

Case No.35522

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LEEORR M. ROSIER, and
LEEORR M. ROSIER, Executrix
Of the Estate of Stearl Rosier,

Appellant,

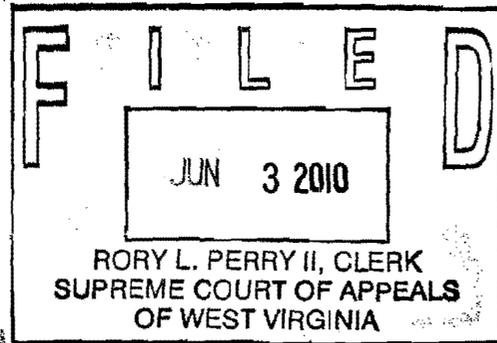
v.

Circuit Court No. 06-C-12

ROBERT LEE ROSIER,

Appellee.

BRIEF OF APPELLANT



Brief presented by:

Virginia Jackson Hopkins

Virginia Jackson Hopkins
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1. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL.

This is an appeal from two rulings by the Circuit Court of Tucker County, West Virginia, the Honorable Phil Jordan presiding. On October 8, 2008, the court granted partial summary judgment in favor of the Appellee, holding that as a matter of law certain conveyances of real estate could not be set aside. On July 30, 2009, after a bench trial, the court refused to grant an interest in certain personal property to the Appellant. The result of the court's two rulings was to leave the Appellant with practically nothing from her marital estate, which was created entirely during her sixty-one year marriage to her husband.

II. STATEMENT OF FACTS.

The Appellant is Leeorr M. Rosier, an 82 year old resident of Parsons, Tucker County, West Virginia. Leorr married Stearl Rosier in 1944. In 1951, Leorr and Stearl bought a parcel of real estate situate in Tucker County, West Virginia, consisting of some 139 acres (See deposition of Leeorr Rosier, p. 18) on which they lived and farmed until Stearl's death in October, 2005 (Leeorr Rosier, p. 19). Leorr and Stearl built a house on the farm in the late 1960's (Leeorr Rosier, p. 19). Although the farm and home were paid for with marital funds (Leeorr Rosier, p. 20, 23), the parcel remained titled in Stearl Rosier's name only during their marriage of more than 61 years (Leeorr Rosier, p. 21). They had four children, one of whom is the Appellee Robert Rosier.

Leorr and Stearl acquired three more parcels of real estate during their marriage: a .61 acre parcel adjacent to the farm which was jointly titled (Leeorr Rosier, p. 35); a 191 acre parcel known as the "Howdershelt Place," which was jointly titled (Leeorr Rosier, p.37, 39); and a 52 acre parcel known as the "Dove Place," which was inherited from the Appellant's mother, although the Appellant voluntarily titled the parcel jointly with her husband (Leeorr Rosier, p. 41, 42).

Leorr and Stearl worked their farm together from 1951 until Stearl Rosier's death in 2005. They owned a substantial amount of farming equipment, including a mower, square baler, round baler, conditioner, tetter, post hole driver, manure spreader, sprayer, fertilizer scatterer, plows, discs, combine, rakes, a hay conveyer, corn planter, oats combine, oats planter, corn sheller, a John Deere 1010 tractor and a John Deere 2240 tractor (Leeorr Rosier, p. 50, 51, 52, 53). All of the farm equipment was paid for using marital funds (Leeorr Rosier, p. 72, 73, 74).

In December of 2004, Stearl Rosier was stricken with cancer (Leeorr Rosier, p. 66). On or about December 1, 2004, Stearl executed a power of attorney naming his son, the Appellee Robert Rosier, as his attorney in fact. Robert is one of four children of Leorr and Stearl Rosier. The power of attorney, prepared by attorney W. "Mont" Miller, purported to allow the Appellee to convey Stearl's real estate to himself or his (the Appellee's) children, and recited that any such conveyances would not be considered self dealing or a breach of fiduciary duty (See Power of Attorney, attached hereto as "Exhibit 1"). This Power of Attorney was concealed from Leorr (Leeorr Rosier, p. 83).

