chief. However, the Appellants did not renew their motion for a directed verdict after they presented their case in chief, as they were required to do pursuant to Rule 50 (b) of the West Virginia Rules of Civil Procedure. Rule 50 (b) of the West Virginia Rules of Civil Procedure clearly states that a party must make a motion for a “judgment as a matter of law at the close of all the evidence...”.

In Chambers v. Smith, 157 W.Va. 77, 198 S.E. 2d 806 (1973), this Court held that, “in view of the failure of the defendant to renew motion for a directed at the close of all the evidence, he is precluded from successfully questioning the sufficiency of the evidence on this appeal; nor can he successfully maintain that the court erred in denying his motion of a directed verdict at the close of the plaintiff’s evidence”.

As such, the Appellants are precluded from asserting any error on the trial court’s part in denying their motion for a directed verdict, as they failed to perfect their standing to assert same by failing to renew their motion after all of the evidence was presented.

Regardless, the Appellees cannot demonstrate that the trial court erred in denying both of their motions for directed verdict. It is important to remember that in considering whether a motion for directed verdict/judgment notwithstanding the verdict should be granted, the evidence should be considered in the light most favorable to the Plaintiff (Appellees), and should only be granted if the Plaintiff (Appellees) fails to establish a prima facie right to recovery. Huffman v. Appalachian Power Co., 187 W.Va. 1, 415 S.E. 2d 145 (1991); First Nat’l Bank v. Clark, 191 W.Va. 623, 447 S.E. 2d 558 (1994).

In reviewing the trial court’s order denying the Appellants (Defendants) motion for a directed verdict/judgment notwithstanding the verdict, it is not the task of the appeals court to determine how it would have ruled on the evidence presented, but rather, its task is to determine whether the evidence presented was such that a reasonable trier of fact might have reached the same decision. Ingram v. City of Princeton, 208 W.Va. 352, 540 S.E. 2d 569 (2000); Realmark Devs., Inc. v. Ranson, 214 W.Va. 161, 588 S.E. 2d 150 (2003).

Consequently, this Honorable Court must ask itself whether the evidence presented to the trier of fact in the instant matter was such, that it was reasonable for them to conclude that the three deeds discussed herein were not sufficiently delivered to the Appellants.

In doing so, it becomes evident that the trier of fact was reasonable to decide that the three deeds discussed herein were not sufficiently delivered to the Appellants. The jury was presented with more than enough evidence to support their conclusion.

It is long settled precedent that delivery is the transfer of a deed from the grantor to the grantee, or some person on his behalf, in such a manner as to deprive the grantor of the right to recall it at his option. Evans v. Bottomlee, 150 W.Va. 609, 148 S.E. 2d 712 (1966). To constitute a delivery of a deed, the grantor must by act or word, or both, part with all right of possession and dominion over the instrument with the intent that it shall take effect as his deed. Gaines v. Keener, 48 W.Va. 56, 35 S.E. 856 (1900). The intention of the grantor is the true test of what constitutes the delivery. Walls v. Click, 209 W.Va. 627, 550 S.E. 2d 605 (2001).

The fact that an unrecorded deed is found among the private papers of the grantor, at his death, more than two years after the executing thereof, raises the presumption that such deed was never delivered to the grantee, and was never intended to pass the grantor's title...*Syl. Pt. 2*, Foreman v. Roush, 87 W.Va. 341, 105 S.E. 157 (1920). Where three years passed after date of alleged delivery of deed without the deed being recorded, and the deed was in possession of the grantor at his death, a strong presumption was raised that if the deed was delivered, it was not intended by the grantor as an immediate conveyance of title. French v. Dillon, 120 W.Va. 268, 197 S.E. 2d 725 (1938).

Clearly, in the instant matter, there are sufficient facts to show that the three deeds discussed herein were not properly delivered, and that the jury, in considering those facts, reached a reasonable and just decision. The evidence demonstrated that the three deeds discussed herein, were placed in a safety deposit box, owned and exclusively controlled by William H. Callison, Sr.

