

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

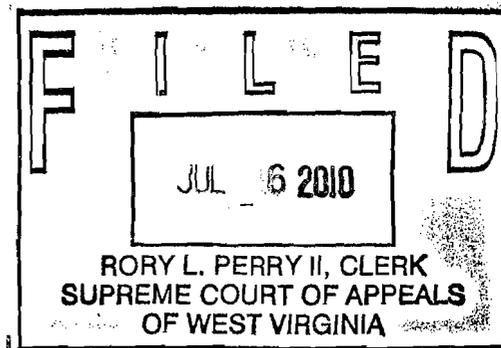
Appellant,

v.

Appeal No. 10-00-70
Case No. 35522

ROBERT L. ROSIER,

Appellee.



BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellant here, plaintiff below, filed this action in the Circuit Court of Tucker County, West Virginia, in or about April, 2006. Thereafter, appellant retained new counsel and filed an Amended Complaint in or about January, 2008. The original complaint contained four counts, alleging: I) breach of fiduciary duty; II) negligent transfer and scheme; III) violation of *W. Va. Code* §43-1-2, i.e., failure to give notice to a spouse of the transfer of real property; and IV) a count essentially requesting an accounting of the estate. The amended complaint reasserted the four original counts and added Count V, which asserted a violation of *W. Va. Code* §40-1A-1 et. seq., claiming a fraudulent conveyance of real estate to defraud creditors. Thereafter, appellee here, defendant below, filed a Motion for Partial Summary Judgment regarding Counts I, II, III, and V of the amended complaint. In response to this motion, appellant, rather than addressing the facts and allegations contained therein, merely filed a counter-motion for summary judgment as to the entire amended complaint. In or about October, 2008, a hearing was conducted at which appellee's Partial Motion for Summary Judgment was granted, and appellant's counter-motion for summary judgment was denied. Appellant moved the Court to have the Order granting Partial Summary Judgment entered as a final order, in order to permit her appeal of that portion of the matters raised in the amended complaint, to which motion appellee objected. After a hearing on that motion, the Court denied the request. Thereafter, the Court directed the parties to submit to mediation for the remaining Count in the amended complaint, however, appellant refused to cooperate with several attempts by appellee's counsel to schedule that mediation. As a result, the lower Court set this matter for trial in July, 2009. Following the presentation of evidence at that trial, the lower Court, by Order entered on or about August 12, 2009, rendered

judgment in favor of appellee as to Count IV of the Amended Complaint. On or about December 13, 2009, appellant filed her Petition for Appeal.

STATEMENT OF FACTS

Appellant LeeOrr Rosier is the surviving widow of Stearl Rosier who died testate in October, 2005. In the Last Will and Testament of Mr. Rosier, he made very specific devises of real property in order to distribute his estate as he deemed appropriate. That Will, executed in November, 2002, presumed to dispose of Mr. Rosier's interest in certain tracts of real estate, some of which Mr. Rosier actually owned jointly with survivorship with appellant. That Will also omitted reference of any kind to a tract of real estate containing 139 acres which Mr. Rosier owned separately.

After executing that Will, Mr. Rosier some time later reviewed it and noticed the omission of the 139 acre tract. He took this Will to William M. Miller, an attorney in Parsons, West Virginia, to consult with him about including the 139 acre tract and the general distribution of his estate consistent with the terms of the Will. After reviewing the deeds affected by the terms of the Will, Mr. Miller concluded that the 2002 Will executed by Mr. Rosier could not dispose of the real estate as provided, due to the survivorship provision the respective deeds contained. Further discussion with counsel resulted in Mr. Rosier directing Mr. Miller to prepare deeds conveying certain real estate from Mr. Rosier to his daughter, Shirley Carr, and other real estate to appellee herein, to accomplish the desired distribution of real estate which his Will could not achieve. The purpose Mr. Rosier stated for these conveyances was to destroy the right of survivorship that existed between himself and appellant, as Mr. Rosier felt that appellant

was “crazy” and also because upon her death she would not leave this real estate to their children, as she has previously expressed a decision to devise this real estate to her sister. The end result is that appellant became a tenant in common in the respective real estate with her son and daughter. Following the death of Mr. Rosier, Mrs. Carr conveyed to her mother the undivided interest in real estate she received by deed from her father. The 139 acre tract owned separately by Mr. Rosier, which was completely omitted from the 2002 Will, was conveyed entirely to appellee herein, by virtue of a deed executed by Mr. Rosier himself, in December, 2004.

