

---

Volume 102

Issue 5 *Issue 5, A Tribute to Thomas E. McHugh: An Encyclopedia of Legal Principles From His Opinions as a Justice of the West Virginia Supreme Court of Appeals*

Article 29

---

June 2002

## Business Law

Robin Jean Davis

*West Virginia Supreme Court of Appeals*

Louis J. Palmer Jr.

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Business Organizations Law Commons](#)

---

### Recommended Citation

Robin J. Davis & Louis J. Palmer Jr., *Business Law*, 102 W. Va. L. Rev. (2002).

Available at: <https://researchrepository.wvu.edu/wvlr/vol102/iss5/29>

This A Tribute to Thomas E. McHugh: An Encyclopedia of Legal Principles From His Opinions as a Justice of the West Virginia Supreme Court of Appeals is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

be re-executed in order for it to be revived.<sup>1613</sup>

*M. Effects of Marriage on Premarital Will*

Justice McHugh stated in *Mongold v. Mayle*,<sup>1614</sup> that “[e]ven though a testator executed a premarital will, as provided by *W.Va. Code*, 42-3-7 [1992], a surviving spouse of that testator is not precluded from taking an elective share of the decedent spouse’s estate pursuant to *W.Va. Code*, 42-3-1 [1992].”<sup>1615</sup>

XXV. BUSINESS LAW

*A. Shareholders*

Relying in part on *Southern Electrical Supply Co. v. Raleigh County National Bank*,<sup>1616</sup> Justice McHugh held in *Laya v. Erin Homes, Inc.*<sup>1617</sup> that “[t]he law presumes . . . that corporations are separate from their shareholders.”<sup>1618</sup>

*B. Partnership*

In *Transamerica Commercial Finance Corp. v. Blueville Bank of Grafton*,<sup>1619</sup> Justice McHugh addressed several matters pertaining to partnerships. The court initially stated:

*W.Va. Code*, 47-8-2 [1986], which provides that no general partnership may carry on business in this state under any assumed name other than the names of the individuals owning the business unless those persons file in the office of the clerk of the county commission certain information, is to be construed in pari materia with *W.Va. Code*, 46-9-402(7) [1974], which specifies that it is sufficient to put the individual, partnership, or corporate names of the debtors on a financing statement whether or not it adds other trade names of the parties.<sup>1620</sup>

The court next held:

---

<sup>1613</sup> *Id.* at Syl. Pt. 3.

<sup>1614</sup> 452 S.E.2d 444 (W. Va. 1994).

<sup>1615</sup> *Id.* at Syl. Pt. 1.

<sup>1616</sup> 320 S.E.2d 515 (W. Va. 1984).

<sup>1617</sup> 352 S.E.2d 93 (W. Va. 1986).

<sup>1618</sup> *Id.* at Syl. Pt. 1.

<sup>1619</sup> (W. Va. 1993).

<sup>1620</sup> *Id.* at Syl. Pt. 2.

A partnership name must be filed in the manner required by *W.Va. Code*, 47-8-2 [1986] before it sufficiently shows the name of the debtor partnership on a financing statement under *W.Va. Code*, 46-9-402(7) [1974] since the two statutes are to be construed in *pari materia*. If the partnership name is not filed as required by *W.Va. Code*, 47-8-2 [1986], then the individual partners' names must be listed as the debtors on a financing statement whether or not trade names are added. However, a financing statement may be effective against other creditors even though it lists a partnership name which is not filed pursuant to *W.Va. Code*, 47-8-2 [1986] if it is not seriously misleading as provided by *W.Va. Code*, 46-9-402(8) [1974].<sup>1621</sup>

The opinion concluded:

When there is an error in the debtors' names in the financing statement because of failure to comply with *W.Va. Code*, 47-8-2 [1986], it is necessary to determine whether or not the error is seriously misleading under *W.Va. Code*, 46-9-402(8) [1974] by determining whether or not a reasonably prudent creditor searching the filing index for the financing statement would be misled so as to be unable to locate the financing statement. Whether an error is seriously misleading is to be determined by the facts of each case.<sup>1622</sup>

