

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON**

**ROBERT JULIAN WARE, BETTY
JEAN WORKMAN, ALMONTA CREAK,
AND ROGER WARE,**

Appellants,

v.

**Supreme Court No. 31973
Randolph County Civil Action No. 00-C-110**

**ALMIRA JANE HOWELL, Executrix
of the Estate of Biddie L. Ware,**

Appellee.

APPELLANTS' BRIEF

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I. KIND OF PROCEEDING AND NATURE OF RULING

The Appellants Robert Julian Ware, Betty Jean Workman, Almonta Creak, and Roger Ware filed a Notice of Contest with the Randolph County Commission on June 24, 1999 contesting the probate of the Last Will and Testament of Biddie L. Ware dated June 6, 1997 which was presented for probate by the Appellee Almira Jane Howell. The Appellants contended the Last Will and Testament [hereinafter "Will"] of Biddie L. Ware was procured by undue influence and asserted that the Last Will and Testament executed by Biddie L. Ware on June 4, 1990 expressed the decedent's true intentions. The Appellee filed a Response to Notice of Contest on July 9, 1999. By Agreed Order entered June 13, 2000, the matter was removed to the Circuit Court of Randolph County.

After several continuances, this matter was tried on November 5 and 6, 2001. However, the Saturday before trial, November 3, 2001, the evidentiary deposition of Rhonda Lawson, a witness to Biddie L. Ware's execution of the June 6, 1997 Will, was taken. Lawson was residing outside the State and was unable to attend the trial. During her evidentiary deposition, Lawson testified she subscribed Biddie Ware's Will outside the presence of Biddie Ware, which was contrary to the attestation clause. Based upon Lawson's testimony, the Appellants filed a Motion to Amend Notice of Contest on November 5, 2001 asserting the June 6, 1997 Will was not valid because it was not executed in accordance with the requirements of W. Va. Code § 41-1-3. Appellants also filed an Amended Notice of Contest and Supplemental Jury Instructions setting forth the requirements of W. Va. Code § 41-1-3.

At trial, Appellants presented two theories to invalidate Biddie Ware's June 6, 1997 Will. First, evidence was presented that Biddie Ware's Will was improperly executed. Second,

Appellants presented evidence that Biddie Ware's Will was procured by undue influence by the Appellee, Jane Howell. The jury rendered its verdict on November 6, 2001 finding that the June 6, 1997 Will was not properly signed and witnessed. Because the jury found the Will was improperly signed and witnessed, the jury did not address the issue of undue influence.

On November 16, 2001 the Appellee filed a Motion to Alter or Amend Judgment or in the Alternative for a New Trial. After a torturous procedural history of more than two years, the trial court entered an Order dated January 12, 2004 granting Appellee's Motion for New Trial. It is from this Order the Appellants appeal.

II. STATEMENT OF FACTS

Biddie Lemon Ware died on September 26, 1998. The Appellee Jane Howell qualified as Executrix and filed a Last Will and Testament executed June 6, 1997 by Biddie Ware for probate. (See Will attached as Exhibit A to the Notice of Contest filed June 24, 1999). The Appellants filed this Notice of Contest contending the June 6, 1997 Will was procured by undue influence and asserted that the Last Will and Testament executed by Biddie Ware on June 4, 1990 expressed the true intentions of the decedent for the division of her estate. (See Will attached as Exhibit B to Notice of Contest filed June 24, 1999). Pursuant to the provisions of the 1990 Will, Biddie Ware devised to her daughter, Viola Ware, her entire estate and property since all of her other children had homes and were doing well. If Viola failed to survive Biddie Ware by sixty (60) days, she devised her entire estate, except her "home place," to her other children, equally. Each child was to receive a 1/8 share and her deceased son's share was to pass to his children, equally. The "home place," which consisted of 186 acres more or less in Mingo District, Randolph County, was placed in trust, giving any of her children the right or option to

purchase the property at fair market value. If no one purchased the property within one (1) year, then the Trustee was directed to sell the property and divide the proceeds equally between her children or their issue.

The Will presented by the Appellee for probate was purportedly drafted by attorney R. Mike Mullens. The 1997 Will left everything to Appellee and bequeathed One Dollar (\$1.00) to Biddie Ware's remaining living children, except Viola who was completely disinherited. Biddie Ware's deceased son's wife, Ruby Ware, was also bequeathed One Dollar (\$1.00). (See Will attached as Exhibit A to Notice of Contest filed June 24, 1999).