Also while consulting with Mr. Miller, and in light of his recently being diagnosed with cancer, Mr. Rosier requested that a power of attorney be prepared appointing appellee as his attorney-in-fact (his wife being past eighty years of age and suffering vision problems). This document, in paragraph 6, specifically considered the issue of self-dealing, and permitted the appointed attorney-in-fact to execute documents, including deeds conveying real estate to himself or other members of the family, and contained a specific provision that doing so would not be considered self-dealing nor a breach of a fiduciary duty to the principal.

Mr. Rosier also maintained bank accounts, some individually, and another jointly with appellant. Mr. Rosier himself went to the bank and removed the balance of the account, re-depositing the money into a new account jointly between himself, the appellee and his daughter, Shirley Carr. Some time later, the daughter’s name was removed from the account.

For approximately 25 years, Mr. Rosier and appellee jointly operated a farm in Tucker County, and through the course of that operation, appellee acquired many items of farm equipment, personal property and cattle. Prior to his death, Mr. Rosier indicated to various neighbors and friends that anything he owned in connection with the farm he had given to

appellee. Several witnesses were presented at trial who provided testimony of Mr. Rosier's statements. There was no testimony presented by appellant which controverted this testimony.

ISSUES ON APPEAL

I. Whether *W. Va. Code* §40-1A-1 et. seq., is available to, or provides any remedy for, appellant as the surviving spouse of a decedent who disposed of an undivided interest in real property during his lifetime?

II. Whether appellee breached a fiduciary duty to his principal by carrying out the instructions of his principal concerning the desired disposition of real and personal assets?

III. Whether testimony adduced and presented in support of a Rule 56 Motion is admissible under applicable provisions of the *W. Va. Rules of Evidence*, and statutory provisions of *W. Va. Code* §57-3-1.

POINTS AND AUTHORITIES

I. The *Uniform Fraudulent Transfers Act*, codified at *W. Va. Code* §40-1A-1 et. seq., provides no remedy to, nor was it intended to be used by, a surviving spouse in asserting a claim against the estate of a deceased spouse.

Based upon the definitions contained in this code section, as well as the clear intent of the legislature in enacting this statute, appellant is not a "creditor"; is not entitled to "payment" from the assets of the deceased spouse, as no "claim" existed; and plaintiff did not pursue relief afforded by separate statutory enactments.

II. The appellee owed a fiduciary duty only to his principal, the decedent. By acting consistent with the directions of his principal, there could be no breach of that fiduciary duty.

Appellant admits there was no fiduciary duty owed to her. Moreover, appellant relies upon inapplicable code provisions to support her position that a fiduciary duty was breached or that there was a fraud committed.

III. The provisions of Rule 803 (3), and (24); and Rule 804 (a) (3), and (b) (5) of the *W. Va. Rules of Evidence*; and *W. Va. Code* §57-3-1 permit the testimony adduced as to the wishes and desires of the decedent as to the disposition of his estate.

The hearsay testimony presented fell within one or more of the exceptions to the hearsay rule and met the criteria for trustworthiness and reliability, and was used only

for the purpose for which such testimony was presented.

ARGUMENT

I. The Uniform Fraudulent Transfers Act is not available to appellant as the surviving spouse of Stearl Rosier.

The provisions of *W. Va. Code* §40-1A-1 et. seq., West Virginia's codification of the Uniform Fraudulent Transfers Act (the "Act"), are not appropriately applied to this factual scenario. Appellant does not fall within the category of individuals or entities this statute was enacted to protect, nor were the steps taken by Mr. Rosier prior to his death for the purpose of defrauding appellant. Indeed, there is no authority for expanding the Act to apply to the factual circumstances presented in this action. For several reasons, appellant's attempts to distort this statute should be avoided.

