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Property

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PROPERTY

I. PREJUDGMENT INTEREST ON DAMAGES TO REAL PROPERTY


A recognition of economic realities has prompted the expansion of the permissible recovery of prejudgment interest in West Virginia. One such economic reality is that the period of time between the date of loss or injury and the date of judgment may often be quite substantial thereby depriving the injured party of the use of any money awarded. In an attempt to "fully compensate the injured party for the loss of the use of funds that have been expended," the West Virginia Supreme Court of Appeals in Kirk v. Pineville Mobile Homes allowed the recovery of prejudgment interest in cases where a general verdict is returned for loss or damage to real property. A plaintiff may now recover prejudgment interest on the entire amount, which includes loss of use arising from annoyance and inconvenience providing the damages are reasonably susceptible to calculation. In so ruling, the supreme court has substantially enlarged the scope of earlier decisions that limited prejudgment interest awards to cases involving the destruction or loss of personal property. Basic concepts of fairness and equity have dictated such a result.

In Kirk, the plaintiffs sought to recover for damages to their home and personal property as a result of a fire. The jury returned a general verdict in favor of the plaintiffs. However, the Wyoming County Circuit Court denied the Kirks' request for prejudgment interest because the verdict included damages for annoyance and inconvenience. The court based its decision on the fact that the verdict contained an element of unliquidated damages.

On appeal the supreme court stated that although earlier decisions allowing an award of prejudgment interest had involved the loss of personal property, the underlying rationale was equally applicable to the loss of real property. In both situations, an award of prejudgment interest was necessary to make the injured party whole. The defendants argued that because the verdict included sums for annoyance and inconvenience which were not fixed amounts, no prejudgment interest should be awarded on the entire verdict. The court, in rejecting this claim, held

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2 Kirk, 310 S.E.2d 210.

3 Id. at 211-12.

4 Id.

5 Id. at 212.

6 Id. at 211.

7 Id.

8 Id.

9 Id. at 212.

that where an amount for loss of use arising from annoyance and inconvenience is included within a general verdict for loss or damage to real or personal property, the plaintiff may recover prejudgment interest on the entire amount of the general verdict, providing the jury has not made a separate determination as to the amount for such loss of use. In reaching this decision, the court made three observations concerning the inclusion of annoyance and inconvenience. First, such damages are closely tied to property destruction or loss. Second, the sum awarded is a limited amount measured by an objective standard. Third, generally the sum awarded for such damages will only be a minor part of the amount recovered by a successful plaintiff. By allowing prejudgment interest in cases involving damages to real property, the court joined the majority of other jurisdictions.

II. ASSIGNMENT


In Randolph v. Koury Corp., the court held that "where a lease is assignable and it contains an option to purchase, unless there is clear language in the lease that limits the assignability of the option, the option is also assignable." In reaching this decision, the court remained consistent with prior case law adopting the general rule that a lease is ordinarily assignable unless clear language is presented to the contrary.

The defendant corporation leased a parcel of real estate to another corporation. The lease also contained an option to purchase the property during the term of the lease or during a renewal term. However, there was no express provision prohibiting assignment of the lease or the option. Years later, the lease was assigned to the plaintiff who attempted to exercise the option to purchase the property. When the defendant refused to convey the property, the plaintiff instituted an action for specific performance in the Kanawha County Circuit Court which directed the conveyance. The defendants appealed and raised three issues, two of which are of primary importance: First, whether the purchase option contained in the lease between the two corporations was assignable to the plaintiff; second, whether the

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11 Kirk, 310 S.E.2d at 213. The appropriate statute is W. VA. CODE § 56-6-31 (1966 & Supp. 1981) which now embodies this common law rule. As the trial court correctly ruled—and the supreme court reiterated—the statute could not be retroactively applied and thus was not controlling in Kirk. Kirk, 310 S.E.2d at 212 n.1.  
12 Kirk, 310 S.E.2d at 212-13.  
13 Id. See, e.g., Alabama Power Co. v. Allen, 218 Ala. 416, 419, 118 So. 662, 665 (1928); Davenport v. Intermountain Ry., Light & Power Co., 108 Neb. 387, 393, 187 N.W. 905, 907 (1922); King v. McGuff, 149 Tex. 432, 438, 234 S.W.2d 403, 407 (1950). Each of these cases allowed the award of prejudgment interest from the time of damage because of fire.  
15 Id. at 762.  
16 Id. See Easley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 112 S.E. 512 (1922).  
17 Randolph, 312 S.E.2d at 761.  
18 Id. at 760-61.
terms of the assignment had been met when the plaintiff attempted to exercise the option.\textsuperscript{19}

In addressing the first issue, the court recognized that the West Virginia rule on assignment is in accord with the general rule that unless there is a statutory or express provision in the lease to the contrary, a lease on real property is assignable.\textsuperscript{20} Since the issue of the assignability of a purchase option in an assignable lease was a question of first impression in West Virginia, the court pointed to persuasive authority in other jurisdictions which have held that such an option is assignable unless there is clear language providing otherwise.\textsuperscript{21} In practical effect, the court extended the scope of assignment to include purchase options while reiterating the underlying rationale that "[b]eing a restraint on alienation, a condition against assignment . . . is governed by the rule of strict construction . . . ."\textsuperscript{22}