The testimony at trial showed that in October 1991, Biddie Ware, her daughter Viola, and her daughter, Jane Howell, the Appellee, decided to live together and share living expenses (See Jane Howell Conrad's trial testimony, p. 11). At the time, Biddie Ware was in her mid-nineties (Jane Howell Conrad's trial testimony, p. 13) and Viola Ware had Alzheimer's disease (See Jane Howell Conrad's trial testimony, p. 17). Prior to her death, Biddie Ware made it clear to Jane Howell that should something happen to Biddie Ware, she wanted care provided to her daughter Viola. (Jane Howell Conrad's trial testimony, p. 17).

In the Summer of 1997, Jane Howell took Biddie Ware's 1990 Will to the law offices of R. Mike Mullens where her daughter-in-law Susan Elza had worked. (Cassandra Wilmoth trial testimony, pp. 34-35 and Jane Howell Conrad trial testimony, pp. 15-16). Although the various trial testimony is conflicting, Jane Howell testified she, alone, discussed Biddie Ware's Will with Cassandra Wilmoth, a legal assistant in Mr. Mullens' office. (Jane Howell Conrad trial testimony, p. 18). Jane Howell told Cassandra Wilmoth to change Biddie Ware's Will to leave everything to herself, rather than Viola, and remove the sixty (60) day survival requirements. (Jane Howell

Conrad trial testimony, p.18). Biddie Ware did not meet with Cassandra Wilmoth prior to executing the Will. (Cassandra Wilmoth trial testimony, p. 34, Jane Howell Conrad trial testimony, pp. 18-19). Moreover, neither Jane Howell nor Biddie Ware met with Mr. Mullens, the attorney, to discuss what Biddie Ware wanted in her Will. (Jane Howell Conrad trial testimony, pp. 16 and 19).

Conversely, Cassandra Wilmoth testified that both Jane Howell and Susan Elza came to the office to have Biddie Ware's Will changed. (Cassandra Wilmoth trial testimony, p. 34). Cassandra Wilmoth testified that both Susan Elza and Jane Howell met with Mr. Mullens regarding the changes to Biddie Ware's Will. (Cassandra Wilmoth trial testimony, p. 35). Contrary to the assertions of Jane Howell, Cassandra Wilmoth testified she did not discuss the changes to Biddie Ware's Will with Jane Howell. (Cassandra Wilmoth trial testimony, pp. 35 and 37). Although Cassandra Wilmoth testified that she drafted Biddie Ware's Will, she claims it was done only pursuant to notes from Mr. Mullens, the attorney. (Cassandra Wilmoth trial testimony, pp. 38-39). Mr. Mullens testified he had no specific recollection of talking with anyone (R. Mike Mullens trial testimony, p. 7, attached as Exhibit 1).

On June 6, 1997, Jane Howell took Biddie Ware to Mr. Mullens' law office. Biddie Ware signed the Will prepared by Cassandra Wilmoth while seated in an automobile in the parking lot behind Mr. Mullens' law offices. (Cassandra Wilmoth trial testimony, p. 40). At the time, Biddie Ware was 100 years old. (Jane Howell Conrad trial testimony, p. 20). Biddie Ware sat in the car and the witnesses, Rhonda Lawson and Sandra Harman, and the Notary, Cassandra Wilmoth, went to the car to execute the Will since it was misty and the wind was blowing. (Cassandra Wilmoth trial testimony, p. 40). Cassandra Wilmoth testified she went through the

Will with Biddie Ware, not verbatim, but in a cursory fashion having Biddie Ware sign each page. (Cassandra Wilmoth trial testimony, pp. 42-43). Sandra Harman and Rhonda Lawson, employees of R. Mike Mullens, were the witnesses to Biddie Ware's Will. Both testified they witnessed Biddie Ware sign the Will (Rhonda Lawson trial testimony, pp. 57-58; Sandra Harman trial testimony, pg. 74); however, neither Sandra Harman nor Rhonda Lawson heard Biddie Ware say anything (Rhonda Lawson trial testimony, pp. 68 and 70; Sandra Harman trial testimony, p. 76).