Obviously it is appellant's preference that this Court view this matter from a marriage termination standpoint rather than an estate issue. Factually, such perspective is incorrect. From the correct perspective, it is clear that appellant, as a surviving widow, does not fall within the purview of the code section. Appellant is not a "creditor" as the term is defined in the statute, i.e., §40-1A-1 (d) "...a person who has a claim". Immediately prior, in §40-1A-1 (c) the term "claim" is specifically defined as "...a right to *payment*, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured".(Emphasis added). Subsection (e) defines "debt" as "...liability on a claim". Additionally subsection (f) defines "debtor" as "...a person who is liable on a claim". Finally, Mr. Rosier was not "insolvent" at the time of the conveyance, as defined in §40-1A-2 (a) and (b); nor was the conveyance complained of a conveyance of

substantially all of his assets.

In December, 2004, the deeds from Mr. Rosier to his children simply destroyed the right of survivorship which existed between himself and appellant, or conveyed his separate property to his intended grantee. Having done so, neither he nor appellant would receive the survivor's interest in the real estate, and appellant consequently became a tenant in common with her children. With this, she owned essentially the same interest in the property after the deeds from Mr. Rosier as before they were executed.

Appellant's argument focuses primarily on the 139 acre tract which was owned solely by Mr. Rosier. He owned this real estate individually, although it was acquired during the marriage, by deed in or about 1948. Pursuant to *W. Va. Code* §48-29-202 (previously *W Va. Code* §48-3-10), this conveyance to Mr. Rosier individually is presumed to be a gift from appellant, absent evidence to the contrary, since it was titled in his name only but acquired during the course of the marriage. Appellant presented no evidence below which contradicted this presumption. Notwithstanding, appellant contends that she has a "claim", (i.e., a "right to payment") under the cited statute because of an "equitable interest" in the property she alleges to have acquired as Mr. Rosier's spouse. Interestingly, appellant does not explain how the purported "...inchoate rights that LeeOrr had in the property..." constitute a right to "payment" from Mr. Rosier for that real estate. Had the parties been involved in a divorce action she would not have had any equitable distribution claim to the real estate nor a portion of its value. Additionally, she testified in her deposition that she never contemplated a divorce, had never been to an attorney to see about getting a divorce, and was married to Mr. Rosier at the time of his death (deposition of LeeOrr Rosier taken on July 9, 2008, p. 23 lines 4-12 [pertinent portion

attached]). Therefore, these asserted “inchoate rights” could not give rise to a “right to payment” from Mr. Rosier.

Alternatively, had appellant chosen to pursue an elective share under *W. Va. Code* §42-3-1 et. seq., she *may* (though unlikely) have successfully argued that the 139 acre tract constituted a portion of the augmented estate of Mr. Rosier. However no such claim was made a part of the civil suit filed in this or any other action. Nonetheless, any payment would not be from Mr. Rosier, but rather from his estate of which appellant was both the executor and beneficiary. Having made no such assertion, appellant would not be entitled to “payment” from Mr. Rosier’s estate. Finally, clearly, she is not a “creditor” of nor entitled to receive payment from appellee in this action.

The argument appellant advances attempts to blur the lines between a divorce action and the process of estate administration. She asks this Court to recognize an otherwise unviable equitable distribution claim in an estate matter. (See *W. Va. Code* §48-1-233:definition of marital property has no application outside the provisions of the divorce statute...). While the proper mechanism for asserting appellant’s perceived “inchoate property right” is provided for in *W. Va. Code* §42-3-1, appellant, given at least two opportunities to do so, chose instead to pursue her claim under an unrelated code provision.

Appellant’s cited authority is not on point. In each case, the decision is based upon the claim of a **former** spouse, and relate to payments of equitable distribution, alimony or child support awarded in the divorce action. In none of the cited cases was the obligor spouse deceased, nor were the claims made against the estate of the decedent, but against the obligor himself. Finally, none of the cases involve conveyances which took place during the marriage of

the spouses.

