

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.

Appeal No. 35552

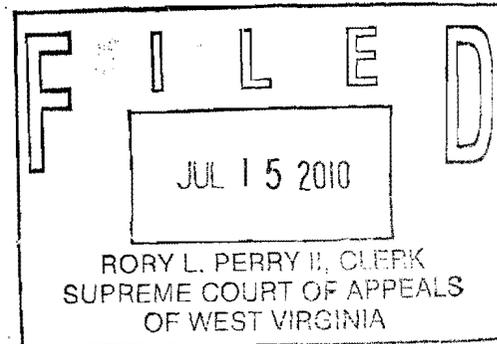
ROBERT LEE ROSIER,

Appellee.

REPLY TO APPELLEE'S BRIEF

Presented by:


Virginia Jackson Hopkins
Counsel for Appellant
101 E. Main Street
Kingwood, WV 26537
(304) 329-3903
State Bar ID 1784



The appellant hereby replies to the Brief of Appellee, which contains a number of clear errors of both fact and law.

While not directly pertinent to the issues herein appealed, the appellant points out as a preliminary matter that the appellee is wrong in stating in his brief that the parties were ordered to mediate this case, and that the appellant failed to cooperate in scheduling mediation. In fact, the opposite is true- the court specifically did *not* order mediation, although the court did encourage the parties to attempt a settlement. A settlement was not accomplished but the appellant disputes that it was because of her failure to cooperate. The appellant wants to clear the record on this point.

I. REPLY TO APPELLEE'S STATEMENT OF FACTS

The appellee's statement of facts also contains some important errors and misstatements. First, the appellee states that Stearl Rosier executed a will in 2002, some three years before his death, in which he made "very specific devises of real property in order to distribute his estate as he deemed appropriate." A simple reading of Stearl Rosier's 2002 will demonstrates that this is not true. The will leaves his entire estate, including all real and personal property, to the appellant, his wife, if she survived him. Only in the event that his wife predeceased him did the will leave specific devises of real estate, a contingency which obviously did not happen (the appellant executed a similar will at the same time, with identical devises, which of course gave Leeorr the expectation that the wills were reciprocal, adding to her surprise that she would be disinherited). The appellee's statement that Stearl Rosier's will made "very specific" devises of real estate is simply wrong. Stearl Rosier's will left his entire estate to his wife, a fact which the appellee fails to acknowledge.

The appellee's statement that Stearl Rosier made "very specific devises" in his will, which the appellee claims to have carried out, looks past the fact that Stearl Rosier was survived by his wife and sole beneficiary. It demonstrates the appellee's attitude perfectly- looking past his mother as if she had no property rights in any of the assets she and her husband owned, as if she was of no importance whatsoever. The minute Stearl Rosier died the appellee began to divide up his assets as if his mother did not even exist.

The appellee goes on to suggest that the "very specific devises" of Stearl Rosier's will were carried out by the appellee, which is also not completely true. Even if the court looks past the fact that Stearl Rosier was survived by his wife and sole beneficiary, it is plain that the appellee picked and chose which of the terms of the will he would carry out, and of course he chose those terms which favored himself. For example, the will specifies gifts to Stearl Rosier's grandchildren (again, only in the event that his wife predeceased him) which the appellee ignored in "distributing" his father's assets.

The appellee's brief claims that Stearl Rosier conveyed real estate to the appellee in order to effectuate a disposition of his real estate "that his will could not achieve." The appellant agrees with this statement. It is very clear that Stearl Rosier's will could not dispose of the 139 acre farm to his and the appellee's liking, without his wife's elective share getting in the way. So they only way he could cheat his wife out of her elective share was to convey the property to the appellee before his death (being careful to conceal the conveyance) so that it never became part of the estate. And this is exactly what the appellee and Stearl Rosier did. To characterize the conveyance of the 139 acre farm as a matter of legitimate "estate planning" is certainly putting a positive spin on cheating a 60 year spouse out of at least her elective share.

The appellee's brief also claims that "for approximately 25 years, Mr. (Stearl) Rosier and the appellee jointly operated a farm in Tucker County." But the fact is that there was no "joint" operation of the farm. The appellant's testimony was that the farm belonged to her and her husband Stearl- if there was an agreement between Stearl Rosier and the appellee Robert Rosier to "jointly" operate the farm, it was without the appellant's knowledge or consent. While the appellee helped on the farm, he was paid for his work and the farm was owned and operated by the appellant Leeorr Rosier and Stearl Rosier. Any proprietary interest in the farm that the appellee had was unbeknownst to the Leeorr Rosier, and the appellee only openly claimed a proprietary interest in the farm after Stearl Rosier's death.

