January 1984

Property

Michael Lee Keller
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr
Part of the Legislation Commons, and the Property Law and Real Estate Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol86/iss2/24

This Survey of Developments in West Virginia Law: 1983 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.
PROPERTY

I. LATENT DEFECTS AND IMPLIED HABITABILITY


A new measure of consumer protection against vendors of defective housing has been provided as the court continues to chip away at the concept of caveat emptor in real estate transactions. In Thacker v. Tyree the court ruled for the first time that a seller's willful failure to reveal a hidden defect that could substantially affect the value or habitability of a home can create a cause of action for fraud. In another ground-breaking decision, the court held in Gamble v. Main that a builder-vendor of a new home gives his purchaser an implied warranty that the building is reasonably fit for habitation. Although the doctrines developed in these cases have precedential support in other jurisdictions, they represent a substantial new direction in West Virginia property law.

In Thacker, the appellants purchased a home from the appellees which developed substantial problems with the foundation. The Thackers learned that the damage was caused by a subsurface water problem that the Tyrees had known about but failed to disclose during the purchase period.

An action for fraudulent concealment was brought charging that the Tyrees had failed to reveal a known latent defect. The Tyrees sought summary judgment, asserting that no questions had been asked about the house's quality and no express misrepresentations had been made. The Cabell County Circuit Court granted summary judgment, holding that fraudulent concealment of a defect in a house did not give rise to a cause of action in West Virginia.

In reversing the lower ruling, the supreme court carefully placed its decision in the context of its continuing strong hostility toward the doctrine of caveat emptor in property law. The court noted its recent decision in Lengyel v. Lint as a reaffirmation of the notion that a vendor of real property may not erect caveat emptor as a barrier against a charge of fraud.

---

1 297 S.E.2d 885 (W. Va. 1982).
2 300 S.E.2d 110 (W. Va. 1983).
3 297 S.E.2d at 886.
4 Id.
6 280 S.E.2d 66 (W. Va. 1981). The court considered a claim of fraudulent misrepresentation in relation to the size of the lot and the quality of the house sold by the vendor. The court noted that "It has long been the law in West Virginia that a vendor of real property may be liable to the vendee in an action for fraud." Id. at 69.
The issue of first impression in *Thacker* was whether "nondisclosure of a material latent defect not known or discoverable by the exercise of diligence on the part of the purchaser constitutes fraud." A survey of prior West Virginia cases led to the conclusion that concealment of the truth could provide a basis for a fraud action even though it had not hitherto been applied to the sale of real property. The court also found a substantial number of decisions from other jurisdictions that recognized fraudulent concealment as a cause of action in property disputes.

The *Thacker* court based its expansion of the fraudulent concealment doctrine into the area of real property on the support of decisions from other jurisdictions. It held that a cause of action can arise when a vendor of a house knows of but fails to reveal a defect. The defect must substantially affect the value or habitability of the property. It must also be unknown to the purchaser and of such a nature that it would not be disclosed by a reasonably diligent inspection.

The *Thacker* decision, as do many pioneer rulings, may raise as many questions as it answers. Clearly a seller of housing in West Virginia can no longer rely on the careful avoidance of express misrepresentation or the failure of a prospective buyer to ask questions as an absolute protection against subsequent legal action. Beyond that point linger a number of issues that await litigation. How extensive must a defect be in order to "substantially affect" the value or habitability of a home? How much time will a buyer be allowed to discover such a defect? What is the appropriate remedy for fraudulent concealment?

The answers are more difficult to provide than the questions. Our court has shown a willingness to rely on judicial theories developed in other states. It has also demonstrated a disconcerting tendency to pick and choose elements of a doctrine that it finds congenial while ignoring others. Predictions, therefore, become hazardous.

The foreign cases on which the court relied in *Thacker* generally involved prominent defects readily discoverable soon after the sale. Courts applying the concept of latent defect have tended to respond by granting rescission of the sales contract although damages have been allowed on some occasions. Whether we will follow this pattern must wait until a fuller application of the latent defect doctrine has been judicially explored.

---

9 297 S.E.2d at 887.
8 Frazer v. Brewer, 52 W. Va. 306, 43 S.E. 110 (1902) ("Fraud is the concealment of truth just as much as it is the utterance of a falsehood." *Id.* at 310, 43 S.E. at 111).
10 297 S.E.2d at 888.
The protection offered to a purchaser by the decision in Thacker was predicated upon a wrongful act by the vendor. In Gamble v. Main\(^\text{14}\) the court expanded a purchaser's rights still further by recognizing that a right of action could exist grounded in an implied warranty of habitability in new home sales.