The second issue concerned the validity of the assignment. The defendant asserted that the contract of assignment had terminated when the plaintiff failed to exercise the purchase option by a particular date.\textsuperscript{23} The general view, as acknowledged by the court, is that a party who has a contractual obligation may not escape performance when a contract right has been assigned by pointing to a defect in the assignment, unless the defect leaves the assignment void.\textsuperscript{24} Furthermore, the obligor may not defend his failure to perform on any ground which renders the assignment voidable such as fraud or undue influence. In addition, the obligor may not offer the defenses of a lack of consideration or the existence of a fiduciary relationship between the assignee and assignor.\textsuperscript{25} As the court noted, the rationale for a rule requiring an assignment to be void and not merely voidable before an obligor may raise a defense is to insure against the possibility that an obligor may have to pay the same claim twice.\textsuperscript{26}

III. DEEDS—THE REQUIREMENT OF DELIVERY


An effective legal delivery may be made by a grantor's manual delivery of a deed to a third person with the direction that the deed be delivered to the grantee

\textsuperscript{19} Id. The third issue was related to the defendant's claim that specific performance was improper because the option price and the fair market value of the property were grossly disproportionate. The court, however, declined to give extended discussion to this issue since it was not seriously asserted at trial. \textit{Id.} at 765.

\textsuperscript{20} \textit{Id.} at 762. \textit{See, e.g.}, Crump v. Tolbert, 210 Ark. 920, 198 S.W.2d 518 (1946); Valley Oil Co. v. Barberian, 344 Mass. 759, 183 N.E.2d 109 (1962). The court acknowledged that a tenancy at will was notable exception to the general rule. \textit{Randolph}, 312 S.E.2d at 762 n.3.


\textsuperscript{22} \textit{Randolph}, 312 S.E.2d at 762 (quoting \textit{Easley Coal Co.}, 112 S.E. 512 (syllabus point two)).

\textsuperscript{23} \textit{Randolph}, 312 S.E.2d at 763.

\textsuperscript{24} \textit{Id.} at 764.

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.}
after the grantor’s death. An effective conveyance of title to the grantee is then complete, providing that no express or implied reservations are preserved and no powers of recall, revocation, or modification are exercised by the grantor without the grantee’s consent. In recognizing this general rule of law, the court in Daugherty v. DeWees noted that although there are no West Virginia cases on point, this view is consistent with the holdings of nearly all courts.

Mr. Daugherty died in 1978. Surviving him were his second wife, the plaintiff, and a daughter from his first marriage, the defendant. Prior to his death, Mr. Daugherty delivered two packages of papers containing deeds, to a third party in escrow, one marked for his wife and the other marked for his daughter. Subsequently, Mr. Daugherty reacquired the packages and redelivered one of them to the third party with instructions that it be delivered to his wife after his death. Contained in the package, which remained in the possession of the third person until Mr. Daugherty’s death, was an envelope on which was written: “This is the Deed for Luvena DeWees [the decedent’s daughter] after I have passed on ...” The Wirt County Circuit Court accepted the plaintiff’s arguments that there had been either no delivery or a mere conditional delivery that had been subsequently revoked. Consequently, the trial court ordered the deed to be set aside and decreed that the plaintiff was the recipient of the deed to the property.

On appeal, the supreme court pointed to the long-standing rule in West Virginia that delivery of a deed is directly dependent on the intent of the parties. The court stated that the circuit court’s conclusion concerning Mr. Daugherty’s intent was based on a clearly erroneous finding that he had been in possession of the deed at the time of his death. The court reversed the trial court’s finding and remanded the case for a factual determination of Mr. Daugherty’s intent at the time of the delivery to the third party. The court clearly stated that although a previous delivery of a deed may appear to have been conditionally made because of reacquisition, this fact alone may not imply a reservation upon a second delivery of the same deed.

IV. ADOPTED CHILD’S RIGHT TO INHERITANCE


The law in West Virginia concerning intestate succession is entirely statutory.
and therefore often presents the court with questions of statutory interpretation and legislative intent. The issue in King v. Riffee,37 concerning when rights under intestate succession statutes vest, arose because of a material change in the law between the years 1943 and 1969 as they related to an adopted child's intestate succession rights.38

The plaintiff was born out of wedlock in 1942 and was legally adopted in 1955. He alleged, however, that his natural father was Denzil T. Carney, one of five sons of George W. Carney who died intestate in 1978. Denzil T. Carney would have been entitled to one-fifth of his father's estate had he not died before George W. Carney. The plaintiff claimed a one-fifth interest in his alleged natural grandfather's estate.39

The court in King required a determination of the effect of the plaintiff's adoption in 1955 upon his rights to inherit from his alleged natural grandfather when he died in 1978.40 At the time of the plaintiff's adoption, the statutes41 provided that legitimate children who were adopted inherited from their natural parents and enjoyed a limited right to inherit from their adoptive parents.

38 Id. at 87.
39 Id. at 86.
40 Id. This case had previously been before the court to determine whether an illegitimate child can be limited to inheritance from his mother under W. VA. CODE § 42-1-5 (1982). The court decided that W. VA. CONsT. art. III, § 17 "prohibits limiting illegitimate children to the maternal line for intestate inheritance because denying inheritance from their natural fathers discriminates invidiously against illegitimate children." King, 309 S.E.2d at 86.
41 King, 309 S.E.2d at 87. In 1955, the inheritance rights of adopted children were governed by 1943 W. Va. Acts, Ch. 43. Section 3 of this Act dealt with the contents of the decree adopting a child and provided in pertinent part:

[F]rom the date of such decree, the rights, duties, privileges and relations, theretofore existing between the child and his or her parent or parents, shall be in all respects at an end, excepting the right of inheritance; and that the rights, duties, privileges and relations between the child and his or her parent or parents by adoption, shall thenceforth in all respects be the same, including the right of inheritance, as if the child had been born of such adopting parent or parents in lawful wedlock, except only as otherwise provided in this article.