Of the utmost importance, is the fact that after the three deeds were placed in the safety deposit box, Mr. Callison, Sr., was the only individual who opened the safety deposit box. The record of entry for the subject safety deposit box shows that Mr. Callison, Sr., accessed the safety depositions box eighteen (18) times, and that he was the only individual who ever accessed the safety deposit box. (See Exhibit 2 Attached).

Appellants are attempting to argue that since William H. Callison, Jr., and later Cecil G. Callison, had access to the safety deposit box, that somehow shows that a delivery of the deeds took place. However, Appellants fail to mention that William H. Callison, Sr., paid the rental fee for the safety deposit box throughout his lifetime and was the only person to open the box during his lifetime.

Moreover, Appellants failed to mention that neither of the Appellants took possession of the subject deeds before their father's death. Appellants' entire argument is that they took possession of the subject deeds because they had an opportunity to take possession of the deeds if they would have accessed the safety deposit box. The jury found Appellants argument fragile.

Additionally, the facts of the instant matter show that William H. Callison, Sr., and his wife, Gladys M. Callison, continued to act throughout their lifetimes in a manner consistent with their continued ownership over the real estate at issue. Both lived upon

the Home Farm until their deaths. Until Mrs. Callison died in 1977, they jointly owned all three tracts of property. Following her death, William H. Callison, Sr., listed all three tracts on the appraisal for her estate as property in which she held an interest at the time of her death, even though two of the purported deeds at issue in this action had been created several years prior to her death.

Additionally, even after Mrs. Callison's death, William H. Callison, Sr., continued to pay the real estate taxes on all three tracts, and paid certain expenses relative to the upkeep of the Home Farm and the Robinson Property. (See Deposition of William H. Callison, Jr., pgs 39-41). With regard to the Taylor Property, Mr. Callison, Sr., actually rented the real estate to various persons up until his death, including the Appellant, William H. Callison, Jr. For the years 1994, 1995 and 1996, William H. Callison, Jr., paid \$10,000 per year as rental for the Taylor Property. (See Deposition of William H. Callison, Jr., pgs 21-22). Even Cecil G. Callison admitted that Mr. Callison, Sr., was collecting rent for the Taylor Property up until his death in 1997. (See Deposition of Cecil G. Callison, pg. 7).

Likewise, it is important for this Honorable Court to remember that the first purported deed, giving William H. Callison, Jr., the Home Farm, was executed on January 15, 1968. The second purported deed, giving William H. Callison, Jr., the Robinson Property, was executed on October 15, 1973. The third deed, giving Cecil G. Callison the Taylor Property, was executed on May 11, 1984. The Last Will and Testament of William H. Callison, Sr., was dated May 11, 1984, together with a Codicil thereto dated September 7, 1984. Pursuant to the Last Will and Testament of Mr. Callison, Sr., the Appellants and the Appellees are each entitled to a  $\frac{1}{4}$  undivided interest

in the subject real estate. Common sense dictates that at the time Mr. Callison created his Last Will and Testament on May 11, 1984, together with a Codicil thereto dated September 7, 1984, he must have believed he owned all three tracts of land discussed herein. Why else would he have included them?

In addition, it is important to bear in mind that Mr. Callison, Sr., only owned three tracts of real property, being the three tracts subject to the instant matter. When Mr. Callison, Sr., created his Last Will and Testament, on May 11, 1984, he specifically stated, in Paragraph 6, that he wanted all of his children to have a  $\frac{1}{4}$  undivided interest in his, "property, **real**, personal or mixed". (See Exhibit 3 Attached).

Nonetheless, at the time, according to Appellants, Mr. Callison had already deeded all of his real property to the Appellants. Thus, the logical question is why, would Mr. Callison Sr., mention real property in his Last Will and Testament, and the Codicil thereto, if, as Appellants contend, Mr. Callison, Sr., had already divested all of his real property to the Appellants?

Appellants, in their Brief, argue that this Court's holding in Walls v. Clink, 209 W.Va. 627, 550 S.E. 2d 605 (2001), establishes precedent that placing a deed in a safety deposit box, by a grantee, constitutes possession, which is prime facie evidence of delivery. However, the facts of Walls are distinguishable from the present matter.