The appellants had been considering purchasing a certain lot for the purpose of building a home. They consulted Main, a builder, on the suitability of the land. After a brief examination, Main pronounced the lot acceptable. The Gambles purchased the land and employed Main to build their home and an accompanying septic system. Approximately a year after taking possession the Gambles discovered that the lot was slipping and causing extensive damage to the septic system.\(^\text{15}\)

After Main declined to repair the septic system, suit was brought alleging that Main had impliedly guaranteed the suitability of the building site.\(^\text{16}\) In his answer, Main argued that West Virginia did not recognize implied warranties in the sale and construction of homes. He also asserted that even if such a warranty did exist, it did not extend to latent soil conditions which the builder could not reasonably discover.\(^\text{17}\)

The trial court declined to instruct the jury on the issue of implied warranties on the grounds that it was not applicable. The jury then reached a verdict in favor of Main.\(^\text{18}\)

The manner in which the West Virginia Supreme Court of Appeals approached the issues in Gamble reflected a clear determination to create a new remedy for aggrieved home buyers even though the final ruling affirmed the lower decision. The supreme court found that the majority of existing cases did not hold a builder responsible for soil conditions that were unknown and not reasonably discoverable.\(^\text{19}\)

The issues in Gamble could have been resolved without addressing the broader question of implied warranties. The fact that the court chose to go beyond a limited holding and to rule expansively on the issue of implied warranty unmistakenly demonstrates a commitment to harmonize West Virginia property law with the more liberal developments in other areas.

The court recognized that the doctrine of implied warranty was a

\(^{13}\) See Ware v. Scott, 220 Va. 317, 257 S.E.2d 855 (1979).
\(^{14}\) 300 S.E.2d 110 (W. Va. 1983).
\(^{15}\) Id. at 111.
\(^{16}\) Id.
\(^{17}\) Id. at 112.
\(^{18}\) Id. at 111.
judicially created protection that had been steadily gaining support in other jurisdictions. In analyzing the reasons why the doctrine has found judicial favor the court cited with approval the New Jersey case of *McDonald v. Mianecki*.

The *Mianecki* court found a justification for implied warranties in the buyer's need to rely on the vendor. In its opinion, the seller's superior knowledge and bargaining position coupled with his unique ability to prevent harm argued for an equitable counterweight on behalf of the buyer.

Clearly the West Virginia Supreme Court of Appeals found the logic of the *Mianecki* court convincing. It has not, however, accepted all of the points involved in the decision. For example, the homeowner who builds his own house and sells it on a nonrecurring basis is specifically exempted. The court gives no authority for this exception. It seems to be simply a matter of judicial preference.

Just as *Thacker* raised questions, so also does the holding in *Gamble*. The court by its own admission has not considered all the ramifications of its ruling. Even if *Mianecki* sets a pattern that West Virginia may follow, it leaves unanswered such concerns as:

1. Will third party actions be permitted, or is privity required to maintain an action?
2. Are implied warranties contained only in new houses or can they be extended to used homes?
3. Is it possible to disclaim such warranties?
4. What is the proper measure of damages for violation of an implied warranty?

The decisions in *Thacker* and *Gamble* may signal a new era in the field of West Virginia housing. The full extent of the changes inherent in these rulings is difficult to estimate at this early moment, but it is apparent that the court has expressed a strong antipathy toward the use of *caveat emptor* to deny protection for the housing consumer.

### II. Adjoining Landowner's Right to Lateral Support


The court in *Noone v. Price* addressed the responsibility of landowners to provide lateral support to adjoining property owners. The opinion of the
court was ostensibly based upon long existing common law and the earlier West Virginia decisions in the field. The conclusion reached, however, represents a substantial revision in the West Virginia view of lateral support.

The appellants had purchased a home on a hill above the property owned by the appellee, Ms. Price. The appellee's predecessors in title had erected a retaining wall between the two tracts. The Noones' property began to slip causing damage to their house. The Noones asserted the slippage was due to Price's failure to maintain the wall and brought an action for damages to their house.\(^{29}\)

The Fayette County Circuit Court granted partial summary judgment on behalf of Price, holding that while there was a duty to support adjoining land, the duty did not extend to structures on the land. The Noones were entitled to recover damages to their land if they could prove a loss of lateral support but they had no claim to damages for their house.\(^{27}\)

Justice Neely, writing for the court, reviewed the existing law on lateral support and found that removal of support could invoke either strict liability or liability for negligence, depending on the circumstances.\(^{28}\) The general rule, as stated in *McCabe v. City of Parkersburg*,\(^{29}\) is that a landowner is entitled, *ex jure naturae*, to lateral support for his soil in the adjacent land. The right of support is "a property right and absolute."\(^{30}\) The removal of this support by the adjoining landowner subjects him to strict liability for the damage to his neighbor's land.\(^{31}\)