Section 5 of the same Act dealt with an adopted child's rights of inheritance from his or her adoptive parents and read as follows:

[E]xcept that such child shall not be capable of taking property expressly limited to the heirs of the body of the adopting parent or parents, nor property coming from the lineal or collateral kindred of such adopting parent or parents by right of representation: Provided, That on the death of the adopting parent or parents and the subsequent death of the child so adopted without issue, the property of such adopting deceased parent or parents shall descend to or be distributed among the next of kin of such parent or parents, and not the next of kin of the child adopted: Provided further, That if such adopting parent or parents shall have another child or children, theirs by birth, then, and in that case, the adopted child shall share the inheritance with the child or children born to the adopting parent or parents, and in such case also, such adopted child and such child or children by birth shall respectively inherit from and through each other the property and estate of the adopting parent or parents, as if all had been children of such parent or parents born in lawful wedlock. (emphasis added)
The legislature, however, in subsequent amendments to West Virginia Code section 48-4-5 in 1959 and 1967\textsuperscript{42} changed the law. The new law foreclosed adopted children from inheriting by intestacy from their natural parents or lineal or collateral kindred but acknowledged their rights to inherit from adoptive parents and their lineal and collateral kindred.\textsuperscript{43} Plaintiff claimed that the statute in effect at the time of his adoption was controlling and, therefore, he should be allowed to inherit from his natural grandfather's estate.\textsuperscript{44} The Jackson County Circuit Court held that the law of intestate succession in effect at the time of the death of the plaintiff's grandfather in 1978 was the applicable statute, thereby barring Mr. King from inheriting from his natural grandfather.\textsuperscript{45}

On appeal, the West Virginia Supreme Court reaffirmed its previous interpretation of West Virginia Code section 48-4-5\textsuperscript{46} in \textit{Wheeling Dollar Savings & Trust Co. v. Hanes}\textsuperscript{47} which held that an adopted child is to be placed on complete par with a natural child in regard to inheritance through his or her adoptive families.\textsuperscript{48} The court in \textit{King} recognized the legislature's inherent authority to alter the way in which property descends or is distributed in cases of intestacy in much the same manner that an individual may change his will.\textsuperscript{49} Additionally, the court noted that adopted children, as a class, receive many more benefits under current statutes than under the earlier provisions that governed intestate succession.\textsuperscript{50} Over the years, each amendment has broadened the rights of adopted children to share in the property of their adoptive families.\textsuperscript{51}

The court pointed to two specific policy considerations that influenced its decision. First, most adopted children cannot prove their descent, thereby making inheritance from natural parents nearly impossible.\textsuperscript{52} Second, title to real property automatically descends to heirs by operation of law in the event of intestacy. To have held that the statute in effect at the time of plaintiff's adoption was controlling rather than the statute in effect at the time of the death of the ancestor could have resulted in great chaos as long-settled titles to real property could be called into question.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{43} \textit{King}, 309 S.E.2d at 87.
\item \textsuperscript{44} Id. at 86.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} W. VA. CODE § 48-4-5 (1980).
\item \textsuperscript{47} \textit{Wheeling Dollar Savings & Trust Co. v. Hanes}, 237 S.E.2d 499 (W. Va. 1977).
\item \textsuperscript{48} In \textit{Wheeling Dollar Savings}, the court held that adopted children were to be included within provisions referring to "child," "natural children," "heirs," or "issue" in a will or inter vivos trust. Id. at 499.
\item \textsuperscript{49} \textit{King}, 309 S.E.2d at 89.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\end{itemize}
V. CONSTRUCTIVE AND RESULTING TRUSTS


The decision in Bailey v. Banther, reaffirmed the principle that if a grantor makes a conveyance to avoid invalid, unproved, or illusory claims by potential creditors, the grantor may enforce the transfer as a constructive or resulting trust against the grantee. The court also recognized longstanding criteria for determining whether a subsequent buyer is entitled to protection as a bona fide purchaser without notice.

J. D. Banther, the defendant, purchased a tract of land from his father. In order to protect the property from potential creditors of his first wife, the defendant deeded the property to his seven year old son. However, the defendant continued to live on the property and make improvements. When the defendant’s son became 18 years old, the son deeded the property to the plaintiffs who subsequently attempted to evict the defendant from the property. Upon defendant’s refusal to leave, the plaintiffs brought suit in the Wyoming County Circuit Court. The trial court concluded that the evidence presented by the defendant did not overcome the presumption of gift from father to son. Additionally, the court determined that the plaintiffs were purchasers for value without notice and entitled to the property.