Thereafter, on or about December 6, 2004, Stearl Rosier deeded the 139 acre farm to the Appellee Robert Lee Rosier, with instructions "DO NOT PUBLISH" written on the face of the deed (See Deed, attached hereto as "Exhibit 2"). The conveyance was made with the provision that the Appellee take care of Stearl Rosier, his father, on the farm. No provision of any kind was made for the care of Leorr Rosier. The Appellant was not told of this conveyance, and it is undisputed that the conveyance was made in order to defeat the Appellant's marital rights to the property (See Robert Lee Rosier's deposition, p. 48, 49, 51 and 52, and William M. Miller, p. 14). Leorr did not learn that the farm had been secretly conveyed to her son until after Stearl Rosier's death.

On or about July 13, 2005, by deed prepared by William M. Miller, the Appellee Robert Lee Rosier conveyed Stearl Rosier's ½ interest in the 191 acre "Howdershelt Place" to himself, using the power of attorney heretofore mentioned (See "Howdershelt Deed" attached hereto as "Exhibit 3").

According to the deposition testimony of both William M. Miller, the attorney, and Robert Lee Rosier, the Appellee, this conveyance was made in order to defeat the Appellant's survivorship rights (Robert Rosier, p. 48, 49, 51 and 52, and William M. Miller, p. 82).

After Stearl Rosier's death on October 6, 2005, the Appellant learned that the 139 acre farm had been conveyed in its entirety to her son, the Appellee (Robert Rosier, p. 64). She also learned that her husband's ½ interest in the "Howdershelt Place" had been conveyed to her son, the Appellee, and that her survivorship rights had been defeated. The Appellant also learned that her son, the Appellee, had converted all the farm equipment to his own use -- and that he was claiming ownership of all of it, including the herd of cattle the Appellant had owned with her husband at the time of his death.

The Appellant received nothing from the cattle, and has been put out of her home and the farm pursuant to the Appellee's conversion of all the assets to his own use (Leeorr Rosier, p. 10) and now lives on Social Security payments of about \$1,000 per month (Leeorr Rosier, p. 33, 75) while the Appellee has moved his daughter into the home on the farm (Leeorr Rosier, p. 71). Other than approximately \$35,000 the Appellant received for the sale of timber from the "Dove Place" long before the death of her husband, (Leeorr Rosier, p. 77), the Appellant has no assets or means of support.

Evidence was presented at trial that the Appellee and his wife lived directly adjacent to the Appellant and Stearl Rosier. The evidence was undisputed that Stearl Rosier's health began to deteriorate when he was diagnosed with lung cancer, and that the Appellant Leorr suffered from macular degeneration and was nearly blind. As a result of the bad health of Stearl and Leeorr Rosier, the Appellee and his wife helped with their banking and bill paying chores.

The Appellant's evidence was that the Appellee was put on Stearl Rosier's bank accounts specifically so that they could assist in the bill paying chores, not so that a gift *causa mortis* would be made of the bank accounts. At various times, however, Stearl Rosier and the Appellee Robert Rosier transferred monies which had been jointly titled between Stearl Rosier and the Appellant to survivorship

accounts between Stearl Rosier and the Appellee. The Appellee thus gained possession of those bank accounts without the Appellant's knowledge.

Evidence was also presented that Stearl Rosier had executed a will dated November 8, 2002, leaving all real and personal property to his wife, the Appellant. However, to defeat this will and the elective share that Leorr could claim under any different will, Stearl's assets were secretly disposed of prior to his death by transfers to the Appellee, his attorney in fact. These transfers nearly completely disinherited the decedent's wife, his other children and the other beneficiaries mentioned in his will.