The application of strict liability, however, has traditionally been limited to land in its natural state. The adjoining landowner has no obligation to support the added weight of buildings or other structures.\(^{32}\)

The liability for support of structures on the land involves the question of negligence. If the structures are actually being supported, the neighbor who withdraws this support must do it in a reasonable manner.\(^{33}\)

Since the retaining wall in question had preceded the construction of the house on appellant's property, the court noted that the wall need only be sufficient to support the land in its natural state.\(^{34}\) The removal of natural support and its replacement with artificial support created an incident on the

\(^{26}\) Id. at 220.
\(^{27}\) Id. at 221-22.
\(^{28}\) Id. at 221.
\(^{29}\) 138 W. Va. 830, 79 S.E.2d 87 (1953).
\(^{30}\) Walker v. Strosnider, 67 W. Va. 39, 67 S.E. 1087 (1910) (syllabus point one by the court).
\(^{31}\) 298 S.E.2d at 221.
\(^{32}\) Id.
\(^{33}\) Id. at 223.
\(^{34}\) Id.
land compelling subsequent owners to maintain that support but only to the extent of its original responsibility.35

The analysis at this juncture would seem in accordance with that of the circuit court. Justice Neely noted, however, that even though the lower tribunal had correctly identified the issue as one of strict liability, it had failed to apply the rule correctly to the question of recoverable damages.36

The application of strict liability in Noone, although characterized as a correction, actually represented a substantial departure from existing West Virginia doctrine. Justice Neely implicitly recognized this departure when he noted that his view had never been expressly stated by a West Virginia court.37 The court in Noone held that while strict liability for lateral support did relate only to land in its natural condition, if the removal of support would have caused the land in question to subside without the added weight of existing structures, then the responsibility for damages extended to both the land and the structures on it.38

Under the doctrine developed in Noone the simplistic rule that damages to structures caused by a loss of lateral support can never be recovered without proof of negligence has been replaced by a consideration of the causes of land subsidence. An adjoining landowner may no longer assume that withdrawal of lateral support conveys no responsibility for structures. Strict liability for all damages is now applicable if the land in its natural state is capable of supporting the structure, and if the weight of the structure is not a factor in subsidence.

The rule in Noone can be interpreted as a reasonable modernization of West Virginia property law. It brings our interpretation of the right to lateral support into line with what the court regards as the majority view in the nation39 as well as with the view expressed by the Restatement (Second) of Torts.40

III. JOINT TENANCY


The rules governing land tenure and transfer were once the sole province of the common law. In West Virginia, as elsewhere, the common law has been

---

35 Id. at 222.
36 Id. at 220-21.
37 Id. at 221.
38 Id.
39 Id.
40 RESTATEMENT (SECOND) OF TORTS § 817 comment N (1979):

[The actor . . . is subject to this liability for harm to artificial additions on the supported land that may be caused by his withdrawal of the naturally necessary support.]
altered and in some areas supplanted by statute. The case of Herring v. Carroll\textsuperscript{4} provided the court with an opportunity to clarify the extent to which the common law rules on joint tenancy have survived the intervention of statutory law.

At common law joint tenancy was the preferred estate. Each tenant held an undivided share in the whole with the right of survivorship. Joint tenancy arose not by specific words in a document but through the creation of what was known as the four unities: (1) Time. Each party's undivided interest must vest at the same time; (2) Estate. Each party must receive an undivided interest in the whole estate; (3) Interest. Each party's interest must be co-equal as to estate and duration; (4) Title. Each party must receive his interest in the same document.\textsuperscript{42}

Joint tenancy which often left descendants of the original joint tenants without an interest in the land has gradually lost favor to the estate known as tenancy in common. The tenancy in common allowed each tenant an undivided share in the whole and could be created without the requirements of the four unities but did not include a right of survivorship.\textsuperscript{45}

The West Virginia position on tenancy was established in West Virginia Code section 36-1-19\textsuperscript{44} and section 36-1-20. The two statutes have been interpreted as requiring a conveyance to two or more persons to be regarded as tenancy in common unless joint tenancy is clearly intended by the document.\textsuperscript{46}

This relatively straight-forward reversal of the common law presumption has been greatly complicated by subsequent statutes and judicial decisions. The 1981 amendment to section 36-1-20\textsuperscript{47} stated that the use of the disjunctive "or" in a conveyance to multiple owners created joint tenancy with sur-

\textsuperscript{4} 300 S.E.2d 629 (W. Va. 1983).
\textsuperscript{42} Id. at 631.
\textsuperscript{44} Brown, Some Aspects of Joint Ownership in Real Property in West Virginia, 63 W. Va. L. Rev. 207, 209 (1961).
The preceding section [§ 36-1-19] shall not apply to any estate ... when it manifestly appears from the tenor of the instrument that it was intended that the part of one dying should then belong to the others.
\textsuperscript{46} E.g., DeLong v. Farmers Bldg. and Loan Ass'n, 148 W. Va. 625, 137 S.E.2d 11 (1964).
vivorship unless the language of the conveyance expressly declared otherwise. The earlier reversal achieved by sections 36-1-19 and 36-1-20 was at least partially undone.