On appeal, the supreme court noted the general rule that a purchaser who conveys property to a family member is presumed to have made a gift or an advancement of the property. However, once there is clear and convincing evidence indicating a contrary intention, the presumption may be rebutted. Considerations of equity provide courts with guidance in determining whether a constructive trust has been validly created. These considerations make them reluctant to establish trusts in favor of those transferring property to avoid creditors. Equitable principles, however, are flexible and, as such, may change with the nature of a creditor’s claim. For example, “a deed to avoid creditors that may be voided by creditors,

57 Id. at 179.
58 Id. at 180-81.
59 Id. at 178.
60 Id.
61 Id. at 179.
62 The court distinguished a situation in which the property is conveyed to a stranger rather than to a family member. In such a situation, the courts presume that a resulting or constructive trust has been created. Id. at 179 n.3 (citing Watts Brothers & Co. v. Frith, 79 W. Va. 89, 91 S.E. 402 (1917)).
63 Bailey, 314 S.E.2d at 179 (citing Carter v. Walker, 121 W. Va. 81, 84, 1 S.E.2d 483, 484 (1939); Deck v. Tabler, 41 W. Va. 332, 23 S.E. 721 (1895) (syllabus point two)).
is valid between grantor and grantee." But when the supposed creditor's claims are invalid, unproved, or illusory, a court may nevertheless find that the grantee holds in trust for the grantor. This enforcement of a resulting or constructive trust appears to be a view accepted by many other courts under similar circumstances. In Bailey, the court found that the presumption of gift was overcome by direct, uncontradicted testimony that supported the defendant's claim of a constructive trust. Also, there was no evidence that any creditor had moved against the defendant or that any actual liability or debt existed.

The second issue the court resolved was whether the plaintiffs were purchasers without notice. In a review of West Virginia law pertaining to purchasers without notice, the supreme court noted its consistent ruling that a purchaser has a duty to inquire. Conditions and circumstances which fairly put a party on inquiry may be regarded as sufficient notice. Included within the context of this rule of law is actual possession of the property by one holding land under a prior equitable title from the same vendor. The defendant's son could sell no more than he had, which was, in essence, legal title as constructive trustee for his father. Because the plaintiffs had been neighbors of the defendant for many years and had failed to inquire into the nature of the defendant's actual possession of the property, the court held that they were not entitled to evict the defendant or to recover damages.

VI. WILLS


In Davis v. KB & T Co., the court reaffirmed the distinction between mutual and reciprocal wills and addressed the issue of the validity of inter vivos trusts which impair the statutory rights of a surviving spouse to share in the settlor's estate. In 1973, David Farley executed a will which devised his entire estate to his wife. Several months later, his wife, by an identical will, devised her entire estate to him. About three years later, Mrs. Farley suffered a mental collapse requiring hospitaliza-

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64 Id.
65 Id. (citing Wilcoxon v. Carrier, 132 W. Va. 637, 53 S.E.2d 620 (1949) rev'd on other grounds, LaRue v. LaRue, 304 S.E.2d 312, 322 (1983); Criss v. Criss, 65 W. Va. 683, 64 S.E. 905 (1909)).
66 Bailey, 314 S.E.2d at 180. The court specifically cited a number of cases from other jurisdictions dealing with an attempt by a grantor to avoid potential creditors. See, e.g., Hlista v. Altevogt, 239 Md. 43, 210 A.2d 153 (1965); Evans v. Evans, 180 Okla. 46, 67 P.2d 779 (1937).
67 Bailey, 314 S.E.2d at 180.
68 Id. at 181.
69 Id.
70 Id.
71 Id.
72 Id.
73 Davis v. KB & T Co., 309 S.E.2d 45 (W. Va. 1983).
tion, and Mr. Farley also had to be temporarily hospitalized because of health problems.\textsuperscript{74}

Shortly thereafter, Mr. Farley established an inter vivos trust naming Kanawha Banking & Trust Company (KB & T) as trustee.\textsuperscript{75} The trust provided that the net income should be paid to Mr. Farley during his lifetime and that should Mrs. Farley survive him, the income should be used for her benefit if her other assets proved to be insufficient. The powers of revocation and amendment of the trust were also expressly reserved.\textsuperscript{76} Simultaneously with the creation of the trust, Mr. Farley executed a new will bequeathing to KB & T, as trustee under the inter vivos trust, the residue of the estate consisting solely of personality.\textsuperscript{77}

After Mr. Farley's death, the plaintiff, Dorothy Evelyn Davis, was qualified as committee for her incompetent sister, Mrs. Pennsy Farley. She commenced an action in the Circuit Court of Kanawha County seeking to renounce Mr. Farley's will.\textsuperscript{78} The plaintiff relied upon two primary arguments.\textsuperscript{79} First, she alleged that the wills executed by Mr. and Mrs. Farley in 1973 were irrevocable reciprocal wills. Second, Mrs. Davis argued in the alternative that Mrs. Farley should be entitled to a dower interest in all the property in control of her husband at the time of his death, including the property placed in the inter vivos trust.\textsuperscript{80}

The circuit court rejected each of the plaintiff's claims holding: (1) the wills made by Mr. and Mrs. Farley in 1973 were not irrevocable or reciprocal;\textsuperscript{81} (2) the inter vivos trust created by Mr. Farley in 1976 was valid;\textsuperscript{82} and (3) Mr. Farley's estate did not include property transferred to the inter vivos trust thereby depriving Mrs. Farley of those assets she would have received under the will executed in 1973.\textsuperscript{83}

On appeal, the supreme court found that the 1973 wills were reciprocal wills and not mutual wills. Reciprocal wills name each testator as a beneficiary under similar testamentary plans.\textsuperscript{84} As the court noted, the Farley's 1973 wills met these criteria since the wills were identical and each named the other spouse as the sole beneficiary.\textsuperscript{85} Mutual wills are those executed pursuant to an agreement or contract between the parties to dispose of their property in a particular manner, each in consideration of the other.\textsuperscript{86} As earlier cases decided by the court have held, the