The facts of Walls show that the grantor executed a deed giving certain property to the grantee. After the deed was executed, the grantor called the grantee and instructed the grantee to open a safety deposit box, and to place the deed in the safety deposit box, and to leave it there, and to not record the deed until after the grantor died.

Thus, in Walls, the deed in question was given to the grantee, and the grantee placed it in a safety deposit box owned and controlled exclusively by the grantee. From that moment on, the grantor in the Walls case did not have access, control or possession over the deed.

In the present case, the facts are completely opposite. William H. Callison, Sr., executed the deeds discussed herein, and put them in his own safety deposit box. The Appellants never had physical possession of the executed deeds during the lifetime of Mr. Callison, Sr., and the Appellants never entered the safety deposit box where the deeds were located. (See Exhibit 2 Attached).

**(2) The trial court was correct to prohibit, (under the auspices of the Dead Man's Statute) the testimony of the Appellants as to the displayed and overt intent of Mr. Callison, Sr., and Gladys Callison, in delivering the respective deeds.**

In the instant matter, Appellants argue that William Callison, Jr., should have been allowed to testify regarding the intention of his father to give the Taylor Property to his brother, Cecil Callison, and that Cecil Callison should have been allowed to testify that his parents intended to give the Home Farm and the Robinson Property to his brother, William Callison, Jr.

The trial court, however, concluded the testimony is barred by West Virginia Code Section 57-3-1. West Virginia Code Section 57-3-1, commonly known as the Dead Man's Statute, provides in relevant part:

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, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic.

The purpose of the Dead Man's Statute is "to prevent the 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 it by reason of the decedent's death." Meadows v. Meadows, 196 W.Va. 56, 60, 468 S.E. 2d 309 (1996).

Under the Dead Man's Statute, a witness is incompetent to testify as to (1) personal transactions or communications with the deceased; (2) where the witness is a party to the suit or is interested in its outcome; and (3) the testimony is against the deceased's personal representative, heir at law or beneficiary. *See generally* Syl. Pt. 6, Cale v. Napier, 186 W.Va. 244, 412 S.E. 2d 242 (1992); *Syl. Pt. 13*, Board of Education of McDowell County v. Zando, Martine and Milstead, Inc., 182 W.Va. 597, 390 S.E. 2d 796 (1990).

Addressing each element in turn, it becomes evident that the trial court was correct to bar the Appellants testimony about the intention of their parents to give the other Appellant the subject property.

First, we must address whether the Appellants testimony would have been about personal transactions or communications, they had between themselves and their deceased father, William H. Callison, Sr.

As recognized by this Court in Meadows v. Meadows, 196 W.Va. 56, 468 S.E. 2d 309 (1996), the term "transaction" may include, "An act, agreement, or several acts or

agreements between or among parties whereby a cause of action or alteration of legal rights accrue”. 196 W.Va. at 62.

Appellants argue that the trial court was incorrect to prohibit testimony about “business transactions” between Appellants and their deceased father, William H. Callison, Sr., because the Meadows Court redefined what a “transaction” was, and in so doing, the Meadows Court stated that testimony as to the mental acuity of a decedent would be permitted to enable a determination of capacity. The Appellants argued that such a concept is not distant from the issue of intent to deliver a deed, and as such, the trial court should have allowed the Appellants testimony.

In fact, however, the Meadows Court held that, where the competence of the maker of a testamentary document is put in issue, the Dead Man’s Statute does not bar a party from testifying as to the deceased’s appearance and demeanor. *Syl. Pt. 1, Meadows v. Meadows*, 196 W.Va. 56, 468 S.E. 2d 309 (1996). In that case, the witness was merely relating observations about the deceased’s conduct, which, in and of itself, had no legal significance.