Sandra Harman's recollection of the signing of Biddie Ware's Will is minimal. She testified that initially she could not remember where she signed Biddie Ware's Will, although she did remember going outside to watch Biddie Ware sign the Will (Sandra Harman trial testimony, p. 74). Sandra Harman testified when she first thought about it, she thought she did not sign Biddie Ware's Will outside, but then determined she must have signed it outside. (Sandra Harman trial testimony, p. 75). With such a sketchy recollection, Sandra Harman says, unequivocally, she just doesn't remember (Sandra Harman trial testimony, p. 75). On cross-examination, however, Appellee's attorney, David Wilmoth, indicated that had Sandra Harman not signed the Will outside in the presence of Biddie Ware, Harman would have been lying in the attestation clause. (Trial transcript, pp. 77-79). In response to this questioning, Harman indicated she had not lied and would have signed it outside in the presence of Biddie Ware and Rhonda Lawson. (Sandra Harman trial testimony, p. 79). Harman testified on redirect, however, she did not remember Rhonda Lawson signing the Will. (Sandra Harman trial testimony, p. 80).

Contrary to Sandra Harman's assumptions concerning where she signed Biddie Ware's Will, Rhonda Lawson, the other witness, testified she did not sign Biddie Ware's Will while

outside, but instead, waited until she went in the law office. (Rhonda Lawson trial testimony, p. 67). Despite the assertions in the attestation clause, Rhonda Lawson unequivocally testified she did not subscribe her name to Biddie Ware's Will in the presence of Biddie Ware. (Rhonda Lawson trial testimony, pg. 68). Furthermore, Rhonda Lawson testified she had never read Biddie Ware's Will nor the attestation clause which stated she subscribed her name to Biddie Ware's Will in the presence of Biddie Ware. (Rhonda Lawson trial testimony, pp. 69-70). Rhonda Lawson simply went outside to watch Biddie Ware sign her Will because her boss, Cassandra Wilmoth, asked her to. (Rhonda Lawson trial testimony, p. 61).

Rhonda Lawson's trial testimony was taken the Saturday before trial because she was residing outside the State and could not be available to testify in person. Based upon Lawson's testimony, Appellants moved to Amend their Notice of Contest pursuant to Rule 15(b) of the W. Va. R. Civ. P. to allege the Will was not validly executed and filed an Amended Notice of Contest and supplemental jury instructions. The Appellee did not object. In addition to the supplemental jury instructions regarding the valid execution of a Will, the jury was advised by the civil charge that they were "the sole judges of the credibility of the witnesses and the weight of the evidence." (See, civil charge). Moreover, the jury was advised:

From these considerations and all other evidence and circumstances appearing in the trial you may give to the testimony of the witness such credit and weight as you believe such evidence is entitled to receive.

If you believe that any witness in this case knowingly testified falsely as to any material fact, you may after considering and weighing the testimony of such witness, disregard the whole of the testimony of such witness or give it or any part thereof such weight and credit as you believe it to be entitled to receive.

(See civil charge).

The jury, after hearing the evidence and assessing the credibility of the witnesses, rendered a verdict in favor of the Appellants and found that the Will was improperly executed. Because the jury found the Will was not properly executed, the jury did not render a decision on the undue influence issue. (See Verdict Form dated November 6, 2001).

On November 16, 2001, before a Judgment Order was entered, the Appellee filed her Motion to Alter or Amend Judgment or in the Alternative for a New Trial claiming the verdict was contrary to the weight of the evidence. Appellee alleged the jury disregarded the testimony of the notary and the attestation clause, which indicated Rhonda Lawson signed Biddie Ware's Will in her presence. On November 20, 2001, Appellants filed their response to the Appellee's motion. Despite the outstanding motion, on December 20, 2001, Judge John L. Henning entered an Order removing the case from his docket with instructions to submit a proposed order incorporating the jury's verdict within thirty (30) days if the parties desired. Appellants' attorney had sent to Appellee's attorney a proposed judgment order on November 21, 2001. Because the Appellee's attorney did not forward the judgment order to the Judge for entry, Appellants' attorney, again, on December 11, 2001 sent a letter to Appellee's attorney asking him to file the order. On December 20, 2001, the same day the Judge entered his Dismissal Order, Appellee's attorney filed the judgment order with the Judge. That Order was entered January 4, 2002.