Appellant provides no authority for her position that the Act should be applied under this factual scenario. Conversely, the only case from this jurisdiction which appellant cites provides no support for her argument. In *Rich v. Rich*, 185 W. Va. 148, 405 S. E. 2d 858 (W. Va. 1991), this court merely decided “...that an inter-spousal transfer of property is clearly subject to the Act.” (*Rich* at page 151). The *Rich* decision did not set aside the conveyance, but merely acknowledged the fact that the transferor owed an existing child support obligation and attempted to avoid the real estate being attached to satisfy that claim. There is no similarity between the facts of *Rich* and the facts of this case. The remaining cases cited by appellant follow along the same lines, i.e, equitable distribution in a divorce case, (see *Jacobowitz v. Jacobowitz* 925 A. 2d 424, Conn. App. 2007); a divorce judgment enforcement action, (See *Mladenka v. Mladenka* 130 S.W. 2d 397, Tex. App.-Houston [14th Dist] 2004), and a complicated and contentious divorce action; (see *Varner v. Varner* 662 So. 2d 273, Ala. Civ. App. 1994). Appellant continuously confuses the issue by comparing the process of achieving equitable distribution in a divorce action with the process of administering the estate of a decedent.

Had the legislature intended the Act to apply to the facts of the instant case, there would be no need for the Elective Share statute codified at *W. Va. Code* §42-3-1. This Court has repeatedly held that “it is presumed that the legislature will not enact a meaningless or useless statute[.]” *Hardesty v. Aracoma-Chief Logan No. 4532, Veterans of Foreign Wars of the United States, Inc.*, 147 W. Va. 645, 129 S. E. 2d 921 (W. Va. 1963). Further, this Court has recognized that the legislature is presumed to be familiar with all existing law, and intended any enacted law to harmonize completely with the full body of law of which it is a part (see Syl pt. 1,

Lee v. W. Va. Teacher's Retirement Board 186 W. Va. 441, 413 S. E. 2d 96, (W. Va. 1991).

Finally, this Court has recognized that the object in construing a statute is to ascertain and give effect to the intent of the Legislature (See Syl pt. 1, *Smith v. State Workmen's Comp. Comm.*, 159 W. Va. 108, 219 S. E. 2d 361 (W. Va. 1975)). Applying these decisions regarding statutory interpretation, the Act could not reasonably be applied to the facts of this case. Instead, the legislature enacted the elective share statute to provide for the claims of a disinherited spouse. From the plain language of the Act, appellant is not a "creditor", not entitled to "payment", and would hold no "claim" against Mr. Rosier. To arrive at this conclusion, as appellant urges, would require a significant departure from the plain language the legislature approved.

II. The fiduciary duty in this matter was owed only to Mr. Rosier, and there could be no breach of that duty by complying with the directions of the principal.

It is clear that appellee owed a fiduciary duty only to Mr. Rosier in this matter.

Appellee had been appointed attorney-in-fact by his father and carried out the instructions he was given in executing the deeds in question. (Appellant attached to her brief the power of attorney granting to appellee the power to act from Mr. Rosier. Note the provisions of paragraph 6, which address the issue of the agent be authorized to execute deeds from the principal to himself.) In the course of discovery in this action, appellee submitted Interrogatories to plaintiff, responses to which were verified by plaintiff. The pertinent interrogatory and response is as follows:

"INTERROGATORY NO. 9 Identify the individual to whom a duty was owed by defendant Robert Rosier as you allege in paragraph 8 of your complaint.

ANSWER: The defendant owed a fiduciary duty to Stearl Rosier, his principal."

Notwithstanding this acknowledgment, appellant continues to assert that a fiduciary duty was breached in the execution of the deeds in question. As can later be seen in the

testimony of William M. Miller and the decision of the lower court, there was in fact no breach of that fiduciary duty, as appellee acted in a manner consistent with the instructions and desires of his principal. Appellant makes this assertion based upon the premise that there is a presumption of fraud when an agent conveys real estate of his principal to himself. However there can be no presumption of fraud in this case, as appellee did not direct the preparation of the deeds in question. Rather, they were prepared at Mr. Rosier's direction, and were executed by appellee based upon the instructions given to Mr. Miller. The same holds true in relation to the bank account. Testimony presented by a bank employee indicated that Mr. Rosier himself came to the bank and withdrew the money from the joint account and redeposited the sum into an account bearing his name and the name of the appellee, as joint tenants with survivorship. (See Testimony of Kim Bean, Trial Transcript p.95 line 1- p. 101 line 13).