Here the Appellants sought to testify about dealings wherein the legal relationship of the parties would be altered. Meadows, 196 W.Va. at 62. The Meadows Court did not narrow the meaning of “transaction”, it broadened it to include any “act, agreement, or several acts or agreements between or among parties whereby a cause of action or alteration of legal rights accrue.” 196 W.Va. at 62. In addition, the alleged exchanges between the Appellants and the deceased are “communications” within the meaning of the Dead Man’s Statute.

Secondly, we must address whether the Appellants were a party to the suit or were interested in its outcome. Without question, each Appellant has been a party to the instant matter since the Complaint was filed in 1998. Thus, the second element is satisfied by way of that fact alone. Aside from that fact, each Appellant was also interested in the outcome of the instant matter. Clearly, each Appellant was going to benefit by testifying that their parent intended to give the other Appellant the subject property. In so testifying, each Appellant was in essence, testifying that their parents intended them to acquire their property.

That is, if one Appellant testified that their parent intended the other Appellant to acquire property, the Appellant was in essence testifying that their parent intended them to acquire their property. It is important to note that the interests of both Appellants are subject to one basic inquiry. Did the Appellants' parents intend them to have the property subject to this matter? By testifying that their parents intended for the other Appellant to have their property, it validated their own position that their parents intended them to acquire their property.

Finally, the excluded testimony of the Appellants would have been against the interest of the deceased's personal representative, heir at law or beneficiary. In this case, the Appellants wished to testify in support of their own contentions and against the interest of the decedent's beneficiary, being the Appellees herein.

Wherefore, the trial court was correct to prohibit the testimony of each Appellant as to the intention of their parent to devise their property to the other Appellant, and as such, this Honorable Court should honor the trial court's decision.

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. State v. Calloway, 207 W.Va. 43, 528 S.E. 2d 490 (1999); State v. Broughton, 196 W.Va. 281, 470 S.E. 2d 413 (1996). Thus, to overturn its decision, this Honorable Court must find that the trial court's action amounted to an abuse of discretion.

**(3) The trial court was correct to deny the Appellants' motion to allow testimony barred by the Dead Man's Statute as the statute's prohibitions were not waived.**

This Court has found several circumstances in which the incompetency of a witness under the Dead Man's Statute may be waived by the acts of the adverse party. Martin v. Smith, 190 W.Va. 286, 438 S.E. 2d 318 (1993).

The incompetency of a witness is considered waived when the protected party testifies on his own behalf as to the transaction or communication. Coleman v. Wallace, 14 W.Va. 669, 104 S.E. 2d 349 (1958). Similarly, there is a waiver if the deceased has been examined on his own behalf. Moore v. Moore, 87 W.Va. 9, 104 S.E. 266 (1920). Additionally, there is a waiver if the protected party has elected to call to the stand the incompetent witness, who then can explain all matters about which he is examined. Holland v. Joyce, 155 W.Va. 535, 185 S.E. 2d 505 (1971). Finally, there is a waiver if the incompetency of the witness is not timely protested. First Nat'l Bank v. Bell, 158 W.Va. 827, 215 S.E. 2d 642 (1975).

The Appellants are basically arguing that the Appellees waived the Dead Man's Statute for two reasons. First, the Appellants argue that the Appellees waived the Dead Man's Statute when the Appellees, Ella Montgomery and Marget Ann Bowers, took the

stand and testified on their own behalf concerning matters relevant to the instant matter. Secondly, the Appellants argue that the Appellees waived the Dead Man's Statute by questioning the Appellant, Cecil Callison, in regards to the safety deposit box and the key thereto.

Addressing each argument in turn, it becomes evident that the Appellees did not waive the Dead Man's Statute for a simple reason. The Appellees, in both instances, did not elicit testimony regarding the intention of their parents regarding the subject property, which was the testimony the Appellants were deemed to be incompetent to testify about.

As to their first argument, the Appellants contend that the Appellee, Ella Montgomery, waived the Dead Man's Statute because she testified about:

- (a) A description of the three parcels of property;
- (b) The fact that her father handled her mother's estate;
- (c) The fact that her father listed the three parcels of property as part of her mother's estate;
- (d) The identification of her father's signature;
- (e) The fact that her father gave her a house;
- (f) The fact that her mother and father gave her brothers real estate to build his house on.