It is also important to note that the appellee summarily states, without evidence, that the conveyances of real estate and personal property to the appellee did not dispose of "substantially all of his (Stearl Rosier's) assets" (appellee's brief, p. 6). The evidence was that the conveyances depleted all of the assets Stearl Rosier had and that, technically, he died penniless.

II. ARGUMENT

The appellee very curiously claims that since the 139 acre farm was purchased in 1951 and titled only in Stearl Rosier's name, that there is a presumption that the farm was a "gift" from the appellant Leeorr Rosier. There is no practical way that the appellant Leeorr Rosier could have made a "gift" of real estate which, according to the appellee's theory, she never owned in the first place. Leeorr Rosier had no control over how the farm was titled when it was purchased in 1951, and after all, traditions in purchasing real estate sixty years ago were different than they are now. At that time real estate was frequently titled in the husband's name, without any intention of dispossessing the wife. W.Va. Code 48-29-202, the statute upon which the

appellee relies, contemplates a situation where one spouse pays for real estate but titles the real estate in the name of the other spouse, which is certainly not the case before this court.

The appellee goes on to argue that, even if Stearl and Leeorr Rosier had gotten divorced, that Leeorr would not have had any claim to the real estate. The appellee refers to Leeorr's marital claim to the farm that she worked with her husband of over sixty years as "unviable" (appellee's brief, p. 7). The evidence was that Leeorr worked the farm as hard as her husband did. She made hay, delivered calves in the middle of the night, milked, fed pigs, drove the tractor, raised a garden, canned, helped build the house, fed the hired help, raised the children and single handedly did all the housework. It is inconceivable that she would have no right of equitable distribution in the farm, and hence no claim. Not only does the appellee argue that Leeorr would have no claim to the farm under equitable distribution, but he even claims she would have no claim to "a portion of its value" (appellee's brief, p. 6). In other words, the appellee claims that Leeorr Rosier made a gift of the farm to her husband in 1951 and that she cannot even claim any of the increase in value of the farm based on over sixty years of work on it. And the appellee urges this court to completely dispossess this widow based on this reasoning.

The appellee further argues that the proper way for the appellant to make her claim was to claim her elective share of Stearl Rosier's estate under W.Va. Code 42-3-1. But the appellee fails to acknowledge that the conveyance of the real estate and personal property to the appellee prior to Stearl Rosier's death (which the appellee concealed from Leeorr) took the assets outside of the estate. The appellee admits that Stearl Rosier intentionally thwarted Leeorr's elective share by getting rid of the property before his death (appellee's brief, p. 6)- and now, after thwarting the elective share claim, complains that she did not avail herself of the proper remedy.

It is also worth noting that to put the farm back into the estate under the elective share statute, as the appellee suggests, is to arrive at exactly the same result the appellant Leeorr Rosier advocates anyway, since the will leaves the entire estate to her.

The appellee cites *Davis v. KB&T Co.* 172 W.Va. 546, 309 S.E.2d 45 (1983) to support the notion that the law permits a spouse to divest himself of his property and thereby destroy the mechanism by which the other spouse could assert a claim. But the appellee fails to point out that the conveyance in the *Davis v. KB&T* case was upheld specifically because the conveyance was made to a trust which was to *benefit* the otherwise disinherited spouse. This court very clearly found that the husband in the *Davis* case conveyed substantially all the marital assets to a trust which provided for the wife's "comfortable support and maintenance and medical and hospital care." *Davis*, p. 553. This court ruled that the conveyances made in the *Davis* case were *not* made to deprive the wife of her statutory claim to the husband's estate, but were made in order to provide for the wife. The court also pointed out that Mrs. Davis was a wealthy woman in her own right and would not be left destitute by her late husband's conveyance of their marital estate to a trust. This is quite a different case than that of Leeorr Rosier, who was completely put out of the home she had for over sixty years and forced to live on about \$1000.00 per month in Social Security payments with absolutely no provisions made for her care or maintenance. Also, this court in *Davis* very clearly ruled that each case ought to be decided upon its own merits and that the facts and circumstances of each case would determine its outcome. Clearly the *Davis* court foresaw a case where a husband would fraudulently convey away the marital estate and leave a wife without support, and the court clearly suggested that such a conveyance would not be upheld. *Rosier v. Rosier* is exactly that case.