Appellant repeatedly refers to a claim of fraud in her brief. This completely disregards the facts of this case, and instead seizes upon a claim that was never asserted in the pleadings below. However, appellee will make an effort to respond to this argument.

This Court has previously held that it is entirely appropriate and within the power of an owner of an interest in real estate which may be subject to the claim of a spouse to convey that interest away or otherwise destroy the mechanism by which the spouse would claim ownership. In *Davis v. KB&T CO* 172 W. Va. 546, 309 S. E. 2d 45 (W. Va. 1983) this court cited with approval the provisions of comment (c) of the Restatement (Second) of Trusts when it held:

“Thus, if it is provided by statute that a wife of a testator shall be entitled to a certain portion of his estate of which she cannot be deprived by will, a married man can nevertheless transfer his property inter vivos in trust and his widow will not be entitled to a share of the property so transferred, even though he reserves a life estate and power to revoke or modify the trust”

With this decision, the Court recognized that the conveyance which Mr. Rosier made was entirely within his discretion. It is interesting to note that although the Restatement referenced the conveyance to a trust, the Court implicitly did not limit the decision to that factual situation, by providing that the husband could retain the power to revoke or modify the trust.

Later, in *Johnson v. Farmers and Merchants Bank, et al*, 180 W. Va. 702, 379 S. E. 2d 752 (W. Va. 1989) this Court noted that this state and many other states

“...have long recognized the right of a married person to deplete his or her estate even when the sole intent is to defeat the subsequent claim of a spouse. As long as the depletion is accomplished through complete transfers of the property which comprises the estate, an inter vivos transfer is ordinarily found to be valid” *Johnson* at page 706-707.

Later in *Johnson* this Court discussed the issue of retained control over the trust assets. The Court ultimately decided that the correct inquiry was one of whether the grantor “intended to divest himself of his property” which was conveyed. *Johnson* at page 711.

Applying the *Johnson* decision to the instant case it is clear that Mr. Rosier’s conveyance of his interest in real property was proper. The deeds to appellee and another child relinquished complete and absolute control of Mr. Rosier’s interest in the real estate. He did not retain a life estate in the property, nor any other device, such as a right of first refusal, which would afford to him any measure of retained control over that which he conveyed away. By doing so, he absolutely and unequivocally relinquished ownership in the real estate.

Appellant also argues that various provisions of *W. Va. Code* §48-1-1 et. seq., (the equitable distribution section of the divorce statute) support her position that the conveyance of real estate was fraudulent. By seeking the application of *W. Va. Code* §48-7-108 to this factual situation, appellant urges this Court to disregard the legislative limitation contained in *W. Va.*

Code §48-7-101 which states:

“Except as otherwise provided in this section, upon every judgment of annulment, divorce or separation, the court shall divide the marital property of the parties equally between the parties.”(Emphasis added)

The provisions of this code section are by its own terms limited to matters of divorce, annulment and separation actions. Further, *W. Va. Code* §48-1-216 defines “court” as a “family court”; and repeatedly in this code provision is the phrase “of this article” or “under the provisions of this article”, or words of like effect, which clearly indicate that the provisions of the code section only pertain to divorce, annulment or separation. Finally, the language of *W. Va. Code* §48-7-108 itself makes it clear that its provisions only apply to divorce, annulment or separation when it states

“Provided, That as to any transfer prior to the entry of an order under the provisions of 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 ...” (Emphasis added)

The language of this code section indicates that the only time its application was appropriate was to achieve equitable distribution of the marital estate, between divorce litigants, by repeatedly including the terms “provisions of this article” and reference to “court” as defined in that code section.

Finally, the code provision advocated by appellant contains more language indicative of legislative intent that it be applied only in cases of divorce, annulment and separation when it provides in *W. Va. Code* §48-1-233:

“The definitions of “marital property” contained in this section has no application outside of the provisions of this article, and the common law as to the ownership of the respective property and earnings of a husband and wife, as altered by the provisions of article 29 of this chapter and other provisions of this code, are not abrogated by implication or otherwise, except as expressly provided for by the provisions of this article as such provisions

are applied in actions brought under this article for the enforcement of rights under this article”

The repeated reference to and inclusion of this limiting language in the code provisions cited favorably by appellant indicate that reliance upon these provisions under this factual situation is misplaced, and the cited code section provides no authority to support the arguments advanced by appellant.