### C. *Piercing the Corporate Veil*

Justice McHugh noted in *Laya v. Erin Homes, Inc.*<sup>1623</sup> that “[t]he propriety of piercing the corporate veil should rarely be determined upon a motion for summary judgment. Instead, the propriety of piercing the corporate veil usually involves numerous questions of fact for the trier of the facts to determine upon all of the evidence.”<sup>1624</sup> He also said that

[i]n a case involving an alleged breach of contract, to “pierce the corporate veil” in order to hold the shareholder(s) actively participating in the operation of the business personally liable for such breach to the party who entered into the contract with the corporation, there is normally a two-prong test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer

---

<sup>1621</sup> *Id.* at Syl. Pt. 3.

<sup>1622</sup> *Id.* at Syl. Pt. 4.

<sup>1623</sup> 352 S.E.2d 93 (W. Va. 1986).

<sup>1624</sup> *Id.* at Syl. Pt. 6.

exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement).<sup>1625</sup>

The court in *Laya* concluded that

[g]rossly inadequate capitalization combined with disregard of corporate formalities, causing basic unfairness, are sufficient to pierce the corporate veil in order to hold the shareholder(s) actively participating in the operation of the business personally liable for a breach of contract to the party who entered into the contract with the corporation.<sup>1626</sup>

#### D. *Action by Foreign Corporation*

Justice McHugh wrote in *Dieter Engineering Services, Inc. v. Parkland Development, Inc.*<sup>1627</sup> that

[p]ursuant to *W.Va. Code*, 31-1-66 [1974] which states, in relevant part, that “[n]o foreign corporation which is conducting affairs or doing or transacting business in this State without a certificate of authority shall be permitted to maintain any action or proceeding in any court of this State until such corporation shall have obtained a certificate of authority[.]” such corporation may maintain an action or proceeding in any court in this State when the corporation obtains a certificate of authority even though the corporation did not have the certificate at the time it instituted the action or proceeding.<sup>1628</sup>

#### E. *Appointing Corporate Counsel to Represent Indigents*

Justice McHugh held in *Cunningham v. Sommerville*<sup>1629</sup> that

[h]ouse counsel employed on a full-time basis by a business corporation which forbids such counsel from engaging in the separate practice of law may, under Rule 6.2(b) of the West Virginia Rules of Professional Conduct (1989), avoid an appointment by a tribunal to represent an indigent in a criminal or

<sup>1625</sup> *Id.* at Syl. Pt. 3.

<sup>1626</sup> *Id.* at Syl. Pt. 5.

<sup>1627</sup> 483 S.E.2d 48 (W. Va. 1996).

<sup>1628</sup> *Id.* at Syl. Pt. 3 (alterations in original).

<sup>1629</sup> 388 S.E.2d 301 (W. Va. 1989).

other eligible proceeding, on the ground that the representation “is likely to result in an unreasonable financial burden” on the lawyer.<sup>1630</sup>

*F. Agency*

Justice McHugh held in *Teter v. Old Colony Co.*<sup>1631</sup> that “[o]ne of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent.”<sup>1632</sup>

*G. Capitalization*

In *Laya v. Erin Homes, Inc.*,<sup>1633</sup> Justice McHugh stated that “[g]enerally, the presumption is that the party dealing with the corporation did not assume the risk of grossly inadequate capitalization.”<sup>1634</sup>

## XXVI. CONCLUSION

During his tenure on the West Virginia Supreme Court of Appeals, Justice McHugh established himself as a judicial giant who walked with a humble spirit and gracious demeanor. Although few may equal his talents as a legal thinker, none will ever measure up to the fullness of the man. As a member of our state’s highest court, Justice McHugh was a judicial jewel who did his best not to allow his greatness to cast a shadow over the lights of those around him.

---

<sup>1630</sup> *Id.* at Syl.

<sup>1631</sup> 441 S.E.2d 728 (W. Va. 1994).

<sup>1632</sup> *Id.* at Syl. Pt. 3.

<sup>1633</sup> 352 S.E.2d 93 (W. Va. 1986).

<sup>1634</sup> *Id.* at Syl. Pt. 4.