The Appellant was devastated to learn that her husband and son had conspired to disinherit her, and had deprived her of any interest in the farm and home she had worked and maintained for over sixty years. She was forced out of her home after the death of her husband, in large part because she could not afford the monthly bills. The Appellee, her son, refused to take care of her. While the Appellee had managed the couple's funds and paid their bills while his father was alive, he refused to do so after his father's death: he had the bills transferred into his mother's name and told her she was now responsible for paying them, even though he had kept practically all of the money that had belonged to the couple. The Appellant was forced to live and pay these bills on her Social Security check alone (about \$1,000.00 per month), without any of the farm income or cash assets which had been secretly transferred from her possession or control.

The Appellant brought suit against her son, the Appellee Robert Rosier, seeking to set aside the conveyances of the 139 acre farm, the .61 acre parcel adjacent to the farm, the 191 acre "Howdershelt Place" and further seeking the return of the personal property, including money, farm equipment and cattle, which had been owned by the Appellant and her husband.

The Appellee sought summary judgment from the circuit court as to all issues, and the Appellant filed a cross motion for summary judgment, seeking to set aside the conveyances of real estate. The issues were briefed by the parties and oral arguments were heard by the court. On October 8, 2008, the court denied the Appellant's motion for summary judgment seeking to set aside the conveyances of

real estate, and granted the Appellee's motion for summary judgment on counts I, II, III and V of the complaint.

The court's summary judgment order finds that all of the secret conveyances of real estate to the Appellee were entirely legal. The court permitted the case to be tried solely on the issue of the personal property. That case was tried before the court on July 30, 2009, at which time evidence was presented as to three issues: (1) The cattle which had been owned by Stearl and Leeorr Rosier prior to Stearl Rosier's death, which ended up in the possession of the Appellee; (2) several bank accounts which ended up in the possession of the Appellee, but which had been owned by both Stearl and Leeorr Rosier; and (3) the farm equipment that had been owned by Stearl and Leeorr Rosier, and which ended up in the possession of the Appellee when Leeor was forced off the farm. The court found that the plaintiff was not entitled to the return of any of the personal property, and therefore entered judgment for the Appellee. The Appellant was even required to pay the court costs.

In the instant case, the Appellant appeals both the summary judgment order which disposed of the real estate, and the trial order, which disposed of the balance of the assets of the estate of Stearl Rosier.

ASSIGNMENTS OF ERROR

1. The court erred when it found that the conveyance of the 139 acre farm by Stearl Rosier to the Appellee, and all of the other conveyances before the court, were not transfers in fraud of a creditor under the *Uniform Fraudulent Transfers Act, W.Va. Code 40-1A-1, et seq.* The court reasoned that the Appellant was not a "creditor" to her husband because she was not "owed a payment." However, a wife has at least an equitable interest in marital property, whether or not such claim is asserted by way of a divorce action. Furthermore, the Appellant had a vested and indefeasible inheritance interest in the property in question under her husband's will -- or by taking her elective share under the law of descent and distribution. Because the

Appellant had a claim to real estate, whether titled in her husband's name individually or otherwise, and personal property, any secret conveyance of that property made in order to defeat her claim was a transfer in fraud of a creditor under W.Va. Code 40-1A-1, *et seq.*

2. The court erred in finding that the Appellee, Robert Lee Rosier, did not breach a fiduciary duty when he conveyed his principal's real estate to himself without consideration. There is a presumption of fraud in such cases, and the circuit court did not specifically find that the presumption of fraud had been rebutted. Additionally, the court found that the Appellee acted upon his principal's direction, based upon the testimony of William M. Miller as to what the decedent had said. However, Attorney Miller's testimony was *inadmissible* under Rule 802 of the West Virginia Rules of Evidence, known as the "hearsay" rule.
3. The court erred in failing to set aside the real estate conveyances as common law and statutory fraud. Under W.Va. Code 48-7-108, the conveyance of real estate by a spouse is voidable if made to someone other than a bona fide purchaser and if the conveyance is found to be fraudulent.
4. The court erred in finding that Stearl Rosier "caused the transfer of the bank accounts, the farm machinery and the cattle out of his estate prior to his death because of his strong desire to protect his children's inheritance from a wife he could no longer trust." Although all these assets were conveyed from a principal to a fiduciary, at a time when the principal was dying of cancer and in a very frail mental and physical state, the court failed to find that the presumption of fraud had been overcome.
5. The Circuit Court erred in finding that the farm equipment and cattle were a bona fide gift to the Appellee. No competent evidence was given of a bona fide gift.