III. The hearsay testimony presented is admissible under the West Virginia Rules of Evidence promulgated by this Court, and was properly admitted by the trial court as relevant and reliable evidence.

A. Testimony of William M. Miller

Appellee would concur that the testimony of attorney William M. Miller concerning the content of conversations between he and Stearl Rosier prior to Mr. Rosier's death is hearsay. However, appellee would not concur that such testimony is inadmissible. Appellant ignores the exceptions that permit its admission and which were argued below, under which the lower court admitted the testimony. The determination of whether a statement is hearsay under Rule 802 is only the beginning of the analysis to determine its admissibility. (See *State v. Phillips* 194 W. Va. 569, 461 S. E. 2d 75 (W. Va. 1995) i.e., 1) does the statement fall within one of the exceptions to the hearsay rule, 2) is it relevant to the issues, and 3) does the prejudicial effect outweigh the probative value?). There are several applicable rules of evidence which render this testimony admissible. Upon completion of the evidentiary analysis, such testimony would be still only be admitted through the statutory provision commonly referred to as the Dead Man's Statute (*W. Va. Code §57-3-1*) which in cases of this nature further limits the nature and content of testimony which may otherwise qualify as admissible under the rules of evidence.

Under provisions of both Rule 803 (declarant availability immaterial) and Rule

804 (declarant unavailable), the testimony of Mr. Miller would be admissible. First, the provisions of Rule 803 (3) would admit the testimony as it relates to Mr. Rosier's then existing state of mind, i.e., his intent, plan, motive or design. Specifically, Mr. Miller testified that Mr. Rosier desired to have his interest in real estate distributed according to the residuary clause of his will (Deposition of William M. Miller June 30, 2008, p. 17 line 5-19). Mr. Miller further testified that Mr. Rosier had inquired about destroying the survivorship provisions of the deeds, in order to allow him to convey his interest to the individuals he desired (p.13 line 22 - p. 15 line 2). Clearly these statements fall within the exception of Rule 803 (3). This testimony is certainly relevant, as appellant contends that appellee executed some of the deeds which accomplished this result, and alleges fraud on appellee's part by executing those deeds. The testimony of Mr. Miller is further admissible under the provisions of *W. Va. Code* §57-3-1, as he is not a party to this litigation, nor does he have a pecuniary interest in the outcome of the case.

Initially, early in the development and discovery of this case, appellee's counsel identified and disclosed Mr. Miller as a witness. As a result, appellant's counsel deposed Mr. Miller on June 30, 2008. It was portions of the transcript of testimony adduced at this deposition which were presented to the lower court in support of the Rule 56 Motion which was subsequently granted in favor of appellee. Counsel for the adverse party had ample notice of the identify of the witness, appellee's intent to use this testimony, (it was attached as an exhibit to the Rule 56 Motion), and a sufficient opportunity to prepare to meet it.

This Court has previously directed the admission of testimony of this nature in a very similar situation. In *Transamerica Occidental Life Ins. Co., v. Burke* 179 W. Va. 331, 368 S.E. 2d 301 (W. Va. 1988), this court found that the trial court incorrectly excluded the testimony of a co-worker of the decedent who would testify as to the intent of the testator when

he identified his “children”, in a situation where there existed biological children as well as step-children who were potential beneficiaries of a life insurance policy. In that decision, the Court reiterated its earlier holding in *Gault v. Monongahela Power Co.*, 159 W. Va. 318, 223 S. E. 2d 421, (W. Va. 1976), “[A] declaration of intention is admissible to prove that the declarant had such intention.” *Gault* at page 327. In the instant case, the testimony of Mr. Miller was submitted for the purpose of showing the intention of Mr. Rosier as to the disposition of his real estate. Indeed, it was Mr. Rosier who directed Mr. Miller to prepare the deeds.