\textsuperscript{74} Id. at 47.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. The circuit court found no merit to the plaintiff's contention that Mr. Farley was incompetent at the time the inter vivos trust and will were executed.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 47-48.
\textsuperscript{84} Id. at 48 (citing 79 Am. Jur. 2d Wills § 754 (1975)).
\textsuperscript{85} Davis, 309 S.E.2d at 48.
\textsuperscript{86} Id.
The mere existence of reciprocal provisions is insufficient alone to establish a contractual relationship to execute mutual wills. While they may be evidence of a contractual agreement, additional circumstances must be shown which give rise to a clear implication that the wills were made by a common understanding. The court refused to disturb the finding of the circuit court that no agreement or common understanding existed between Mr. and Mrs. Farley to execute mutual wills.

The court then reached the question of the validity of the inter vivos trust which impaired the right of Mrs. Farley to share in Mr. Farley's estate. The plaintiff claimed that the trust established by Mr. Farley was illusory or testamentary in character, based upon the reservation of a right to amend or revoke the trust during Mr. Farley's lifetime. In analyzing this issue, one of two approaches is generally followed. A determination may be made as to the bona fide or illusory nature of the property transfer. In the alternative, the presence or absence of fraud upon the rights of the spouse because of the transfer may be examined. It has been the established rule in West Virginia, as well as a host of other jurisdictions, that a settlor's retention of power to revoke or modify a trust is insufficient, standing alone, to render a trust illusory or testamentary.

In Davis, the plaintiff also argued that the inter vivos trust was established with the intent to deprive Mrs. Farley of her statutory share of her husband's estate, thereby making it a fraudulent conveyance. As support for this claim, the plaintiff relied upon the recent decision of Wallace v. Wallace, where the court found that a husband's conveyance of stock in contemplation of a divorce was fraudulent because it diminished the husband's estate. The Davis court, however, rejected this application and confined Wallace's holding that "intent to deprive is per se fraud" to its particular facts. The court noted that other jurisdictions which have considered the validity of an inter vivos trust, attacked as a fraud upon the rights of a spouse, have generally recognized that proof of intent to deprive is not by itself sufficient to establish "fraudulent intent." The majority of courts addressing

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87 Id. See In re Werkman's Will, 122 W. Va. 58, 13 S.E.2d 73 (1940).
90 Davis, 309 S.E.2d at 48.
91 Id. at 48-49.
92 Id. at 49.
93 Id. at 49-50. The West Virginia Supreme Court of Appeals recognized this rule in Spangler v. Vermillion, 80 W. Va. 75, 92 S.E. 449 (1917).
94 Davis, 309 S.E.2d at 50. See, e.g., Richards v. Worthen Bank & Trust Co., 261 Ark. 890, 552 S.W.2d 228 (1977); Johnson v. LaGrange State Bank, 73 Ill. 2d 342, 383 N.E.2d 185 (1978).
95 Davis, 309 S.E.2d at 49-50.
96 Id. at 50.
98 Davis, 309 S.E.2d at 50 (quoting Wallace, 291 S.E.2d at 388).
99 Davis, 309 S.E.2d at 50.
100 Id. (quoting Annot., 39 A.L.R.3d 14, 19 (1971)) (emphasis added).
the question have decided the issue on a case by case basis in regard to the facts and evidence presented. The West Virginia Supreme Court accordingly ruled that a "flexible standard which takes into account all the circumstances and weighs the equities on each side" should be the appropriate method to test the validity of an inter vivos trust attacked by the settlor's spouse as a fraud upon his or her marital rights.

The court in this case found that the facts did not support the conclusion that the inter vivos trust established by Mr. Farley was illusory or testamentary. The intent of the settlor was not found to be contrary to any positive rule of law and was given great weight. The court decided that the trust was valid since it was not established to deprive Mrs. Farley of her statutory share in her husband's estate but to provide for both Mr. and Mrs. Farley in the event of incapacity.

In another decision dealing with the issue of intent, the West Virginia Supreme Court of Appeals ruled in Mrocko v. Wright that the resulting effect of a residuary clause in a will should be subject to the context and intent within which it is written. Virginia Z. McMurdo willed all of her property to her husband and two sisters, Jean Lea Wright and Mavadelle Tomich. The proviso in the holographic will that gave rise to the present case read, "This is providing that all named are living at my death." At the time of Mrs. McMurdo's death, both her husband and one sister, Mavadelle Tomich, had already died. The plaintiffs, who were the heirs of the deceased sister, brought suit in Upshur County Circuit Court requesting that the court construe the will. The circuit court ruled that the remaining sister, the defendant, was the sole beneficiary under the will. The plaintiffs first relied on West Virginia Code section 41-3-3 in claiming they were beneficiaries under Mrs. McMurdo's will.