POINTS AND AUTHORITIES AND DISCUSSION

1. The court erred when it found that the conveyance of the 139 acre farm by Stearl Rosier to the Appellee, and all of the other conveyances before the court, were not transfers in fraud of a creditor under the *Uniform Fraudulent Transfers Act*, W.Va. Code 40-1A-1, *et seq.* The court reasoned that the Appellant was not a “creditor” to her husband because she was not “owed a payment.” However, a wife has at least an equitable interest in marital property, whether or not such claim is asserted by way of a divorce action. Furthermore, the Appellant had a vested and indefeasible inheritance interest in the property in question under her husband’s will -- or by taking her elective share under the law of descent and distribution. Because the Appellant had a claim to real estate, whether titled in her husband’s name individually or otherwise, and personal property, any secret conveyance of that property made in order to defeat her claim was a transfer in fraud of a creditor under W.Va. Code 40-1A-1, *et seq.*

The circuit court refused to set aside the purported conveyances a “transfer in fraud of a creditor” under W.Va. Code 40-1A-1, *et seq.*, because of its conclusion that the Appellant was not a “creditor” under the law. According to the court’s order, Leeorr had no “claim” to real estate titled in Stearl’s name -- despite the fact that she was married to the decedent for over 61 years, the real estate was purchased with marital funds, she had lived on the real estate and farmed it since 1951, and she was married to the decedent at the time he gave it away without her knowledge and then concealed the conveyance. Importantly, the Appellant was completely deprived of the property by the conveyance, and no provision for her maintenance was made.

The court erred in finding that the Appellant had no “claim” to real estate because the 139 acre farm was titled to Stearl Rosier individually. W.Va. Code 40-1A-1, *et seq.*, known as the *Uniform Fraudulent Transfers Act*, addresses all transactions designed to defeat the legitimate claims of creditors. W.Va. Code 40-1A-1(c) defines a creditor as “a person who has a claim.” The statute defines a claim as a “right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated,

fixed, contingent, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." This is the broadest possible definition of a claim and clearly encompasses the inchoate rights that Leeorr had in the property that was acquired and improved with her sweat and labor over 61 years.

W.Va. Code 40-1A-4 provides that a "transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: 1.) with actual intent to hinder, delay or defraud any creditor of the debtor."

The worst that can be said about the Appellant's claim is that it was "unmatured" or "equitable," but both of those terms are clearly included within the meaning of "creditor." The circuit court's ruling that Leeor does not have the protections of the *Uniform Fraudulent Transfers Act* has dispossessed a widow simply because she did not "mature" her claim to the property -- by filing for a divorce from her longtime husband.

The Supreme Court of Appeals of West Virginia has found that an interspousal claim related to property is clearly protected by the *Uniform Fraudulent Transfers Act*. See *Rich v. Rich*, 185 W.Va. 148, 405 S.E.2d 858 (1991). In *Rich*, a spouse transferred real estate to his second wife to avoid paying child support to the first wife. The court found that the transaction was plainly within the purview of the *Uniform Fraudulent Transfers Act*, and proceeded to assess the fraudulent intent of the transfer. The court had no hesitation in finding that a child support obligation -- was a "claim" and that the person to whom the obligation was owed was a "creditor." While the transfer between Stearl Rosier and the Appellee was not interspousal, the court's reasoning in *Rich* applies nonetheless. The Appellant had a claim against the real estate in question, whether or not that claim was reduced to judgment.