A further complication was added by West Virginia Code section 48-3-7a, which permitted a husband or wife to convey to his or her partner an undivided interest in a whole estate with the right of survivorship. This creation of joint tenancy was not possible at common law because such a conveyance without an intervening straw party attempted to create joint tenancy without the required unities.

This confusing interplay of statutory revisions culminated in the broad statement of the West Virginia Supreme Court of Appeals in State ex rel. Miller v. Sencindiver. "[B]y the Legislature's modification of the common law concerning joint tenancies, tenancies by the entirety, and cotenancies... the Legislature has in effect preempted the matter." The appellants in Herring relied heavily upon that statement of judicial frustration in Sencindiver.

Mr. and Mrs. George Herring had owned land conveyed to them as joint tenants. Mrs. Herring subsequently conveyed her interest away to a son by a prior marriage. At common law such a conveyance was permitted, but it had the effect of transforming the joint tenancy into a tenancy in common through the rupture of the four unities. The tenants controlling the land no longer had a right of survivorship in the whole.

Mr. Herring and, after his death, his son and daughter sought to have Mrs. Herring's conveyance nullified. Their theory was that if the legislature had truly preempted the field as suggested in Sencindiver then the four unities and their common law applications were no longer a force in West Virginia. In the absence of the four unities, the language of the original conveyance which granted a right of survivorship controlled the relationship.

The court rejected appellant's theory and distinguished the Sencindiver holding in such a manner as to largely repudiate its expansive statement on legislative presumption. The decision in Sencindiver was narrowly characterized as only an interpretation of West Virginia Code section 42-4-2.

---

50 300 S.E.2d at 631.
51 275 S.E.2d 10 (W. Va. 1980).
52 Id. at 14.
53 300 S.E.2d at 631.
54 Id. at 632.
55 Id. at 633.
56 Id.
57 W. Va. Code § 42-4-2 (1982). The statute aims at preventing a person "who has been convicted of feloniously killing another" from obtaining "any money or property... from the one
rather than a general statement on the viability of common law elements such as the four unities.\textsuperscript{57}

The court also reasoned that the adoption of West Virginia Code section 48-3-7\texttextsuperscript{a} implied the continued application of the unities since the type of conveyance legalized by that statute was an exception to the common law on joint tenancy. A specific exception would not be required if the general rule was no longer effective.\textsuperscript{59}

The court acknowledged that it had never determined if a West Virginia joint tenancy could be unilaterally destroyed by one party conveying away his interest.\textsuperscript{60} Since it had already determined that the common law on joint tenancy still had force in West Virginia, the court applied the standard common law interpretation and held that the right of a joint tenant to end survivorship was an element in joint tenancy properly utilized in \textit{Herring}.\textsuperscript{61}

Although the common law on joint tenancy has undergone legislative tinkering, certain underlying principles remain. The right of survivorship in the whole is ultimately subject to the whims of the tenants. The removal of any of the four unities, except in cases of statutorily created exception, converts joint tenancy into tenancy in common despite the contrary wishes of the remaining tenants or the express language in a conveyance.

IV. RESTRICTIVE COVENANTS IN DEEDS


The decision in \textit{Allred v. City of Huntington}\textsuperscript{62} strongly reaffirmed the validity of reasonable restrictive covenants when utilized in deeds as a means of private zoning. It also recognized the continued importance of proper and thorough title searches in determining when such covenants are in existence.

The appellant originated the action seeking an injunction when her subdivision neighbor began construction of a garage beyond a set-back line restriction present in both chains of title. At trial the lower court agreed that the restriction was present and binding but nevertheless allowed the neighbor to leave in place the equivalent of a carpott. The roof and support column of the structure extended beyond the set-back line.\textsuperscript{63} The trial court

\vspace{1cm}

\textsuperscript{57} 300 S.E.2d at 631.
\textsuperscript{59} 300 S.E.2d at 634.
\textsuperscript{60} \textit{Id.} at 632.
\textsuperscript{61} \textit{Id.} at 634.
\textsuperscript{62} 304 S.E.2d 358 (W. Va. 1983).
\textsuperscript{63} \textit{Id.} at 359.
apparently believed such an addition was not a permanent structure within
the meaning of the restrictive covenant.