The Appellants also contend that Appellee, Margaret Ann Bowers, waived the Dead Man's Statute because she testified about:

- (a) Her parents' character and relationship;
- (b) The fact that her parents did not give her any land during their lifetime;

The important fact to note regarding the above cited testimony is that none of it is regarding their parents' intention to give, or not to give, the Appellants, the subject property. In order to waive the protections of the Dead Man's Statute, the Appellees would have had to testify about their parents' intention. Common sense dictates that if the Appellees testified about their parents' intention not to give the Appellants the subject

property, the Appellants would have been able to testify themselves, about their parents' intention to give the other Appellant the subject property.

However, that is not what the Appellees testified about. Appellees, Ella Montgomery, testified, as to historical facts not concerning her parents' intention. She provided a description of the three subject parcels of property. She testified about the fact that her father handled her mother's estate, and that her father included the subject property in her mother's estate, and that her parents had previously given her, and her brothers, the Appellants, property, prior to their deaths. None of this testimony was concerning the intention of her parents regarding the subject property. All of the above cited testimony was regarding a factual occurrence that had taken place prior to the subject lawsuit.

The only opinion offered by the Appellee, Ella Montgomery, was that of her father's signature. However, this Court has long held that even though a party cannot testify as to the act of signing a document, as that would be considered a personal transaction, subject to the Dead Man's Statute, the party may testify as to their independent knowledge of someone's handwriting because that would not be considered a personal transaction. Poole v. Beller, 104 W.Va. 547, 140 S.E. 534, 58 (1927).

Likewise, the Appellee, Margaret Ann Bowers, did not waive the Dead Man's Statute for the same fundamental reason. She never testified about the intention of her parents regarding the subject property. She only testified as to her parents' character and the fact her parents had not given her property prior to their deaths.

As such, the Appellees, Ella Montgomery and Margaret Ann Bowers, did not waive the Dead Man's Statute through their testimony as their testimony was not

concerning the intention of her parents regarding the subject property, which was the subject matter the Appellants were deemed incompetent to testify about.

Secondly, the Appellants argue that the Appellees waived the Dead Man's Statute because they asked the Appellant, Cecil Callison, questions regarding the subject safety deposit box. During trial, the Appellees asked the Appellant, Cecil Callison, if he had a key to the safety deposit box, and if so, had he ever opened the safety deposit box. On cross examination, counsel for the Appellants, began to question Mr. Callison, as to the intention of his father in giving him the key to the safety deposit box. The trial court sustained an object from counsel for the Appellees, on the ground that such testimony is barred by the Dead Man's Statute.

Herein, the Appellants contend the Appellees waived the Dead Man's Statute by asking the Appellant, Cecil Callison, questions about the safety deposit box. However, as was the case before, the Appellees never asked questions regarding the intention of their parents regarding the subject property. Counsel for the Appellees never asked the Appellant what his father told him about the safety deposit box, the key thereto, or the subject property.

Counsel for the Appellees simply asked the Appellant if he had a key to the safety deposit box. The key could have come from the other Appellant? Just because the Appellees asked a question about the safety deposit box does not necessarily mean they were asking questions about the parents of the parties hereto.

It cannot be stressed enough that under Holland v. Joyce, 155 W.Va. 535, 185 S.E. 2d 505 (1971), this Court held that the incompetency of a witness under the Dead

Man's Statute is waived if the protected party has elected to call to the stand the incompetent witness, who then can explain all matters about which he is examined.

However, that does not mean that the incompetency of a witness under the Dead Man's Statute is waived just because the adverse party calls the incompetent party as a witness. The Holland case establishes that if an adverse party calls a witness, that is incompetent because of the Dead Man's Statute, and then the questioning party elicits testimony which falls under the prohibitions of the Dead Man's Statute, the questioning party waives their right to object, because they were the party who sought to elicit testimony regarding transactions or communications barred by the Dead Man's Statute.