Similarly, courts in other jurisdictions have found that transfers of property made in an effort to defeat a spouse's claim to alimony are fraudulent. In *Jacobowitz v. Jacobowitz*, 925 A.2d 424 (2007), the court held a conveyance fraudulent when a husband conveyed property to his mother and sister while

filing for divorce from his wife. The court reasoned that the property would have otherwise been subject to claims of equitable distribution. Likewise, the Texas court found a conveyance to defeat an equitable distribution claim was fraudulent under similar circumstances. *Mladenka v. Mladenka*, 130 S.W. 2d 307 (2004). The Alabama court found a conveyance to be fraudulent under its fraudulent transfers statute when a husband conveyed property to his parents in order to limit his liability to his wife. *Varner v. Varner*, 662 So. 2d 273 (1994).

Clearly, courts around the country have found that conveyances can be found fraudulent if made to defeat rights acquired in a marital relationship.

Moreover, it is important to note again that the Appellant had an actual inheritance *right* to the property which was conveyed *inter vivos* to the Appellee. There is no dispute that Stearl Rosier's will left his entire estate to the Appellant. Stearl Rosier could have written another will to disinherit her, but even then the Appellant could have taken her "elective share" under W.Va. Code 42-3-1, which would have been 50% of the augmented estate, given that the couple had been married for over sixty years.

The only way that Stearl Rosier and the Appellee could effectively disinherit the Appellant was to make an *inter vivos* transfer of the estate just prior to the decedent's death. This is exactly what they did, taking special care to conceal the transfers from the Appellant so that she did not have an opportunity to enforce her rights. The situation might have been different if the Appellant merely "expected" to inherit the property -- but West Virginia law clearly gave her a *right* to an inheritance that could only be (purportedly) defeated by *getting rid of the property without her knowledge*.

West Virginia also recognized that the *Uniform Fraudulent Transfers Act* applies in cases like the instant one in *Davis v. KB&T Co*, 172 W.Va. 546, 309 S.E. 2d 45 (1983), where a husband transferred substantially all of his assets to a revocable trust for his maintenance and his wife's maintenance after his death. The revocable trust was created after the wife suffered a complete mental collapse and was not capable of taking care of herself. The court found that such *inter vivos* transfers must be decided on

a case by case basis, taking into account the facts and circumstances of each case and weighing the equities on both sides. The *Davis* court allowed an *inter vivos* transfer of the husband's property, but unlike the present case, *the trust was created with the intent to take care of the wife*. Furthermore, unlike the present case, it was shown that the wife was not mentally capable of caring for herself and that creating the trust was actually in her best interest. In the instant case, there were absolutely no provisions made for the maintenance of the Appellant, and in fact she has been deprived of the property she worked all of her life to earn. There is no doubt that the equities are on the Appellant's side, and that there was no justification for depriving her of her interest in the maritally-acquired real property.

2. The court erred in finding that the Appellee, Robert Lee Rosier, did not breach a fiduciary duty when he conveyed his principal's real estate to himself without consideration. There is a presumption of fraud in such cases, and the circuit court did not specifically find that the presumption of fraud had been rebutted. Additionally, the court found that the Appellee acted upon his principal's direction, based upon the testimony of William M. Miller as to what the decedent had said. However, Attorney Miller's testimony was inadmissible under Rule 802 of the West Virginia Rules of Evidence, known as the "hearsay" rule.

There is a presumption of fraud when a fiduciary engages in self-dealing with a principal's assets. See *Napier v. Compton*, 210 W.Va. 594, 558 S.E.2d 593 (2001) and *Work v. Rogerson*, 152 W.Va. 169, 160 S.E.2d 159 (1968). "Where a fiduciary relationship exists and there is an indication of fraud, a presumption of fraud arises and the burden of going forward with the evidence rests upon the fiduciary to establish the honesty of the transaction." Syllabus Point 10, *Work*. Robert Lee Rosier was in a fiduciary relationship with his father as power of attorney. Using such power, he enriched himself, an indication of fraud. Under the presumption, the burden shifts to the Appellee to show the honesty of all transactions relating to his father's interests.