The use of restrictive covenants has substantial precedential support in
West Virginia. The court in Wallace v. St. Clair64 compared them to zoning
and found such covenants to be "lawful and laudable. If the restrictions are
reasonable in nature and purpose they are upheld."65

Set-back lines were specifically sustained in Kaminsky v. Barr.66 The re-
ponsibility of landowners for discovering the existence of such restrictions
was clearly established by the court in Recco v. Chesapeake & O. Ry. Co.67

Satisfied with the underlying validity of restrictive covenants, the Sup-
reme Court of Appeals considered three possible arguments against their ap-
lication in the Allred case. First, the decision in Morris v. Hease68 recognized
that restrictive covenants could lose their force if changes in a neighbor-
hood were sufficiently substantial to nullify the need for the restriction. The
court in Allred, however, found no evidence that such a change had
occurred.69

The court accepted the possibility that the meaning of the word "struc-
ture" contained in the covenant could be debated. This analysis implied the
possibility that some form of construction might extend beyond the set-back
line and yet not violate the covenant.

The court's survey of case law found no West Virginia holding that ruled
specifically on carports. A substantial number of cases from other jurisdic-
tions, however, applied a stringent standard of limitation against similar
types of construction that violated set-back restrictions.70 Accepting the ex-
amples provided, the court held that a carport was a "sufficiently
substantial" structure to be considered a violation of the covenant.71

The court also considered and firmly rejected an argument that the ap-
pellant was estopped from bringing her action since she had allegedly al-
lowed the construction to proceed when the neighbors were ignorant of the
covenant. The responsibility of a landowner to search his chain of title for the
existence of restrictions is well established.72 The constructive notice of the

65 Id. at 389, 127 S.E.2d at 751.
66 106 W. Va. 201, 145 S. E. 267 (1928).
69 304 S.E.2d at 360.
70 E.g., Gilbert v. Repertory, Inc., 302 Mass. 105, 18 N.E.2d 437 (1939) (theatre marquee); Mc-
71 304 S.E.2d at 361.
72 Id.
public record thus imposed in West Virginia may have applications that seem harsh in individual cases. Nevertheless, the duty to search the existing records for limitations on land use is so basic to West Virginia property law that a party who fails to make such a search can expect little judicial sympathy.

V. PRESCRIPTIVE EASEMENTS


An effort was made in Veach v. Day to fashion a definition of "continued" or "continuous" use as it relates to the creation of a prescriptive easement. The basic requirements of such a right of way were stated in Town of Paden City v. Felton:

To establish an easement by prescription there must be continued and uninterrupted use or enjoyment for at least ten years, identity of the thing enjoyed, and a claim of right adverse to the owner of the land, known to and acquiesced in by him, but if the use is by permission of the owner, an easement is not created by such use.

Utilizing the Paden City definition, the Grant County Circuit Court found that the appellees had gained a prescriptive right of way across land belonging to the appellants. The evidence in support of the claim showed that the appellees crossed the land approximately five times a year to hunt, and had done so for more than ten years.

The supreme court conceded that no West Virginia case had ever discussed the requirements of "continued use," but a survey of decisions from other jurisdictions strongly suggested that the lower court had applied a standard that was far too lenient. The holdings in a Massachusetts case, Uliasz v. Gillette and in a Texas case, Fanin v. Somervell County were cited to support a ruling that "occasional or sporadic" use is not sufficiently continuous to support a prescriptive easement. In the court's opinion a few hunting trips are clear examples of sporadic use.

The ruling in Veach offers little new clarification to the issue of prescriptive easements. A definition of "continued use" as that which is not "sporadic or occasional" is comparable to defining light as that which is not dark.

---

74 No. 15359, slip op. at 4 (citing Town of Paden City v. Felton, 136 W. Va. 127, 66 S.E.2d 280 (1951)).
75 No. 15359, slip op. at 2.
76 Id. at 2-3.
79 No. 15359, slip op. at 6.
Clearly a few random crossings of land such as those offered in *Veach* will not support a prescriptive easement. However, the question remains whether a use lying between the extremes of daily use and a small number of infrequent crossings could create a prescriptive right.

VI. JOINT ACCOUNTS


The case of *Waggy v. Waggy* presented the court with an opportunity to restate its earlier opinions on the property rights created by a joint bank account. It also provided an occasion for a judicial reaffirmation of the importance of public records.

Two brothers, Carson and Reed Waggy, disputed the ownership of three certificates of deposit. The certificates had been owned by their father prior to his death in 1971. Carson Waggy asserted that his father had given the certificates to him before his death. For a time he placed the certificates in both his brother's name as well as in his own, but later had Reed's name removed.

In a suit to dissolve a farming partnership between the brothers, a court-appointed commissioner had determined that the certificates were the sole property of Carson Waggy. An appeal of the ruling concentrated on two factual issues: the presence for a time of Reed's name on the certificates and the commissioner's refusal to consider new evidence of the estate assessment of the elder Waggy, which tended to prove that the certificates were part of the estate.