W. VA. CODE § 41-3-3 (1982) provides in its entirety:

If a devisee or legatee die before the testator, or be dead at the time of making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will. And if the devise or bequest be made to two or more persons jointly, and one or more of them die without issue, or be dead at the time of the making of the will, the part of the estate so devised or bequeathed to him or them shall not go to the other joint devisees or legatees, but shall, in the case of a devise, descend and pass to the heirs at law, and, in the case of a bequest, go and pass to the personal representative, of the testator, as if he had died intestate, unless the will otherwise provides. (emphasis added)
This section provides that if a devise or bequest is made to two or more persons jointly, and one of them dies without issue, the part of the estate devised or bequeathed to that individual shall pass to his or her personal representative.\(^{111}\) The circuit court flatly rejected this argument saying that the provision, "This is providing that all named are living at my death," applied as a condition precedent to all named beneficiaries in the will, and that a beneficiary must be alive before he or she would be entitled to an inheritance.\(^{112}\) The circuit court applied the provisions of West Virginia Code section 41-3-4\(^{113}\) which provides that if a bequest in a residuary clause fails, the bequest does not pass to the personal representative of the beneficiary whose bequest has failed, but instead goes to the other residuary legatee or legatees.\(^{114}\)

On appeal, the supreme court affirmed the circuit court's determination that the controlling factor in construing Mrs. McMurdo's will was her intent to benefit close relatives.\(^{115}\) It is well settled in West Virginia that the intent of a testator is the controlling factor in construing a will.\(^{116}\) Consequently, the bequest to Mavadelle Tomich failed entirely because she was not alive at Mrs. McMurdo's death. In effect, section 41-3-3 includes an exception to the ordinary application of the statute: "unless a different disposition thereof be made or required in the will."\(^{117}\) Consequently, the heirs of Mavadelle Tomich would have taken under the McMurdo will had there not been a different disposition made, that is: "all named are living at my death."\(^{118}\) Under the provision of section 41-3-4, the failure of a residuary devise or bequest requires that the devise or bequest not pass as in the case of intestacy but must pass to the remaining residuary devisees or legatees in proportion to their respective interests in the residue. As a result, the supreme court affirmed the circuit court's ruling that the entire estate under the residuary clause passed to the living sister, Jean Lea Wright.\(^{119}\)

\(^{110}\) *Mrocko*, 309 S.E.2d at 117.
\(^{111}\) *Id.* at 115.
\(^{112}\) *Id.* at 117.
\(^{113}\) *W. Va. Code* § 41-3-4 (1982) provides in its entirety:

Unless a contrary intention shall appear by the will, such real or personal estate, or interest therein, as shall be comprised in any devise or bequest in such will, which devise or bequest shall fail or be void, or be otherwise incapable of taking effect, shall, if the estate be real estate, be included in the residuary devise, or, if the estate be personal estate, in the residuary bequest, if any residuary devise or bequest be contained in such will, and, in the absence of such residuary devise or bequest, shall pass as in case of intestacy. However, when a devise or bequest shall be included in a residuary clause of the will, which devise or bequest shall fail or be void or be otherwise incapable of taking effect, it shall not pass as in case of intestacy but shall pass to the remaining residuary devisees or legatees or devisee or legatee, if any there be, in proportion to their respective shares or interests in the residue.

\(^{114}\) *Mrocko*, 309 S.E.2d at 117-18.
\(^{115}\) *Id.* at 118.
\(^{116}\) *Id.* (citing Farmers and Merchants Bank of Keyser v. Farmers and Merchants Bank of Keyser, 216 S.E.2d 769 (W. Va. 1975)).
\(^{117}\) *W. Va. Code* § 41-3-3 (1982).
\(^{118}\) *Mrocko*, 309 S.E.2d at 118.
\(^{119}\) *Id.*
VII. UNLAWFUL DETAINER AND SUMMARY EVICTION


Strickland v. Daniels\textsuperscript{120} required the court to reconcile two statutory provisions, West Virginia Code sections 50-4-8 (1978)\textsuperscript{121} and 50-2-1 (1983),\textsuperscript{122} in its holding that regardless of the amount in controversy, magistrate courts have initial jurisdiction over unlawful detainer cases. However, if the case "involves"\textsuperscript{123} more than three hundred dollars, removal to circuit court becomes a matter of right.\textsuperscript{124} In a related area, the court also articulated the proper test for deciding whether a claim by a defendant against a plaintiff logically arises from the same transaction thereby making it a compulsory counterclaim.\textsuperscript{125}

The petitioner, Emma Strickland, resided in Pine Valley Apartments which was managed by the respondent, Patsy Hargis. Mrs. Strickland entered into a one year lease which could be renewed monthly for indefinite periods. The two hundred dollars per month rent was paid entirely by the United States Department of Housing and Urban Development (HUD) because of the petitioner's low income. However, rent could be increased if her income changed or if the number of her dependents was reduced, although an absolute ceiling of three hundred sixty dollars was set as the "market retail" price.\textsuperscript{126}

The respondent, Hargis, brought an eviction action in magistrate court alleging that Mrs. Strickland's guests had on one occasion disturbed other tenants in violation of the lease.\textsuperscript{127} Mrs. Strickland, in turn, filed a counterclaim requesting damages of two thousand dollars for invasion of privacy and intentional infliction of emotional distress. She then sought to remove both the eviction action and the tort action to the Wyoming County Circuit Court. The magistrate removed defendant's