Four days after becoming Stearl Rosier's power of attorney, the Appellee accepted a deed for the 139 acre farm from his principal, without consideration. Then, in July, 2005, three months before Stearl Rosier's death with cancer, the Appellee conveyed to himself his principal's ½ interest in the "Howdershelt Place," again without consideration. In his brief before the circuit court, the Appellee failed to cite any admissible evidence whatsoever that would overcome the presumption that these conveyances were fraudulent

Although the Appellee cited no evidence of the honesty of either transaction, the circuit court ruled that there was no breach of fiduciary obligation because the Appellee was acting "at the behest of his principal." The court cited the deposition testimony of attorney William M. Miller, who testified in deposition as to what the decedent had said about his wishes for the property. In ruling that the words of the decedent, told secondhand by a witness, could overcome a presumption of fraud, the court decided the case on inadmissible hearsay.

Hearsay is ordinarily known as an out of court statement, not made under oath and not subject to cross examination, which is offered to prove the truth of the matter asserted. Rule 801 defines hearsay as a statement, other than one made by the declarant while testifying, which is offered to prove the truth of the matter asserted. Clearly, since Stearl Rosier is dead, William M. Miller would not be permitted to testify as to statements made by Stearl Rosier as to what he wanted with regard to his estate. Since there was absolutely no other evidence presented to overcome the presumption of fraud, the presumption was not rebutted and the conclusion that the conveyances were fraudulent is inescapable.

It is worth noting that Rule 56(e) of the West Virginia Rules of Civil Procedure specifies that affidavits in support of or opposed to motions for summary judgment ought to be based upon personal knowledge and upon such facts as maybe admissible in evidence. Clearly, a court commits error in deciding a case on summary judgment based upon inadmissible hearsay. And Miller's testimony as to

what Stearl Rosier claimed his wife said is most assuredly not on personal knowledge, as required by Rule 56.

Curiously, the court's order granting the Appellee summary judgment did not even mention the presumption of fraud that arises when a fiduciary engages in self dealing with the assets of a principal. As it is quite clear that the Appellee's actions create a presumption of fraud, the circuit court could not have applied the correct law when it does not even mention the presumption in its order. The court did not explicitly find that the presumption had been overcome, and therefore erred. Summary judgment orders are subject to a *de novo* standard of review. Syllabus point 1, *Painter v. Peavey* 192 W.Va. 189, 451 S.E.2d 755 (1994).

3. The court erred in failing to set aside the real estate conveyances as common law and statutory fraud. Under W.Va. Code 48-7-108, the conveyance of real estate by a spouse is voidable if made to someone other than a bona fide purchaser and if the conveyance is found to be fraudulent.

W. Va. Code 48-7-108 explicitly contemplates fraudulent transfers to avoid the claims of spouses. "Provided, that as to any transfer prior to the entry of any order pursuant to this article, a transfer other than to a bona fide purchaser for value shall be voidable if the court finds such transfer to have been effected to avoid the application of the provisions of this article *or to otherwise be a fraudulent conveyance* (emphasis added)."

It is undisputed that the conveyances from Stearl Rosier to the Appellee were made prior to the entry of any order made pursuant to the divorce statute (the testimony was that no divorce was filed or even contemplated). Furthermore, although the conveyances may not have been made to avoid equitable distribution, the statute provides that the application extends to conveyances "otherwise found to be fraudulent." So if the conveyance to the Appellee was fraudulent for any purpose, the statute makes the conveyance voidable.

