No. 32844 – *Linda J. Haines, Beneficiary of the Estate of Ralph W. Haines, deceased v. Pamela K. Kimble, Executrix of the Estate of Ralph W. Haines, deceased*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

I write separately to express my disagreement with the majority decision. This case is about an elderly attorney, with more than sixty years experience practicing law and with impeccable credentials in estate matters, who died testate leaving his quite large estate solely to his only daughter, Linda J. Haines. By his will he entrusted in his long-time secretary and legal assistant of twenty-four years, Pamela K. Kimble, with the responsibility of settling his estate by naming her in his will as executrix. Following her father's death, Ms. Haines made four separate failed attempts to remove Pamela K. Kimble from her position as executrix of Ms. Haines' father's will before coming to this Court.

The first attempt to remove Ms. Kimble as executrix was at a hearing before the fiduciary commissioner of Hampshire County. The fiduciary commissioner, a local attorney who knew the parties, refused to remove Ms. Kimble. The fiduciary commissioner got it right.

The second attempt to remove Ms. Kimble was at a hearing before the Hampshire County Commission. The Hampshire County Commissioners refused to remove Ms. Kimble. The commissioners got it right.

The third attempt to remove Ms. Kimble was at a rehearing before the Hampshire County Commission. Again, the commissioners refused to remove Ms. Kimble.

Again, the commissioners got it right.

The fourth attempt to remove Ms. Kimble was before the Circuit Court of Hampshire County. The circuit court refused to remove Ms. Kimble, and the circuit court got it right.

However, following an appeal to this Court, the majority of this Court ordered the removal of Ms. Kimble as executrix and ordered that she be replaced with Ms. Haines as "substitute executrix."[1] The majority of this Court got it wrong.

The majority correctly cites to the standard of review as set forth in *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). *Burgess* tells us that the ultimate disposition is properly reviewed under an abuse of discretion standard, findings of fact are reviewed under a clearly erroneous standard, and conclusions of law are reviewed *de novo*.

With respect to questions of fact, I believe that the majority fails to give proper deference to the circuit court's findings. In citing several examples of alleged areas of dispute between Ms. Kimble and Ms. Haines, the majority never once declares a particular finding of fact to be "clearly erroneous." Further, on the question of law regarding the applicability or inapplicability of *Highland v. Empire National Bank of Clarksburg*, 114 W.Va. 498, 172 S.E. 551 (1933)*, infra,* the majority simply misapplied the holding in *Highland*. And, without stating that the circuit court "abused its discretion," the majority

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[1]*W.Va. Code*, 44-1-9 [1935], suggests that a court-appointed substitute administrator of an estate when an executor or executrix named in a will is removed by a court should be called an *administrator de bonis non cum testamento annexo,* administrator with will annexed. *See also, Black's Law Dictionary* 49 (8th Ed. 1999).

assumed to have greater knowledge and greater wisdom than all of the previous local decision makers in this matter *who knew all the parties*, and substituted the majority's judgment for that of those who really knew what the case was all about.

The majority relied, in part, on the *Highland* case, *supra*. It is my opinion that the majority was wrong to apply *dicta* from the *Highland* case to the facts of this case. The holding in *Highland* pertained to hostile relations among co-executors and co-trustees – not to conflicts between a single executrix and a beneficiary. The *Highland* case stands for the proposition that when co-executors and co-trustees, who must act jointly, cannot agree to such an extent that administration of the estate or trust is impaired, there may be cause for the removal of one or more of the fiduciaries. *Highland* simply does not apply to the facts of this case.

I do not disagree with the concern of the majority for the protection of the estate for the beneficiary, and the appropriateness of removing a fiduciary when there is conflict. However, it is troubling that the decision suggests that a beneficiary may foment a hostile relationship with an executrix named by a testator, thereby resulting in the removal of a testator's appointed executrix. The majority allows the wrongdoer, or person with unclean hands, to profit from wrong doing.