In addition to subparagraph 3 of Rule 803, the testimony of Mr. Miller would also be admissible under the provisions of subparagraph 24, as this testimony has equivalent circumstantial guarantees of trustworthiness. Clearly the conversation between Mr. Miller and Mr. Rosier concerning Mr. Rosier’s desired disposition of his interest in real estate bears the earmarks of reliability; is offered as evidence of a material fact; the statement is more probative on the point than any other evidence which could be procured by reasonable efforts; and the purpose of the Rules of Evidence and the interests of justice are best served by permitting this testimony. All other requirements of this provision of the Rule having been met, it was appropriate that Mr. Miller’s testimony be admitted.

Similarly, the provisions of Rule 804 also permit the introduction and consideration of Mr. Miller’s testimony. Particularly, Rule 804 (b) (5), nearly identical to Rule 803 (24), permit the introduction of this testimony. The statement of Mr. Rosier, as related to his attorney, was offered as evidence of a material fact, i.e., whether Mr. Rosier desired to have deeds prepared which conveyed his interest in real estate, or whether such deeds were procured fraudulently. On this issue the statement of Mr. Rosier is clearly more probative on that point than any other evidence which could be offered, and the general purpose of the Rules of

Evidence and the interests of justice are best served by allowing the Court to consider testimony of an independent, non-party witness as to the expressed wishes of a grantor who has since passed away.

B. Testimony concerning personal property

Testimony presented by friends of Mr. Rosier concerning statements he made to them prior to his death regarding the disposition of his personal property are also admissible. Applying the same analysis as above, and within the provisions of Rule 804 (b) (3), any statement attributed to Mr. Rosier which indicated that he gave away all or a significant portion of his personal property, including cattle, farm equipment, and related items, is so contrary to his pecuniary interest that a reasonable person in his position would not have made such a statement unless he believed it to be true, would be admissible. This is the exact nature of testimony presented at trial. Several friends of Mr. Rosier, including co-workers and neighbors, testified that Mr. Rosier told them on several occasions that he had given his farm equipment and cattle to his son, the appellee in this action. These witnesses' testimony would be admissible also because they have no pecuniary interest in the outcome of the case nor are they parties to the action.

C. Relevancy of Testimony

This Court's decision in *Phillips* directed the manner in which testimony presented under Rule 803(3) was to be analyzed prior to its admission. First the Court recognized the need to determine whether the testimony was in fact hearsay under Rule 801 (c). Next, the Court, citing *Syllabus Point 2 of State v. Dillon*, 191 W. Va. 648, 447 S. E. 2d 583 (W. Va. 1994) indicated that the court should determine whether the testimony fell within an exception when it said:

“Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless:...3) the statement is hearsay but falls within an exception provided for in the rules”. *Syl. Pt. 1, State v. Maynard* 183 W. Va. 1, 393 S. E. 2d 221, (1990).

Third, the Court held that although a statement may bear all the indicia of trustworthiness, relevancy of the statement under Rule 403 was of “equal concern” (*Phillips* p. 575). This prong of *Phillips* mandates determining whether the testimony satisfies the requirements of Rules 401, 402 and 403. If the Court is satisfied that all of these requirements have been met, the testimony should be admitted.

In the instant case, all of these steps were met. First, while the submitted testimony relates to hearsay, the nature of the hearsay testimony falls within one of the exceptions to the rule, i.e., Rule 803 (3), or 804 (3). As shown in the attached transcript, and the Court record, it was Mr. Rosier’s intent to convey his interest in the real estate to his children, and allow his wife to grant or devise her interest as she determined. It was further his intent to convey his personal property to his son.

Next, the Court determined the testimony was relevant for the purpose for which it was admitted. The primary object of appellant’s claim was that the deeds to the children breached a fiduciary duty and were fraudulent because appellee as the attorney-in-fact for Mr. Rosier had executed those deeds which conveyed some of the real estate to himself. The testimony of Mr. Miller concerning his conversation with Mr. Rosier was certainly relevant to that issue, as it was Mr. Rosier’s instructions (rather than appellee’s) which Mr. Miller followed in preparing those deeds. This the lower court specifically addressed in its order granting summary judgment when it said:

“However, before the deed could be signed by Stearl Rosier, he was

hospitalized and Defendant Robert L. Rosier signed the deeds acting as Power of Attorney for his father, (Id. P. 19, lines 10-11.) But, in signing such deeds Robert L. Rosier was acting at the behest of his father, and fulfilling the requests that his father had made to Mr. Miller a few days before. Therefore, because he was acting at the behest of his principal, Robert L. Rosier did not breach a fiduciary duty". (Order of the Circuit Court of Tucker County, West Virginia, entered October 8, 2008).