The purpose of the Dead Man's Statute is "to prevent the injustice that would result from a surviving party to a transaction testifying favorably to him or herself and adversely to the interest of a decedent, when the decedent's representatives would be hampered in attempting to refute it by reason of the decedent's death." Meadows v. Meadows, 196 W.Va. 56, 60, 468 S.E. 2d 309 (1996).

Wherefore, the Appellees did not waive the Dead Man's Statute when they called the Appellant as a witness. Likewise, the Appellees did not waive the Dead Man's Statute when they asked the Appellant about the safety deposit box or the keys thereto. As such, this Honorable Court should not tamper with the decision of the trial court on the same issue.

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. State v. Calloway, 207 W.Va. 43, 528 S.E. 2d 490 (1999); State v. Broughton, 196 W.Va. 281, 470 S.E. 2d 413 (1996). A review of relevant

law shows that the trial court did not commit an abuse of its discretion in refusing to admit certain testimony that fell under the Dead Man's Statute.

**(4) The trial court was correct to deny the testimony of Gene Turner.**

Initially, the Appellants disclosed Gene Turner as a fact witness. However, on April 17, 2006, a pretrial order was entered, in anticipation of an April 25, 2006, trial date. Said pretrial order did not list Gene Turner as a witness. (See Exhibit 4 Attached). The Appellees disclosed all of the witnesses they intended to use at the upcoming trial. Thereafter, the trial date was continued until August 21, 2007.

On or about August 7, 2007, in anticipation of trial, the parties hereto reviewed, and approved, another pretrial order. Once again, the pretrial order, approved by both parties, did not disclose Gene Turner as a witness. (See Exhibit 5 Attached). Appellees, however, did disclose all of the witnesses they intended to use at the upcoming trial.

The pretrial order stated that the trial court must be provided with the final exhibit and witness list no later than August 17, 2007. Also, the pretrial order provided that the pretrial order shall not be amended except by consent of all parties, unless the trial court so orders.

On Sunday, August 19, 2007, Appellants' counsel recognized that Gene Turner was not disclosed on the pretrial order dated April 17, 2006, or the pretrial order submitted to the trial court in August of 2007. As such, on Sunday, August 19, 2007, Appellants' counsel faxed a request to the trial court, and counsel for the Appellees, to add Gene Turner to the witness list. Per the pretrial order, Appellees' counsel objected to the addition of Gene Turner as a witness.

At trial, the trial court was presented with the issue of whether Gene Turner should be allowed to testify in the present matter. The trial court ordered that Gene Turner should not be allowed to testify as the Appellants failed to disclose him on or before August 17, 2007, per the Court's pretrial order. Appellants acknowledge that the pretrial order stated that the parties thereto shall exchange final witness lists no later than August 17, 2007, and that they did not attempt to add Mr. Turner to the witness list until August 19, 2007.

The Appellants in this case had 16 months, from April 17, 2006, until August 17, 2007, to add Gene Turner as a fact witness, but failed to do so. Thus, the trial court was warranted in preventing Gene Turner from testifying in the instant matter, and no manifest injustice occurred because of the trial court's decision to exclude Gene Turner as a witness. The standard for modification of a scheduling order is by implication lower than that contemplated in amending a final pretrial order, which should only be done to prevent manifest injustice. Crafton v. Burnside, 207 W.Va. 74, 528 S.E. 2d 768 (2000).

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. State v. Calloway, 207 W.Va. 43, 528 S.E. 2d 490 (1999); State v. Broughton, 196 W.Va. 281, 470 S.E. 2d 413 (1996).

**(5) The trial court was correct in refusing the testimony of Vane Warner.**

On December 29, 2000, counsel for the Appellees conducted a videotaped deposition of Vane Warner, who had been previously identified as a fact witness by the Appellants. During the deposition, Karen R. Meyers, of KRM Reporting, served as court

reporter, and subsequently submitted a written transcript of said deposition to Vane Warner for his review and revision.

The testimony of Vane Warner, upon direct examination by counsel for the Appellants, was consistent with the positions of the Appellees to this action. Thus, counsel for the Appellees did not conduct any cross-examination of the witness. Subsequent to the submission of the original transcript, typewritten amendments thereto were prepared, signed by Vane Warner, and provided to Karen R. Myers on behalf of Vane Warner.