The Appellee does not deny that the conveyances of the real estate were concealed from his mother for the express purpose of making sure that she did not enforce her rights. The following testimony was given by the Appellee at his deposition:

Q. What happened to the deed after that?

A. He said "Hold it until you need to have it recorded."

Q. Okay, who said that?

A. Dad gave it to Beverly and said hold it until it needed to be recorded.

Q. What was the purpose of holding it?

A. He figured if Mom found out about it, it would be more hell for him.

Q. And did he give her any notice at all?

A. Who?

Q. Did your father give your mother any notice about the deed?

A. No, not to my knowledge.

Q. Did you give your mother any notice-

A. No, nothing.

(Robert Lee Rosier, p. 64).

Thereafter, the Appellee testified in no uncertain terms that the property was conveyed in order to deprive the Appellant rights to the property:

"He had told Mont, then, just like I started to tell you there a while ago, that he wanted these properties deeded to who- his half to who they was willed to, that he was not going to let mom sell them or give them away or do whatever she was going to do with them, so he asked Mont to do this and Mont started the preparation." (Robert Lee Rosier, p. 77).

There is no dispute that the conveyances of the Appellant's marital home and farm and all of her personal property were concealed from her until after her husband's death, specifically so she could not assert her rights. Concealment is the hallmark of fraud, and the conveyances ought to be set aside.

4. The court erred in finding that Stearl Rosier "caused the transfer of the bank accounts, the farm machinery and the cattle out of his estate prior to his death because of his strong desire to protect his children's inheritance from a wife he could no longer trust." Although all these assets were conveyed

from a principal to a fiduciary, at a time when the principal was dying of cancer and in a very frail mental and physical state, the court failed to find that the presumption of fraud had been overcome.

The facts are undisputed that Stearl Rosier left his entire estate to his wife in his will in November, 2002, including all property both real and personal. He evidently "trusted" her in 2002. Over the next two years, though, practically all these assets were conveyed or converted from a principal to a fiduciary, at a time when the principal was dying of cancer and in a very frail mental and physical state. There was no evidence presented that the Appellant and Stearl Rosier had any particular marital difficulties during those two years, nor was there any inference that anything whatsoever had happened to change Stearl Rosier's mind about the disposition of his assets. The court erred in failing to find that the presumption of fraud had been overcome, as there was no evidence or explanation whatsoever as to why Stearl Rosier could no longer trust his wife, and indeed no inference or suggestion that anything had happened to change his mind.

In fact, there was a conflict in the Appellee's evidence: the Appellee's witness Mike Eye testified that Stearl Rosier had given the farm equipment and cattle to the Appellee in 1995, some ten years before his death, yet Stearl Rosier's will left everything to his wife in 2002. This conflict was not resolved, and the trial court simply found, without foundation, that Stearl Rosier gave away his possessions and real estate because he could not "trust" his wife. The circuit court, therefore, made a finding that was not supported by the evidence and therefore clearly erroneous. Findings of fact will be reviewed under a "clearly erroneous" standard, while the final order and disposition will be reviewed under an "abuse of discretion standard." *Timberline Four Seasons Resort v. Herlan*, 679 S.E.2d 329. Again, hearsay becomes an issue because the only evidence that the Appellant was "crazy" or that Stearl Rosier could not "trust" her were alleged statements of Stearl Rosier, who died a year before the lawsuit was brought. This is hearsay evidence upon which the merits of this case ought not to be decided.

Furthermore, the court's order seeks to enforce Stearl Rosier's supposed "strong desire" to protect his children's inheritance by specifically *disinheriting* all of the children except the Appellee. The will made it clear that the Appellant was to be the sole beneficiary if she survived him. Stearl Rosier's daughter Shirley was to receive the house after the death of Stearl and Leeorr Rosier, yet the court's order makes certain that she will not. Also, Stearl Rosier's grandchildren were to receive money, and the court's order frustrates that purpose as well. The other living son of Stearl Rosier was disinherited by the fraudulent transfers (although the Appellee voluntarily gave him some guns and a small amount of money) and the issue of Stearl Rosier's deceased son were cut out completely. So the court found that Stearl Rosier had a "strong desire" to protect the inheritance rights of his children, yet the fraudulent conveyances permitted by the trial court causes the near complete disinheritance of everyone except the Appellee. This constitutes an abuse of discretion.