Since the submitted testimony was only considered for the purpose of identifying the intent of Mr. Rosier when he consulted with Mr. Miller, it was relevant to the issue of breach that had been raised in the amended complaint filed by appellant. Further, since the conveyance was made at the direction of Mr. Rosier, it was not necessary for the Court to make a finding that the presumption of fraud had been rebutted. In fact, there would exist no such presumption, as Mr. Rosier directed the creation of the deeds about which appellant complains.

Finally, this testimony was certainly not more prejudicial than probative on that issue. This testimony is probative of the intent of Mr. Rosier since he had since passed away and was not available to testify. No prejudice could be perceived from this testimony since Mr. Miller only testified about the content of the conversations between himself and the grantor. Since this matter was submitted as a summary judgment motion rather than before a jury, there was no danger of confusion of the issues or misleading the jury. And this evidence was certainly not cumulative as it was the only evidence available to appellee to prove that he had not breached a fiduciary duty.

D. Farm Equipment

In regard to the testimony presented by Mr. Mullenax and Mr. Eye, which was admitted under Rule 804 (b) (3), the Court found that "It would appear in this context that saying that he doesn't own something could be a statement against interest" (Trial Transcript p. 145 line 12-14). Again, the Court reviewed the testimony based upon the proffer concerning its contents

and the pre-trial memorandum submitted by appellee's counsel. This was admitted at the bench trial, and the Court's Order entered on August 12, 2009, found that statement consistent with the testimony of William M. Miller as well as the actions of Mr. Rosier himself. At trial, the only objection to this testimony from appellant was that such a statement would not fall within the exception because "it is supposed to be a very strong statement against interest such as a confession to murder or something significant. To merely say, those cows are mine; those are his, that's not a statement of interest that comes within the meaning of that Rule...". (Trial Transcript p. 144 line 17-23). This argument ignores the specific language of the Rule, that being: "A statement which was at the time of its making so far contrary to the declarant's *pecuniary* or *proprietary* interest... that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true." (Emphasis added). Based upon the argument advanced by appellant at trial and in this Court, i.e., that Mr. Rosier worked on this farm for many years, and had worked hard to obtain what was there, it is clearly against his pecuniary or proprietary interest to say that appellee was in fact the owner of the equipment and cattle. Moreover, this testimony is also admissible under Rule 803 (3) as a statement of Mr. Rosier's then existing state of mind and his intention, design or plan as to the personal property in question.

CONCLUSION

In light of the foregoing, appellant's assertion as to the applicability of the Act is misplaced. The Act does not provide for relief in this situation, nor does it contemplate application from the specific definitions it contains. The claim of breach of duty or fraud is unsupported, as the duty was owed only to Mr. Rosier, and it is clear that the attorney-in-fact acted consistent with the directions of his principal in all manners. The testimony presented by

Mr. Miller, Mr. Mullenax and Mr. Eye are admissible under the Rule of Evidence applicable to this matter and are not prejudicial, but instead is relevant to the issues and the most probative evidence on the topic it was adduced to support. The Court's ruling as to the summary judgment motion is correct, and its opinion after trial of this matter is well reasoned and supported.

The decisions of the Circuit Court of Tucker County, West Virginia rendered in this matter on October 8, 2008 and August 12, 2009 should be affirmed.

Respectfully submitted,

ROBERT L. ROSIER,
Appellee,

By Counsel



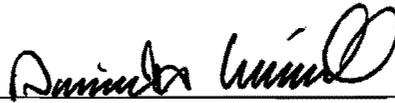
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CERTIFICATE OF SERVICE

I, David H. Wilmoth, counsel for Appellee do hereby certify that on this date I served a true copy of the foregoing **BRIEF OF APPELLEE** upon Virginia J. Hopkins, Esq., counsel for appellant, by depositing a true copy of same in the United States mail, postage prepaid, addressed to said counsel as follows:

Virginia J. Hopkins, Esq.
101 E. Main St.
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Dated this 30 day of June, 2010.



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EXHIBITS

ON

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