The court concluded that the first issue fell within the limitations of West Virginia Code section 31A-4-33 as interpreted in the case of *Dorsey v. Short*. The Code states that joint bank accounts bearing the names of two or more persons create joint tenancy in the property within the account, but the *Dorsey* court also recognized that the person donating the funds could show during his lifetime that joint tenancy was not his intention.

The evidence before the commission showed that Reed Waggy never had physical possession of the certificates and at no time were they stored with the assets of the partnership. The court concluded that the commissioner's

---

81 301 S.E.2d 843 (W. Va. 1983).
82 Id. at 844.
83 Id.
84 Id.
85 Id. at 845.
88 Id. at 872, 205 S.E.2d at 690-91.
judgment that no intention existed to create a lasting joint tenancy of the certificates was justified.\textsuperscript{40}

The commissioner’s exclusion of the estate assessment was upheld on a theory that almost resembles equitable laches. The assessment was filed in 1971, but the appellant did not seek to introduce it until 1981, well after a series of earlier actions before the commissioner.\textsuperscript{40} The court relied on the failure of such information to meet the West Virginia standard for new evidence.\textsuperscript{40} A closer reading of the decision suggests another reason for upholding the exclusion of the evidence. The court was expressing a strong sentiment in favor of the intelligent use of public record. A party who fails promptly to find support for a claim when that support is readily available in the public record may find it difficult to convince a West Virginia court to view its preferred evidence at a later time.

VII. HOLOGRAPHIC WILLS AND THE DOCTRINE OF CY PRES


The factual situation surrounding \textit{In re Estate of Teubert}\textsuperscript{42} generated enormous publicity. The deceased, a retired postal employee whom the court described in admirable understatement as “extremely frugal,” had amassed an estate of approximately three million dollars before his death in 1979.\textsuperscript{43}

Discovered among his personal papers was a document bearing the heading “Law Will, Etc. 9-1-71.” The paper was in the decedent’s handwriting, with the exception of a number of typewritten lines which read “(Revolking [sic] all writings or wills heretofore made by C.J. Teubert) All this for TRUST DEPT., First Huntington Nat’l. Bk. Huntington W. Va.”\textsuperscript{44}

The handwritten portion of the writing appeared to devise certain real property to the Jehovah’s Witnesses; call for the creation of a “James H. and Alice Teubert Foundation” to oversee the disbursement of funds to various recipients, both private and charitable; and finally, to grant the residue of the estate to aid the blind. The document was executed by the decedent.\textsuperscript{43}

The Cabell County Circuit Court overruled the county commission and admitted the writing to probate as a valid holographic will.\textsuperscript{46} Teubert’s heirs appealed on the basis of three principle objections:

\textsuperscript{40} 301 S.E.2d at 844.
\textsuperscript{41} Id. at 845.
\textsuperscript{42} Id.
\textsuperscript{43} 298 S.E.2d 456 (W. Va. 1982).
\textsuperscript{44} Id. at 458.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 459.
(1) W.Va. Code § 41-1-39 which governs holographic wills requires that they be "wholly in the handwriting of the testator." The typewritten portion therefore disqualifies the document.99

(2) The document lacks testamentary intent and is nothing more than notes for a will.99

(3) If intent is present, the objects of the proposed bequests are too vague and uncertain to be enforced.100

In its consideration of these arguments, the court clearly and expressly began its analysis with certain underlying assumptions. Foremost of these was the concept that the law favors testacy over intestacy.101 A purposeful analysis of the statutory recognition of holographic wills also suggested to the court that individuals who choose to make their own wills without legal assistance should not be held to rigid standards of formalism.102

These sympathetic presumptions in favor of testacy and valid holographic wills were reflected in the court's disposition of the appellant's claim that the typewriting disqualified the paper as not being "wholly in writing."103 Other jurisdictions with statutes governing holographic wills recognize a theory known as "surplusage." Under such a theory "nonhandwritten material in a holographic will may be stricken with the remainder of the instrument being admitted to probate if the remaining provisions make sense standing alone."104 The court found the surplusage concept to be fully compatible with its views on holographic wills and expressly adopted the concept.105

The adoption of the surplusage theory moved consideration of the typewritten words on the document out of the narrow arena of legal formalism and into a factual evaluation of their effect on the writing. The lower court had concluded that the typewritten words were not necessary to an intelligent reading of the remainder. The supreme court of appeals agreed.106

The issue of testamentary intent in the writing also raised substantial

99 W. Va. Code § 41-1-3 (1982) provides in pertinent part:

No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such a manner as to make it manifest that the name is intended as a signature; and moreover unless it be wholly in the handwriting of the testator, the signature shall be made . . . in the presence of at least two competent witnesses.