On January 17, 2002, Appellee's Motion for New Trial was noticed for hearing on April 8, 2002. At the hearing, the Appellee orally requested the Judge to rule as a matter of law on the issue of undue influence, the matter not addressed by the jury. The Judge took Appellee's motions under advisement and asked the parties to supplement with further written memorandums if they so desired. Appellants filed their supplement on or about April 16, 2002.

On April 10, 2002, Appellee filed with the Court a proposed order from the April 8, 2002 hearing. The order was not entered by the Judge. By December 2, 2002, the Court had not entered an order from the April hearing and had made no ruling after taking the matter under advisement; consequently, by letter to the Judge dated December 2, 2002, Appellants inquired about the order and offered to set the matter for another hearing. Appellants received no response. Again on April 2, 2003, Appellants inquired of the Judge about the order and submitted a proposed order denying the Appellee's Motion to Alter or Amend Judgment. That same day, the Appellee's attorney sent a letter to the Judge indicating he had objections to the proposed order, although those objections were not set forth in the attorney's letter. Appellee's attorney asked the Court for a reasonable amount of time to respond since his schedule was busy at that time. The Court, again, did not respond. Consequently, on July 7, 2003, Appellants scheduled this matter for hearing for July 28, 2003. At the hearing, nearly two years after the jury rendered its verdict for the Appellants, the Judge granted Appellee's Motion for a New Trial based upon the trial judge's concern about the credibility of the witness Rhonda Lawson as well as the Appellee's opportunity to investigate and inquire as to Rhonda Lawson's credibility. The trial judge granted the motion despite the fact the Appellee did not object to Appellants' Motion to Amend their Notice of Contest to allege Biddie Ware's June 6, 1997 Will was not validly executed nor did Appellee object to any supplemental instructions offered by Appellants concerning proper execution of the Will. Appellee introduced evidence on the proper execution of the will. Moreover, Appellee had the opportunity to cross-examine Rhonda Lawson. Despite Rhonda Lawson's trial testimony the weekend before the trial was scheduled to begin, the Appellee did not seek a continuance of the trial to allow more time to investigate.

Despite Judge John L. Henning ruling on the Appellee's Motion in July 2003, an appealable Order was not entered until January 12, 2004. This is par for the delay that has plagued this action. Jury selection was originally set for February 27, 2001. Because of a conflict with Appellee's attorney, trial was rescheduled for May 8, 2001. Because of a second conflict with Appellee's attorney, the matter was again rescheduled for August 14, 2001. Due to a conflict with one of Appellants' witnesses, the matter was reset and heard on November 5 and 6, 2001. It then took more than twenty months to get a ruling from the trial judge on Appellee's Motion for New Trial and more than two years from the trial date before an order was entered granting the Motion for New Trial.

Appellee's attorney submitted to Appellants' attorney a proposed order from the July hearing on August 5, 2003. On August 17, 2003, Appellants' attorney corresponded with Appellee's attorney stating objections to the order. Because no action was taken by the Appellee, on September 18, 2003, Appellants corresponded with the Appellee's attorney regarding entry of the order. On October 13, 2003, Appellee filed his proposed order along with Appellants' objections with the trial judge. On October 17, 2003, the trial judge corresponded with the Appellee's attorney regarding his ruling and asking the Appellee's attorney to change the order accordingly. On November 13, 2003, a second order was prepared by the Appellee's attorney and was entered by Judge Henning. The order had not been sent to the Appellants' attorney for an opportunity to object. On December 9, 2003, Appellants' attorney sent the trial judge correspondence regarding entry of the order which Appellants were not given an opportunity to review and respond before entry. An order prepared by the Appellants regarding the hearing was

submitted which rescinded the order dated November 13, 2003 to the extent it was inconsistent. The Court entered that Order on January 12, 2004 to which Appellants now appeal.

