No. 32844 – Haines v. Kimble.

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OF WEST VIRGINIA

Maynard, Justice, dissenting:

This case is a lawyer's dream. Lawyers in this case have already collected more than one million dollars in fees with no end in sight, all due to Ms. Kimble's improper acts. Lawyers love Latin phrases and here is one that certainly should apply in this case. *Nemo ex suo delicto meliorem suam conditionem facere potest*, which is one of the ancient equitable maxims and is commonly stated as "no man should profit from his own wrong." (Literally it translates as no one can make his condition better by his own misdeed). In this case, the majority has ignored the maxim and has rewarded gross and serious misconduct by abruptly reversing our earlier opinion without satisfactory explanation. This entire episode is a colossal fiasco and demonstrates why our Court has been criticized. Therefore, I dissent.

This case was originally before this Court upon appeal of a final order of the Circuit Court of Hampshire County entered on November 19, 2004. On March 17, 2006, this Court filed a legally-sound and well-reasoned opinion reversing the circuit court's refusal to remove Ms. Kimble as the executrix of the estate of Mr. Haines. Given the urgency of the situation, we even issued the mandate contemporaneously with our opinion making it effective immediately. On May 11, 2006, nearly two months later and for some unknown and mysterious reason, three Justices of this Court voted to grant Ms. Kimble's petition for

rehearing. Now, more than one year later, and more than two-and-one-half-years after the filing of the circuit court's final order, this Court has issued yet another opinion reversing our own March 17, 2006, decision.

There was simply no reason for this Court to abruptly change its collective mind, leaving this estate in limbo for years. Ms. Haines is the sole heir. She gets it all. There is no dispute about that. Now, after more than one million dollars has been wasted in legal fees, the majority is putting the estate right back in the hands of an individual whose actions have been, at best, highly questionable. It really is irrelevant in this case as to how these controversies and disputes arose or who may have been responsible for creating them because there are no joint fiduciaries or co-executrixes and there are no multiple or joint heirs. I cannot stress that point enough. There is only one executrix and one heir so there are no competing interests in the same classification. How in the world does an estate with only one single solitary heir incur lawyer's fees exceeding one million dollars and generate two conflicting Supreme Court opinions with different results? Only in West Virginia!!!

The issue below was whether Ms. Kimble should have been removed as executrix of the estate of Ralph W. Haines. Ms. Haines, Mr. Haines' daughter and sole beneficiary of his estate, presented strong evidence of continuous hostile relations between her and Ms. Kimble which had resulted in serious damage to Mr. Haines' estate. In our initial decision, this Court was sympathetic to Ms. Haines' concerns. Somewhere along the

line, however, even though no new evidence and no new legal or factual arguments were presented, and after our decision was released and final, the majority of this Court simply had a change of heart. It just does not make sense.

A review of some of the relevant facts is necessary. On May 3, 2002, the testator, Ralph W. Haines, died. At the time of his death, he had accumulated an estate believed to be worth more than ten million dollars. Pursuant to his will, dated March 16, 1993, which was admitted to probate before the County Commission of Hampshire County on May 13, 2002, Mr. Haines named Ms. Kimble as executrix of his estate. Ms. Kimble had been a secretary/legal assistant to Mr. Haines for several years prior to his death. According to his will, Ms. Haines, who is Mr. Haines' daughter and only child, was the sole beneficiary of his estate. On August 1, 2002, after several months of disagreements, Ms. Haines filed a petition for removal of Ms. Kimble as executrix of Mr. Haines' estate.

It is important to point out that at the time of the drafting of Mr. Haines' will in 1993, Ms. Haines was a permanent resident of Massachusetts. She had been a resident of Massachusetts for several years and had just purchased a home. It is more than reasonable to assume that Mr. Haines appointed Ms. Kimble executrix as a matter of convenience in light of Ms. Haines' residency at the time of the construction of his will.

In *Highland v. Empire National Bank of Clarksburg*, 114 W.Va. 498, 501, 172 S.E. 551, 554 (1933), this Court's holding established an unambiguous principle that,

"[w]here inharmonious or unfriendly relations exist between the trustees, or between them and the *cestui que trust* [the beneficiaries], there may be sufficient reason for removal." (Citation omitted). *Highland* makes it clear that an executrix can be removed for something other than failure to perform her fiduciary duty. Moreover, a thorough reading of *Highland* shows that it stands for the proposition that carrying out the primary purposes of a testator's will must supercede keeping a particular fiduciary when the two objectives conflict. *Highland* provides that, "it is not essential how such relations originated, or whether the trustee, whose removal is sought, caused them by his own misconduct or not." *Id*. at 555 (citation omitted).

Additionally, in *Welsh v. Welsh*, 136 W.Va. 914, 928, 69 S.E. 2d 34, 42 (1952), this Court held that the general mandate to give effect to the testator's intent "should not prevent the prompt removal of a personal representative who is incompetent or who fails or refuses to perform his clear duties." It should be clear to anyone reviewing the case at hand that the primary intent of Mr. Haines was to pass his entire estate to his daughter, Ms. Haines, while his secondary and subordinate intent was to name Ms. Kimble as executrix.