If *Highland* is to be applicable in any way to single executors or executrixes, it should not be interpreted to allow a beneficiary to initiate conflict with an appointed executor or executrix for the purpose of effecting the removal of the executor or executrix, thereby negating the testator's intent. The result would be that *any* beneficiary of *any* will

could bring about the removal of *any* executor or executrix. Surely, the majority would not support such a principle.

> In this case the circuit court found that:
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> > Petitioner, Linda Jane Haines [beneficiary], has interfered and refused to cooperate with the proper administration of the Estate, ... and the entire record supports a finding that the executrix has not failed or refused to perform her duties.
> >
> > The actions of Petitioner [beneficiary] have compounded the already difficult job of this executrix.
> > . . .
> >
> > That the hostility between the executrix and the beneficiary herein is a result of the actions of the beneficiary and not based upon action of the executrix adverse to the interest of the beneficiary. The executrix has reasonably taken into consideration the requests and desires of the Petitioner [beneficiary] subject to her paramount duty to administer this estate in accordance with the requirements of the Internal Revenue Service.[2]

In analyzing this case the majority either failed to or refused to apply what I believe to be a long standing principle of law, namely the importance of the testator's right to name who is to administer his estate. It is stated in George W. Thompson, *The Law of Wills* §11 (3rd Ed. 1989) that:

> It is generally held . . . that the disposition of property is not an essential characteristic of a will but that a valid will may be made for the sole purpose of naming an executor . . . .

Further, *W.Va. Code*, 2-2-10 (k) [1998] recognizes the appointment of an executor or

[2]Order of the circuit court dated November 19, 2004.

executrix in the definition of a will:

> The word "will" embraces a testament, a codicil, *an appointment by will*, or writing in the nature of a will in the exercise of a power, also any other testamentary disposition [emphasis added].

The majority opinion, however, reasons in this case that the exercise of the power to appoint the executrix is somehow less important than the provisions for the disposition of the testator's property. The majority somehow reasoned that the provision in the testator's will leaving his estate to his only child, Ms. Haines, was his "primary intention" for making his will. The facts in this case strongly support the opposite conclusion.

I believe the testator's primary intention in the execution of his will was to appoint Ms. Kimble as executrix. *W.Va. Code*, 42-1-3a [1992] provides, in part, that when a decedent has no surviving spouse, all of his estate passes to the decedent's descendants. The testator was a widower and Linda J. Haines was his only child. By virtue of the provisions of our laws of intestacy the appellant would have inherited all of the testator's estate had there been no will. The testator, being well-versed on the administration of wills, obviously elected not to permit his estate to be administered by his daughter.

Therefore, it is more likely that the testator's primary intention for making a will was to see that his estate was settled at the hands of someone in whom he trusted, who was familiar with his personal and business affairs, and who was experienced in the estate settlement process. Furthermore, appointing his long-time secretary and legal assistant as the executrix of his quite large estate likely was the testator's way of compensating his

trusted friend and assistant from beyond the grave.

Frankly, the local fiduciary commissioner, the local county commissioners, and the circuit court, as the trier of the facts, were in the best position to consider the interrelationships between the testator, the executrix and the beneficiary, and all other aspects of the administration of this estate. The circuit court specifically found that the executrix had handled the administration of the estate properly. In its order the circuit court stated:

> That Pamela Kimble has well performed her duties in the complex administration of the Estate of Ralph W. Haines, as evidenced by the employment of tax professionals.

As such, this Court should have given deference to the circuit court; this Court should have affirmed the circuit court's decision.

Finally, I note that this decision is *per curium* and therefore should be limited to the facts of this case. The majority decision is driven by the belief that the executrix somehow acted wrongly to the detriment of the estate, notwithstanding the findings of the circuit court to the contrary. Practitioners should read this case with caution because, in my view, the case in no way undermines our fundamental laws involving the administration of estates.

Respectfully, I dissent.