III. ASSIGNMENTS OF ERROR

- A. **THE LOWER COURT ABUSED ITS DISCRETION BY AWARDING APPELLEE A NEW TRIAL.**
- B. **APPELLEE FAILED TO OBJECT TO APPELLANTS' MOTION TO AMEND THE NOTICE OF CONTEST TO ALLEGE BIDDIE WARE'S WILL WAS NOT VALIDLY EXECUTED AND DID NOT OBJECT TO INSTRUCTIONS REGARDING VALID EXECUTION OF A WILL, AND, THUS, WAIVED ANY RIGHTS TO OBJECT ON THOSE GROUNDS.**
- C. **THE APPELLANTS' CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BECAUSE THE LOWER COURT'S DECISION TO AWARD A NEW TRIAL WAS NOT TIMELY MADE.**

The lower Court abused its discretion when it awarded Appellee a new trial because of its concern over the credibility of the witness Rhonda Lawson, as well as the Appellee's opportunity to investigate and inquire as to Rhonda Lawson's credibility since the verdict was not against the clear weight of the evidence, was not based on false evidence, and would not result in a miscarriage of justice.

IV. POINTS AND AUTHORITIES RELIED UPON

- A. **THE LOWER COURT ABUSED ITS DISCRETION BY AWARDING APPELLEE A NEW TRIAL.**

Pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure, a lower court may grant a new trial "in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law" The lower court's grant of a new trial in this action constitutes an abuse of discretion because the jury's verdict was not against the clear weight of the evidence, was not based on false evidence, and did not result in

a miscarriage of justice. In In re State of West Virginia Public Building Asbestos Litigation, 193 W. Va. 119, 454 S.E.2d 413 (1994), *cert. denied*, 515 U.S. 1160 (1995), this Court discussed the standards pertaining to a motion for new trial:

A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

Asbestos Litigation, at syl. pt. 3.

This Court has recognized "when a trial court abuses its discretion and grants a new trial on an erroneous view of the law, a clearly erroneous assessment of the evidence, or on error that had no appreciable effect on the outcome, it is this Court's duty to reverse." Shiel v. Ryu, 203 W. Va. 40, 45, 506 S.E.2d 77, 82 (1998) (quoting Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995)).

Similarly, in Maynard v. Adkins, 193 W. Va. 456, 457 S.E.2d 133 (1995), this Court reiterated the limited appellate review principles of Asbestos Litigation, but recognized that "consistent with Asbestos Litigation, on the other hand, is the general principle that the judgment of a trial court in awarding a new trial should be reversed if it is 'clearly wrong' or if a consideration of the evidence shows that the case was a proper one for jury determination." Maynard, 193 W. Va. at 459, 457 S.E.2d at 136 (citations omitted). As this Court has consistently explained, "[w]here the trial court improperly sets aside a verdict of a jury, such verdict will be reinstated by this Court and judgment rendered thereon." Shiel, 203 W. Va. at

46, 506 S.E.2d at 83 (citing Bronson v. Riffe, 148 W. Va. 362, 135 S.E.2d 244, syl. pt. 4 (1964)).

Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.

Shiel, 203 W. Va. at 46, 506 S.E.2d at 83 (citations omitted).

In this case, the parties presented testimony from Cassandra Wilmoth, the notary who executed Biddie Ware's Will, and the witnesses who witnessed the Will, Rhonda Lawson and Sandra Harman. The facts concerning the execution of the Will are disputed. Rhonda Lawson unequivocally states that she executed Biddie Ware's Will as a witness inside the law office out of the presence of Biddie Ware. Sandra Harman testified she could not remember where Rhonda Lawson signed the Will. Cassandra Wilmoth, the notary, drafted Biddie Ware's Will and says the witnesses signed their names to Biddie Ware's Will in her presence. The testimony was submitted for jury deliberation and there was no objection by the Appellee of improper instructions or other error in the presentation of the evidence.

This Court has consistently held "that the function of the jury is to weigh the evidence with which it is presented and to arrive at a conclusion regarding damages and liability." Shiel, 203 W. Va. at 46, 506 S.E.2d at 83. In Shiel, this Court cites with authority the United States Supreme Court's decision in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), wherein it explained that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." Shiel, 203 W. Va. at 46, 506 S.E.2d at 83 (quoting Anderson at 255.) Although Asbestos Litigation grants the trial court the authority to weigh the evidence in the context of granting a new trial, "such

authorization does not obviate the essential role of the jury in resolving conflicting evidence."