This Court's original March 17, 2006, opinion correctly decided this case in a fair, competent, and appropriate manner. As we said in that opinion,

[W]hile there may be facts in dispute as to the specific reasons

> surrounding the hostile relations between the appellee and the appellant, there is no dispute that such hostile relations in fact do exist and that the parties cannot work together with any sense of civility or common purpose. We believe that such hostile relations, regardless of who is at fault, necessarily have already damaged, and in the future will continue to damage, the estate and the appellant's interest in it.

Haines v. Kimble, No. 32844, Majority slip op.at 6 (March 17, 2006).

With regard to the disharmony between Ms. Haines and Ms. Kimble, we pointed out that:

> This disharmony between the appellant and the appellee has brought to light numerous troubling allegations surrounding the administration of the testator's estate. For instance, the appellant maintains that the record is replete with examples of how the appellee's actions have hindered the proper administration of the estate. Specifically, she contends that the appellee made extensive corrections to the initial lists of the decedent's property to the detriment of the appellant and the estate and that the appellee appropriated $200,000 of the testator's bearer bonds in alleged contemplation of his imminent death and concealed those bonds for several months prior to giving them to the appellant. With regard to those bonds, the appellant maintains that the appellee initially filed a federal estate tax return reporting that the appellant contributed funds for the acquisition of the bearer bonds, but later reversed herself and filed a "supplemental" federal estate tax return indicating that the testator died owning the bonds solely and the appellant had no pre-mortem interest in them. The appellant argued such action resulted in her owing significant additional federal taxes.

Id. at 6, 7. We also explained:

> The appellant further declares that in spite of evidence that the testator had given her a collection of antique firearms in 1967, the appellee filed tax returns with the IRS reporting the guns as a part of the testator's estate. She also charges that the

> appellee persistently inflated appraisals on the testator's property to bolster her expected commission, that the estate unreasonably had to incur fees for the services of three different law firms at a cost of several hundred thousand dollars, and that the appellee unnecessarily obtained a wasteful loan purportedly to pay a portion of the federal estate taxes. Finally, the appellant states that the appellee mishandled the closing of the testator's law practice including the maintenance of his clients' files in a manner contrary to governing legal and ethical practices and that the appellee failed to maintain, secure, and insure the testator's property subject to the claims of creditors of his estate including his extensive real estate holdings.

Id at 7.

The result of the majority opinion is mind-boggling. Allegations swirled of inflated appraisals to increase Ms. Kimble's commission; improper appropriation of two hundred thousand dollars in Mr. Haines' bearer bonds by Ms. Kimble; unreasonable actions by Ms. Kimble causing Ms. Haines to incur hundreds of thousands of dollars in unnecessary federal and state taxes; more than one million dollars in legal fees from three separate law firms; and mishandling of the closing of Mr. Haines' law practice by Ms. Kimble. As we clearly explained in our first opinion in this case, "regardless of the truth or veracity in the disputed items above and without determining blame or responsibility for the dispute, there are clear issues that simply cannot be ignored with regard to the administration of the testator's will." *Haines v. Kimble*, No. 32844, Majority slip op.at 9 (March 17, 2006).

The record strongly establishes the parties' hostile relations which have

continued from the moment of Mr. Haines' death through his memorial service, funeral, and ever since. Ms Kimble even attempted to preclude any face-to-face interaction with Ms. Haines. In one letter to Ms. Haines, Ms. Kimble explained ". . . it would be to the best interest of both of us that we are not in the office at the same time. I will be in the office from 9-12 each day until further notice." During that time period, Ms Haines was trying to deal with the death of her father and with the finalization of his estate. Instead, she encountered continuous problems as even the most routine matters demanded the attention of legal counsel. Of course, this added to the already growing legal fees subtracted from Mr. Haines' estate.

We have consistently held that decisions involving the construction of a will always begin with the recognition that: "The paramount principle in construing or giving effect to a will is that the intention of the testator prevails, unless it is contrary to some positive rule of law or principle of public policy." Syllabus Point 1, *Farmers and Merchants Bank v. Farmers and Merchants Bank*, 158 W.Va. 1012, 216 S.E.2d 769 (1975); *see also* Syllabus Point 4, *Weiss v. Soto*, 142 W.Va. 783, 98 S.E.2d 727 (1957); *In re Conley*, 122 W.Va. 559, 561,12 S.E.2d 49, 50 (1940). The majority has strayed far afield from this well-established principle.

In sum, there is no dispute that Mr. Haines clearly intended to leave all of his worldly possessions to Ms. Haines as his sole heir. Does anyone reading this seriously believe that Mr. Haines would have appointed Ms. Kimble if he had known there would be

such aggressive and acrimonious battles between her and Ms. Haines in the administration of his estate? Likewise, it is inconceivable that had Mr. Haines envisioned the massive amounts of money being spent in legal fees alone, now estimated at more than one million dollars, that he would have appointed Ms. Kimble. The result of the majority opinion is not simply an injustice to Ms. Haines, it is also an outrage to Mr. Haines whose lifetime accumulation of assets is slowly being squandered dollar by dollar.

Therefore, for the reasons set forth above, I respectfully dissent. I am authorized to state that Chief Justice Davis joins me in this dissent.