99 298 S.E.2d at 459.

99 Id. at 460-61.

100 Id. at 462.

100 Id. at 460.

102 Id.


104 298 S.E.2d at 459.

104 Id. at 460.

105 Id.
questions on the admissibility of extrinsic evidence to prove that intent. The court noted that West Virginia Code section 41-1-3 required testamentary intent in a writing. However, the court in Runyon v. Mills\(^{107}\) held that no particular form of words are necessary to demonstrate that intent. The case of In re Briggs Estate\(^{108}\) also clearly established that extrinsic evidence is admissible to show testamentary intent when the words of the will are ambiguous.

The broad admissibility standard in Briggs may have been reduced in Teubert. The court suggested that extrinsic evidence is subject to a two-stage analysis. An initial determination of whether the document has some "formal indicia of testamentary intent"\(^{109}\) must be made before the introduction of further evidence is permitted. The words "last will" and the testator's signature on the Teubert document met the court's standard of "indicium."\(^{110}\)

Among the evidence offered below was an unsigned codicil which made direct reference to the document in controversy as a will. The codicil was judged to possess high probative value. The remaining extrinsic evidence was admittedly not without conflict, but the deference traditionally due a trial court's factual determination unless plainly wrong argued against reversal.\(^{111}\)

The appellants' third argument seemed to offer the greatest opportunity for success. Their contention that a will must have clear terms has strong case support. In Hunt v. Furman\(^{112}\) the court held that "[a] valid disposition of personal property requires a definite subject and object."\(^{113}\) The bequest in Teubert "to aid the blind" seemed to fail that standard. Furthermore, the Teubert document sought to create a foundation that would administer funds for private and charitable beneficiaries. A creation of that sort could be characterized as a mixed trust, an arrangement that the court in Goetz v. Old National Bank of Martinsburg\(^{114}\) found unacceptable.

The court found no merit, however, in these objections. The mixed trust arrangement in Teubert was viewed as avoiding the flaw that had troubled the Goetz court by providing for a clear method of apportionment among the charitable and private beneficiaries.\(^{115}\)

The seemingly vague bequest "to aid the blind" did not, in the court's

---

\(^{107}\) 86 W. Va. 368, 103 S.E. 112 (1920).


\(^{109}\) 298 S.E.2d at 461.

\(^{110}\) Id.

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) Id. at 711, 52 S.E.2d at 818.

\(^{114}\) Id. at 711, 52 S.E.2d at 818.

\(^{115}\) Id.
view, fall under the control of *Hunt v. Furman*. The validity of the bequest was said to be upheld by West Virginia Code sections 35-2-1\(^{116}\) and 35-2-2.\(^{117}\) These two provisions represent a statutory embodiment of the English doctrine of *cy pres*.\(^{118}\)

The principle concept of *cy pres* is that a charitable trust does not fail simply because there is no identifiable recipient. The certainty requirement is satisfied by a designation of the purpose of the bequest.

West Virginia Code section 35-2-2 states in part that "[n]o conveyance, devise, dedication, gift, grant or bequest . . . [to a charitable trust described in section 35-2-1] shall fail or be declared void for insufficient designation of the beneficiaries in or the objects of any trust." Under the authority of the statute, a circuit court, upon petition, has full power to appoint a trustee to execute the bequest.\(^{119}\)

The court's determination of the issues in *Teubert* strongly suggests that challenges to holographic wills will face an uncertain future, although a stricter application of the court's two-step analysis in the field of extrinsic evidence could lead to increased emphasis on the document alone. Charitable bequests that fall within the protection of the statutory *cy pres* doctrine will be extremely difficult to impeach.

VIII. **PLANNING AND ZONING COMMISSIONS**


The West Virginia Legislature, recognizing the need in a complex era to avoid the haphazard growth of a simpler time, enacted Article 24 of Chapter 8 of the West Virginia Code. That segment of the Code legalized the use of planning and zoning commissions by units of local government and provided regulations to govern their proper functions.

The principle regulatory power of a planning commission is derived from West Virginia Code section 8-24-28,\(^{120}\) which grants to the commission the authority to deny plat approval to any projected development that is not in ac-

---

\(^{116}\) *W. Va. Code* § 35-2-1 (1966). The statute lists the uses that invoke the *cy pres* doctrine. Included are "any other benevolent or charitable institution, association or purpose."

\(^{117}\) *W. Va. Code* § 35-2-2 (1966) provides in part: No conveyance, devise, dedication, gift, grant or bequest hereafter made for any of the uses set forth in the preceding section [§ 35-2-1] shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such conveyance.

\(^{118}\) 298 S.E.2d at 464.