The aforementioned typewritten revisions did not simply correct errors in the transcription of the testimony of Vane Warner, but rather materially and significantly altered the substance of that testimony and substantially contradicted the previous testimony. After receiving the amendments to the deposition transcript, Appellees' counsel attempted to contact Vane Warner to discuss those amendments and to arrange another deposition of Mr. Warner. However, Mr. Warner's wife informed counsel for the Appellees that Mr. Warner was unable to speak with him and that he was unable to participate in any further depositions because of his health. As such, the Appellees were never afforded the opportunity to cross-examine Vane Warner about the amendments to his testimony.

The question, which remained, was whether Vane Warner's amended testimony should be allowed into evidence since he was unavailable to testify at trial. West Virginia Rules of Evidence 804 (b)(1) states "Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now

offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similarly motive to develop the testimony by direct, cross, or redirect examination”.

The Appellees were not afforded the opportunity to cross-examine Vane Warner concerning his materially altered testimony. The two central requirements for admission of extrajudicial testimony under the Confrontation Clause of the Sixth Amendment to the United States Constitution and the W.Va. Const. Art. III § 14 are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness’s out-of-court statement. In re Anthony Ray Mc., 200 W.Va. 312, 489 S.E. 2d 289 (1997).

In the present matter, it is uncontested that Vane Warner was unavailable to testify. Secondly, Vane Warner’s typewritten revisions of his deposition, which materially and significantly altered the substance of his testimony at said deposition, were never proved reliable as counsel for the Appellees was not afforded the opportunity to cross-examine Mr. Warner regarding the material changes. Thus, the trial court was correct in ruling that Vane Warner’s materially altered testimony was hearsay, and not admissible pursuant to Rule 804 (b)(1) of the West Virginia Rules of Evidence.

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. State v. Calloway, 207 W.Va. 43, 528 S.E. 2d 490 (1999); State v. Broughton, 196 W.Va. 281, 470 S.E. 2d 413 (1996).

**(6) The trial court correctly denied the Appellants' motion in limine in regards to the listing of three properties in the estate documents of William Callison, Sr., and Gladys Callison.**

This Court has long held that delivery of a deed is a question of fact rather than of law depending upon the intent of the grantor to vest an estate in the grantee. Parrish v. Pancake, 158 W.Va. 842, 215 S.E. 2d 659 (1975). This Court has also held that subsequent events may illuminate issues of prior intent. In French v. Dillon, 120 W.Va. 268, 197 S.E. 725 (1938), this Court explained as follows:

To constitute legal delivery of a deed, the grantor must intend that it presently vest in the grantee the estate purportedly conveyed. The handing of the deed to the grantee without that intent is not delivery. The purpose of the manual delivery may be shown by circumstances. Among the circumstances admissible are the subsequent control of the property described in the deed, and the subsequent conduct of the parties.

In Reed v. Gunter, 101 W.Va. 514, 133 S.E. 123 (1926), the fact that the grantor remained in possession of the land was also considered among numerous other factors. As in French, the grantor in Reed had retained control of the deed instrument, and the deed was found among his private papers at his death. The grantor's retention of the document raised a presumption that the deed was never intended to pass the grantor's title. *Id.* at 518, 133 S.E. at 124.

The Appellants allege that this Court, in Walls v. Clink, 209 W.Va. 627, 550 S.E. 2d (2001), established that evidence that a grantor remained in control and dominion over the subject property had no impact upon the issue of delivery. The Appellants however, seem to have misunderstood what the Walls Court was holding.

In Walls, this Court held that the issue of control and dominion over the subject property was of no importance because the party offering said evidence was not doing so to show intent to deliver. Rather, the Walls Court found that the party seeking to

offer said evidence had presented no other evidence that the grantor did not intend to deliver the deed in question, and as such, the party was attempting to show the grantor acted fraudulently by acting like he still owned property that he had previously conveyed.