The appellee also points out *Johnson v. Farmers and Merchant's Bank*, 180 W.Va. 702, 379 S.E.2d 752 (1989), arguing that Stearl Rosier's conveyance of the farm should be upheld because he "did not retain a life estate in the property, nor any other device, such as a right of first refusal, which would afford 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" (appellee's brief, p. 11). The facts are very different, though, and the court is invited to look at the deed from Stearl Rosier to the appellee which very clearly reserves a life estate. Not only did Stearl Rosier reserve a life estate in the property he conveyed away, but the plain language of the deed requires the appellee to keep him on the farm the rest of his life and take care of him. For the appellee to say that Stearl Rosier conveyed the farm to him without reserving any control for himself is simply a mistake on the appellee's part. It is unconscionable for Stearl Rosier to convey the property to his son, reserve a life estate for himself with the explicit understanding that the appellee must care for his father on the farm, leaving Leeorr Rosier with nothing and no means of support, and then deny that the conveyance was made in fraud of her rights under *Johnson*.

The lower court's ruling relied heavily upon the supposed statements of Stearl Rosier, to which the appellant objected as hearsay. Without admitting the statements of Stearl Rosier, who was dead at the time of trial, the court could not have had any basis for upholding the conveyances as legitimate estate planning measures. The appellant points out, though, that at one point during the trial appellee's counsel objected to the introduction of statements of Stearl Rosier, and argued that such statements ought not to be admitted as they were statements of a dead man who was not present to rebut the statements. Furthermore, appellee's counsel argued, the statements of Stearl Rosier were hearsay (see trial transcript, p. 33). Now the appellee's

counsel asks this court to uphold several fraudulent conveyances based on the alleged statements of the same-deceased person.

The appellee makes the point in his brief that the statements Stearl Rosier allegedly made to William "Mont" Miller and others is admissible hearsay. The appellee claims that the statements of Stearl Rosier, although admittedly hearsay, had sufficient guarantees of trustworthiness to be admissible under Rule 804. However, it should be noted that the alleged statements of Stearl Rosier to the effect that he had given the farm and all of its equipment to his son the appellee were absolutely *inconsistent* with what Mr. Rosier had told the Assessor of Tucker County. The Assessor, Paul Burns, testified that the farm equipment and cattle were assessed to Stearl Rosier at the time of his death. Furthermore, the testimony was that the appellee is the one who filled out the assessments indicating that the farm equipment and cattle belonged to Stearl Rosier. Since there is a clear written record of who owned the farm equipment and cattle at the time of Stearl Rosier's death, then hearsay statements are certainly not "more probative on the point for which it is offered than any other evidence which the proponent can produce though reasonable efforts." Rule 804(b)(5). As such, the statements allegedly made by Stearl Rosier as to who owned the farm equipment and cattle in 2005 are not hearsay exceptions and ought to be excluded.

The appellee fails to acknowledge or explain why, if the conveyances of real and personal property were legitimate and legal, they had to be concealed from Leeorr Rosier. The appellee also fails to explain why this court ought to uphold secret conveyances which almost completely disinherit and dispossess a widow who worked her life away on the very farm that was taken away from her. Under the very important case of *Davis v. KB&T*, this court ought to set aside those conveyances and restore the widow to her rightful property. The *Davis* court

specifically found that each case should be weighed by its own merits, and that a conveyance to disinherit a spouse would not be upheld if made in fraud of a spouse's marital rights. Although the court did not find those facts in *Davis*, the court acknowledged that the case may come along, and it surely has.

Later, in *Johnson*, this court found again that the equities of each case ought to be weighed in determining whether an *inter vivos* transfer in fraud of a surviving spouse would be upheld. Specifically, this court found that an *inter vivos* transfer may be found to be illusory or testamentary "if it diminishes the probate estate to the extent that there is nothing left for the surviving spouse to elect against, while allowing the transferor to retain dominion and control over the assets placed in the trust." *Johnson v. Farmer's and Merchant's Bank*, syllabus point 4. Again, that case has arrived.

III. CONCLUSION

The appellant Leeorr Rosier prays that this court will reverse the order of the Circuit Court of Tucker County and restore her to the real estate and personal property demanded.

Appellant, by Counsel,

Virginia Jackson Hopkins
Counsel for Appellant
101 E. Main Street
Kingwood, WV 26537
(304) 329-3903
State Bar ID 1784

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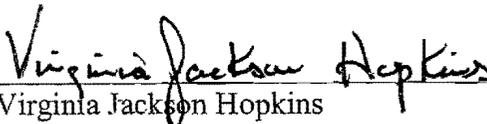
ROBERT LEE ROSIER,

Appellee.

CERTIFICATE OF SERVICE

I, Virginia Jackson Hopkins, hereby certify that on the 15th day of July, 2010, I served a copy of the foregoing **REPLY TO APPELLEE'S BRIEF** on the following by placing a true copy of same in the U. S. Mail, addressed as follows:

David H. Wilmoth, Esq.
P.O. Box 933
Elkins, WV 26241


Virginia Jackson Hopkins
W.V. State Bar No. 1784
Counsel for Appellant
101 E. Main Street
Kingwood, WV 26537
(304)329-3903