\textsuperscript{120} West Virginia ex rel. Strickland v. Daniels, 318 S.E.2d 627 (W. Va. 1984).
\textsuperscript{121} W. Va. Code § 50-4-8 (1980) provides in its entirety:
At any time before trial in a civil action involving less than three hundred dollars the action may be removed to circuit court upon the concurrence of all parties and upon the payment of the circuit court filing fee. At any time before trial in a civil action involving three hundred dollars or more, any party may, upon payment of the circuit court filing fee, cause such action to be removed to the circuit court. All appropriate documents shall then be forwarded along with such fee to the clerk of the circuit court. The matter shall then be heard by the circuit court.
Magistrate court shall have jurisdiction of matters involving unlawful entry or detainer of real estate so long as the title to such real estate is not in dispute.
\textsuperscript{123} W. Va. Code § 50-4-8 (1980).
\textsuperscript{124} Strickland, 318 S.E.2d at 632.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 630.
\textsuperscript{127} Id.
tort action but refused to remove the eviction action. The petitioner then sought prohibition of the enforcement of that ruling from the supreme court.\textsuperscript{128}

On appeal, two independent grounds for removal of the eviction action to circuit court were asserted. First, it was argued that because possession of the apartment had a value to Mrs. Strickland of more than three hundred dollars, she met the amount in controversy requirement, entitling her to remove the action to circuit court as a matter of right under West Virginia Code section 50-4-8.\textsuperscript{129} Her second contention was that the tort claim should have been treated as a compulsory counterclaim arising from the same transaction. Because the \textit{ad damnum} clause in the tort action asked for two thousand dollars in damages, the amount in controversy requirement would be satisfied.\textsuperscript{130}

As a preliminary matter, the court ruled that a writ of prohibition sought by the petitioner was the appropriate remedy since she would not be adequately protected by the right of appeal. She could be evicted before an appeal was fully heard. Also, the court noted that considerations of judicial economy dictated that the two issues be decided together.\textsuperscript{131} Next, the court discussed the seemingly conflicting nature of sections 50-4-8 and 50-2-1 of the West Virginia Code. Under section 50-4-8, a party can remove an action to circuit court if the case involves three hundred dollars or more. Section 50-2-1 grants magistrates jurisdiction over all actions for unlawful entry and detainer. Mrs. Strickland argued that the value of the rental itself exceeded the three hundred dollars limit, and the amount in controversy should not necessarily be governed by an \textit{ad damnum} request.\textsuperscript{132} The supreme court agreed and held, in accordance with the rulings of many recent federal cases,\textsuperscript{133} that in determining the amount of money involved in a particular lawsuit, "courts should look to the concrete monetary value of the matters at stake and include in their calculations the present value of future benefits."\textsuperscript{134}

The court then sought to reconcile this finding with section 50-2-1 of the West Virginia Code\textsuperscript{135} which gives magistrate courts jurisdiction of unlawful entry and detainer actions. Since the legislature had made no exception to the general removal statute when it enacted the summary eviction law, the court held that magistrates have initial jurisdiction over unlawful detainer cases regardless of the amount in

\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 630-31.
\textsuperscript{132} Id. at 631.
\textsuperscript{133} Id. (citing Kimble v. Goldmark, 495 F.2d 356 (1st Cir.), \textit{cert. denied}, 419 U.S. 879 (1974) (involving the present value of a right to future welfare benefits); Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (involving the right to rent subsidies in publicly financed housing).
\textsuperscript{134} Strickland, 318 S.E.2d at 631.
controversy; however, removal to circuit court is a matter of right if the case involves more than three hundred dollars.136

In addressing the petitioner's second argument that her suit for invasion of privacy and emotional distress should be considered as a compulsory counterclaim, the court first examined the criteria for determining the existence of such a claim. Federal courts have followed one of four tests to decide whether cases arise from the same transaction:

1) Whether the issues of fact and law raised by the claim and counterclaim are basically similar;
2) Whether res judicata bars a subsequent suit by the defendant;
3) Whether the evidence to support or refute the two claims is the same;
4) Whether there is a logical relationship between the claim and counterclaim.137

Noting that the first three tests were more stringent than the final test, the court determined that the claim and counterclaim met the requirement of the fourth test in that the claims manifested a logical relationship to one another since they arose out of the same transaction and occurrence.138 Therefore, the defendant's tort claim was ruled to be a compulsory counterclaim, and because the damages sought exceeded the statutory requirement, removal of the entire action to circuit court was permitted.139

Criss v. Salvation Army Residences140 presented the court with the opportunity of further defining the rights of parties in summary eviction proceedings. The court held that either party in an action brought under West Virginia Code sections 55-3A-1 to-3141 may demand a jury trial.142

The defendants lived in a federally subsidized low-income housing project owned by Salvation Army Residences, Inc. The lease was for a period of one year. The plaintiff, as resident manager of the housing project, filed a petition against the defendants pursuant to West Virginia Code sections 55-3A-1 to-3143 for summary relief for wrongful occupation of residential rental property.144 The plaintiff alleged that

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136 Strickland, 318 S.E.2d at 632. W. Va. Code § 55-3A-1(b) (Supp. 1984) provides that once a petition for relief from wrongful occupation is filed with the court, the court must set a hearing date which shall not be less than five nor more than ten judicial days after the request for a hearing is made.
137 Strickland, 318 S.E.2d at 633.
138 Id. at 633-34.
139 Id. at 634.
142 Criss, 319 S.E.2d at 407.
144 Criss, 319 S.E.2d at 405.
the defendants had violated the provisions of the lease in three instances by: (1) not allowing an inspection of their apartment; (2) interfering with the housing project’s management; (3) creating a disturbance in the parking lot of the apartments.145