**(7) The trial court properly instructed the jury regarding what constitutes delivery of a deed.**

The trial court was correct in refusing Appellants Jury Instruction No. 4, and No. 4A. Appellants Jury Instruction No. 4, and No. 4A are different only in that No. 4A added the word “exclusive”, underlined and bolded below. Appellants Jury Instruction No. 4, and No.4A, states as follows:

“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 **(exclusive)** possession of those deeds, there arises a presumption of delivery of such deeds. The burden of overcoming that presumption rests with the plaintiffs 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}

No evidence was presented that Mr. Callison, Sr., and William H. Callison, Jr., together rented a safe deposit box on September 23, 1977. The facts established that Mr. Callison, Sr., rented the safety deposit box and added William H. Callison, Jr’s, name to it. (See Exhibit 2 Attached).

Additionally, the evidence established that Mr. Callison, Sr., paid the rental fee for the safety deposit box. Moreover, the evidence established that Mr. Callison, Sr., was the only person who ever had any sort of control or dominion over the safety deposit box. (See Exhibit 2 Attached). In fact, the evidence presented at trial

established that William H. Callison, Jr., and Cecil Callison, never visited the safety deposit box during the lifetime of their father, Mr. Callison, Sr. (See Exhibit 2 Attached).

Furthermore, the presumption mentioned in Appellants Jury Instruction No. 4, and No. 4A, are also incorrect. In Syl. Pt. 2, Foreman v. Roush, 87 W.Va. 341, 105 S.E. 157 (1920), the Court held, “The fact that an unrecorded deed is found among the private papers of the grantor, at his death, more than two years after the execution thereof, raises the presumption that such deed was never delivered to the grantee, and was never intended to pass the grantor’s title”.

Taken as a whole, the instructions given to the jury in this case were proper and were in no way prejudicial to the Appellants. The trial court did not abuse its discretion to select the specific charge it gave to the jury. A review of the instructions given to the jury, found on pages 65-68, of the August 22, 2007, transcript, clearly shows that the jury was adequately instructed as to the topic of delivery.

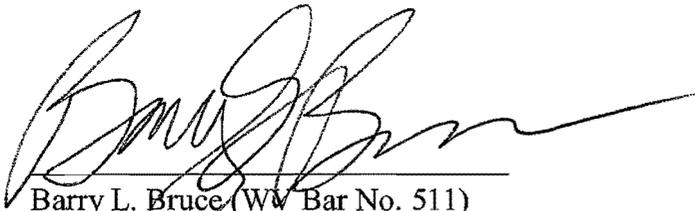
A trial court's instruction to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instructions, and the precise extent and character

of any specific instruction will be reviewed only for an abuse of discretion. State v. Guthrie, 194 W.Va. 657, 461 S.E. 2d 163 (1995).

**CONCLUSION**

WHEREFORE, the Appellees herein respond to the Appellants' Brief, and respectfully ask this Honorable Court to uphold the decision of the trial court on all issues discussed herein.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**ELLA J. MONTGOMERY and  
MARGARET C. BOWERS**

**Appellees,**

v.

**No. 090682**

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

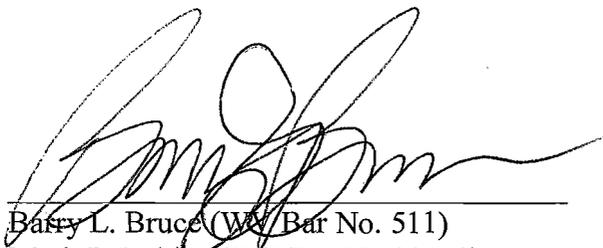
**Appellants.**

**CERTIFICATE OF SERVICE**

I, Mark J. Jenkins, of Barry L. Bruce & Associates, L.C., do hereby certify that a true copy of the foregoing, **APPELLEES' RESPONSE TO APPELLANTS' BRIEF**, has been served upon counsel of record by depositing same in the United States Mail, postage prepaid, this the 3<sup>rd</sup> day of December, 2009, and addressed as follows:

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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**