5. The Circuit Court erred in finding that the farm equipment and cattle were a bona fide gift to the Appellee. No competent evidence was given of a bona fide gift.

The Circuit Court's order specifically finds that the "determining factor" in deciding that the farm equipment and cattle were gifts to the Appellee was the fact that Stearl Rosier had already given him the farm. "Why would he give his son the farm and not the equipment to operate it and keep it in the Rosier family?" (See the trial court's "Order and Opinion"). Other than the hearsay testimony of Charles Mullenex, Jr., no evidence was presented at trial whatsoever to support the notion that Stearl Rosier gave any personal property to his son as a gift. Clearly, the court did not rely on evidence in making this finding anyway; rather, the court relied on its own logic in finding that the "determining factor" was that Stearl Rosier would not have given his son the farm if he weren't also going to give him the farm equipment and cattle. Logical or not, this proposition is not supported by evidence and ought to be set aside.

It is worth noting that there was no writing evidencing the "gift" from Stearl Rosier to his son. In fact, the only writing that exists suggests that Stearl Rosier did *not* make a gift of the farm equipment and cattle. The Assessor of Tucker County, Paul Burns, testified that the 2006 tax assessment, which assesses property owned on July 1, 2005, indicates that Stearl AND Leeorr Rosier owned an Olsmobile Delta, hay and produce, farm equipment, a Dodge Ram and thirteen cows (See testimony of Paul Burns, p. 112 of trial transcript). Clearly, then, it was reported that Stearl Rosier and the Appellant owned the farm equipment and cattle some three months before Stearl Rosier's death. Furthermore, the testimony was that the Appellee himself is the person who actually filled out the tax assessment form indicating that the property was owned by the Appellant and Stearl Rosier at that time. The tax records further show that the very next year, after Stearl Rosier's death, the only personal property owned by the Appellant was a 1984 Olds Delta. So there is no doubt that the Appellant owned the farm equipment and cattle on July 1, 2005, and that Stearl Rosier died on October 6, 2005. So if a gift was made of farm equipment or cattle, it must have been made between those two dates and there was not one word of testimony or other evidence suggesting that it was. As the court's finding of a bona fide gift of the farm equipment and cattle was not supported by any competent evidence, it is error and ought to be set aside.

RELIEF PRAYED FOR

The Appellant's evidence is that the Appellee conspired with Stearl Rosier to defraud her of her property rights, and the evidence of such conspiracy was clear. The Appellant prays for relief from the order of the Circuit Court of Tucker County, West Virginia dated October 8, 2008, granting the Appellee summary judgment on counts I, II, III and V of her complaint. The Appellant prays that the conveyances of real estate made by the Appellee be set aside as void and as acts of fraud, and that the Circuit Court of Tucker County's order of summary judgment be vacated. The Appellant further prays for relief

setting aside the bench order of August 12, 2009, and restoring the personal property to the estate of
Stearl Rosier.

Appellant, by Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO.:325522

LEEORR M. ROSIER and
LEEORR M. ROSIER, Executrix of the
Estate of Stearl Rosier,

Appellants,

v.

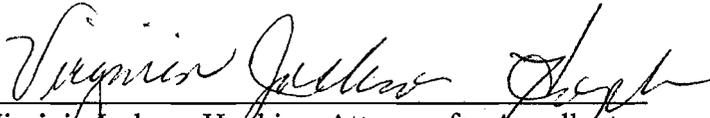
ROBERT LEE ROSIER,

Appellee,

CERTIFICATE OF SERVICE

I, Virginia Jackson Hopkins, do certify that on the ^{2^d} 1st day of June, 2010, a true copy of the attached Brief of Appellant in the above-styled case was served by U.S. Mail, with sufficient postage attached thereto, as follows:

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EXHIBITS

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