In response to the petition, the defendants filed a notice of removal seeking to remove the case to circuit court. In addition, the defendants filed notice of bona fide defenses including retaliatory eviction146 and violation of termination procedures required by federal law.147 The defendants also filed a counterclaim for damages suffered because of the landlord’s retaliatory conduct, demanded a jury trial, made a motion for continuance and a request to obtain discovery.148

The circuit court of Marion County concluded that sections 55-31-1 to -3 do not contemplate jury trials, counterclaims, or discovery. When the case was set for trial, the Crisses sought a writ of prohibition in the supreme court to prohibit the lower court proceedings. The Crisses also moved in circuit court for a continuance, which motion was denied. The circuit court then heard the case but did not announce any rulings at the trial’s conclusion. The supreme court then granted the writ.149

The questions before the West Virginia Supreme Court of Appeals were:

1) Whether West Virginia Code sections 55-3A-1 to -3 entitled the defendants to a jury trial in a summary eviction proceeding;

2) Whether they were entitled to file a counterclaim and obtain discovery;

3) Whether sections 55-3A-1 to -3 deprived the defendants of their rights to due process;

4) Whether the same proceedings denied defendants a right to raise the defense of retaliatory eviction.150

The issue of the right to a jury trial was decided by referring to the United States Supreme Court case of Pernell v. Southall Realty151 and West Virginia Constitution article III, section 13.152 In Pernell, the United States Supreme Court specifically held

145 Id.
146 Retaliatory eviction is defined as the "[a]ct of [a] landlord in commencing eviction proceedings against tenant because of tenant’s complaints, participation in a tenant’s union, or like activities with which the landlord is not in agreement." 319 S.E.2d at 405 n.3 (quoting BLACK'S LAW DICTIONARY 1183 (5th ed. 1979)).
147 Criss, 319 S.E.2d at 405.
148 Id. at 405-06.
149 Id. at 406.
150 Id.
152 W. VA. CONST. art. III, § 13 provides:
In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interests and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.
that summary eviction statutes must accord either party the right to trial by jury.\textsuperscript{153} That decision was based upon the seventh amendment which preserves the right to trial by jury in common law suits where the value of the controversy exceeds twenty dollars. The United States Supreme Court concluded that a summary eviction proceeding was similar to common law ejecting which was protected by courts at common law. Therefore it accorded either party a right to a trial by jury.\textsuperscript{154}

As the West Virginia Supreme Court of Appeals noted, the West Virginia Constitution also provides for a trial by jury in much the same manner as the seventh amendment.\textsuperscript{155} The court, however, did not view the guarantee as unlimited. For example, where the failure to pay rent is the ground for removal, and the tenant does not assert substantial defenses, no genuine issues of material fact remain and the court may grant summary judgment, thereby appropriately denying a jury trial.\textsuperscript{156} However, if a defendant does assert defenses under West Virginia Code section 55-3A-2\textsuperscript{157} a jury trial must be afforded. As a result, based on the defendant's asserted defenses of retaliatory eviction and unlawful termination, genuine issues of fact existed in \textit{Criss} that entitled the defendants to a jury trial.

In addressing the second issue, the court held that the defendant's rights to obtain discovery and file a counterclaim are directly dependent upon whether the Rules of Civil Procedure apply to sections 55-3A-1 to -3 of the West Virginia Code.\textsuperscript{158} Finding there was no legislative intent to the contrary and that rule 81 of the West Virginia Rules of Civil Procedure does not limit the applicability of the rules in unlawful detainer actions, the court held the rules do apply to summary eviction proceedings.\textsuperscript{159} The defendant was entitled to file a counterclaim and obtain discovery as long as the requirements of the applicable rules were met.

Next, the court addressed the petitioner's argument that the time periods prescribed by the summary eviction statute are unreasonably short and, therefore, deprive them of due process.\textsuperscript{160} The court rejected this argument by separating the cases involving summary eviction proceedings into two areas. In instances where the non-payment of rent is the only issue, the time allowed for trial preparation is not unduly short.\textsuperscript{161} However, in other cases where there are genuine issues of material fact, West Virginia Code section 55-3A-3(d)\textsuperscript{162} specifically provides for a continuance. If a party can show that he or she needs more time for trial preparation, and rent payments are provided in the interim, a continuance may be granted by the court.\textsuperscript{163}

\textsuperscript{153} \textit{Pernell}, 416 U.S. 363.
\textsuperscript{154} \textit{Criss}, 319 S.E.2d at 406-07.
\textsuperscript{155} \textit{Id.} at 406. W. VA. CONST. art. III, § 13.
\textsuperscript{156} \textit{Criss}, 319 S.E.2d at 407.
\textsuperscript{157} W. VA. CODE § 55-3A-2 (Supp. 1984).
\textsuperscript{158} \textit{Criss}, 319 S.E.2d at 408.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} W. VA. CODE § 55-3A-3(d) (Supp. 1984).
\textsuperscript{163} \textit{Criss}, 319 S.E.2d at 409.
Finally, the court succinctly rejected the defendant's claim that sections 55-3A-1 to -3 deny them an adequate remedy for the defense of retaliatory eviction. Section 55-3A-3(g) specifically provides for the defense of retaliation. The petitioners were clearly not barred from claiming a defense of retaliatory eviction by West Virginia statutory provisions. Since trial in the case was held after the petition was filed, the writ prohibited the trial court from entering any orders inconsistent with the supreme court's guidelines.

Lura L. Burton

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164 Id.
166 Criss, 319 S.E.2d at 409.