\(^{119}\) *Id.* at 465 n.6.

cordance with an existing comprehensive plan. The criteria to be applied in judging those plats are stated in West Virginia Code Section 8-24-30, which says in part: "Distribution of population and traffic in a manner tending to create conditions favorable to health, safety, convenience and the harmonious development of the municipality . . . ." (emphasis supplied)

The words "harmonious development" have provoked great measures of disharmony, as the courts and local government have grappled over the proper extent of what initially appeared to be a broad grant of authority. The case of Kaufman v. Planning and Zoning Commission of Fairmont may have resolved the issue by virtually declaring the phrase to be unconstitutionally vague.

The case arose from the Fairmont Planning Commission's denial of plat approval to Gold Construction Company. Gold planned to build low-income housing on land purchased from Henry Kaufman. The housing met local zoning restrictions, but it nevertheless invoked loud outcries from local property owners who feared property values would decline if low-income housing were built in the area.

Gold twice attempted to gain plat approval. The initial effort was rebuffed on technical grounds. During a second hearing, after Gold had corrected the technical flaws, the Commission allowed local residents to testify on decreased property values, the nature of low-income renters and the likelihood that public housing would deteriorate. The Commission then denied the plat a second time, citing its authority to rule on considerations of "harmonious development."

Well before Kaufman, the court had expressed misgivings about the extent of the grant of power under section 8-24-30. In Singer v. Davenport the court demanded that a planning commission detail the grounds on which it denied plats. Inherent in that ruling was a belief that local government must not act in an arbitrary and capricious manner that serves to mislead rather than guide its citizens.

Expanding upon the Singer doctrine, the court in Kaufman ruled that the phrase "harmonious development" lacked the specificity necessary to adequately notify persons seeking plat approval of what they must demonstrate before a planning commission. As a corollary to that determination, the

122 298 S.E.2d 148 (W. Va. 1982).
123 Id. at 150-51.
124 Id. at 151.
125 264 S.E.2d 637 (W. Va. 1980).
126 Id. at 641.
127 298 S.E.2d at 154-55.
court ruled that local municipalities must specify the ingredients of "harmonious development" as they apply to plat approval before they can rely on the statute. 128

Although unnecessary to its determination of the principle issue in the case, the court also considered the proper nature of evidence that a planning commission should accept. It found that since plat approval was governed by law, the determination must be made according to proper evidence. Commissioners may not rely on personal experience or on evidence not sanctioned by law. In Kaufman, it was, therefore, improper for the Commission to hear, on the record, the complaints of local residents that did not address a specified ground for plat approval. 129

The court also took pains to establish that decisions of planning commissions are subject to a higher level of judicial scrutiny than zoning commissions. Since planning commission decisions are administrative rather than legislative, the "fairly debatable" standard of review suggested in Anderson v. City of Wheeling 130 does not apply. 131

The power of planning commissions in West Virginia has undergone a sharp reduction at the hands of the Kaufman court. Notwithstanding the broad statutory language of the West Virginia Code, it is clear that future decisions of such panels must be held within tight constraints. The court has driven a stake through the heart of "harmonious development."

There is another aspect of the Kaufman decision that should give local governments pause. The court barely concealed its distaste for criticism upon low-income housing when it noted that "the law does not permit planning to be used as an economic barrier." 132

No authority was cited for such a sweeping pronouncement. It may be argued that the statement elevates social conscience to force of law. It is apparent that the court shares the belief of certain commentators that zoning and planning regulations have been unfairly utilized to discriminate against the economically deprived. 133 Opposition to such regulations has generally relied on claims of constitutional equal protection. West Virginia may well be in the process of developing its own remedy for those claiming economic discrimina-

---

128 Id. at 155.
129 Id. at 156.
130 150 W. Va. 689, 149 S.E.2d 243 (1966). The court in Anderson held that "if the decision of the zoning authorities is fairly debatable the courts will not interfere with such decision." Id. at 698, 149 S.E.2d at 249. It is clear from Kaufman that this liberal standard of judicial review will not be applicable when planning commission activities are in question.
131 298 S.E.2d at 157.
132 Id. at 158.
tion, although it is entirely uncertain on what theory the relief is being offered.

Local governments should, therefore, not assume that mere specificity will satisfy the Kaufman limitation on "harmonious development" regulations. The court's hostility toward covert discrimination in the guise of community planning is beyond question. Regulations that have an economically discriminatory impact will be scrutinized very carefully.

An open question remains concerning whether the court will extend its concern for the economically underprivileged to regulations that affect groups claiming social discrimination. Will the court permit planning or zoning regulations that bar facilities for alcoholics, battered women, juveniles, or the mentally ill? The Kaufman holding gives no unequivocal answer, but strongly suggests that the court would find such regulations unacceptable.

Michael Lee Keller