Shiel, 203 W. Va. at 46, 506 S.E.2d at 83. This Court has consistently held:

'It is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed.' . . . 'Where, in the trial of an action at law before a jury, the evidence is conflicting, it is the province of the jury to resolve the conflict, and its verdict thereon will not be disturbed unless believed to be plainly wrong.'

Id. (citations omitted).

"As an element of that vital task, the jury must analyze the evidence and determine the credibility to be assigned to various components of that evidence." Pauley v. Bays, 200 W. Va. 459, 464, 490 S.E.2d 61, 66 (1997).

In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.

Shiel, 203 W. Va. at 47, 506 S.E.2d at 84 (citing Walker v. Monongahela Power Co., 147 W. Va. 825, 131 S.E.2d 736, syl. pt. 3 (1963)).

In Pauley, Pauley was in an automobile accident with Bays and sued for damages. The jury rendered a verdict awarding Pauley \$20,000.00 in damages and finding her 40 percent at fault. Pauley filed a motion for new a new trial on the issue of damages, which was granted. This Court held that the evidence supported the jury's verdict on damages. The lower court found the jury improperly granted only \$2,000.00 in future medicals and did not grant Pauley a sufficient amount for pain and suffering. In reversing the lower court's ruling, this Court stated:

[t]his is not a situation such as that contemplated in syllabus point three of Asbestos Litigation, wherein the jury "verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice. . ." This is simply a matter of conflicting evidence regarding the degree of physical

injury suffered by the plaintiff. The jury was presented with adequate evidence from the opposing sides, and it arrived at a conclusion.

Pauley, 200 W. Va. at 464, 490 S.E.2d at 66 (*citations omitted*). Because this Court found the lower court abused its discretion, the lower court's order granting a new trial was reversed and this Court remanded the matter for reinstatement of the verdict of the jury. Id., 200 W. Va. at 465, 490 S.E.2d at 67.

In the instant matter, the jury was presented testimony from the two witnesses to Biddie Ware's Will, Rhonda Lawson and Sandra Harman, as well as the notary, Cassandra Wilmoth. The testimony was conflicting. Cassandra Wilmoth indicated she notarized the Will and the witnesses' signatures in the parking lot behind the law offices of R. Mike Mullens. Sandra Harman testified she witnessed Biddie Ware sign the Will in the parking lot, however, she does not remember where she signed the Will as a witness, but presumes it was in the parking lot as well. Rhonda Lawson testified, unequivocally, she signed Biddie Ware's Will outside of the presence of Biddie Ware despite the attestation clause attached to the Will. Although the attestation clause indicates the witnesses signed in the presence of Biddie Ware, Rhonda Lawson testified she did not read Biddie Ware's will. She only witnessed her sign at the request of her boss, Cassandra Wilmoth.

The testimony between Cassandra Wilmoth and Jane Howell, the Appellee, was also conflicting. Jane Howell testified she met with Cassandra Wilmoth and discussed with her how she wanted Biddie Ware's Will changed. Cassandra Wilmoth testified she did not discuss the specifics of Biddie Ware's Will with Jane Howell. Instead, Cassandra Wilmoth testified Jane Howell met with R. Mike Mullens, the attorney, to discuss the Will. Cassandra Wilmoth further

testified she drafted the Will pursuant to notes from Mr. Mullens. Mr. Mullens had no specific recollection of talking with anyone.

The lower court read its civil charge to the jury without objection from the parties. The civil charge advised the jurors they were:

the sole judges of the credibility of the witnesses and the weight of the evidence. As used in these instructions, 'the credibility of a witness' means the truthfulness or lack of truthfulness or of [sic] the witness.' The weight of the evidence means the extent to which you are or are not convinced by the evidence.

(See civil charge). In determining the credit and weight the jurors were to give testimony of the witnesses, they could consider several factors. The jury was advised "from these considerations and all other evidence and circumstances appearing in the trial you may give to the testimony of the witness such credit and weight as you believe such evidence is entitled to receive." (See civil charge). Moreover, the jury was advised if they believed "that any witness in this case knowingly testified falsely as to any material fact, [the jurors] may after considering and weighing the testimony of such witness, disregard the whole of the testimony of such witness or give it or any part thereof such weight and credit as [the jurors] believe it to be entitled to receive." (See civil charge).

In their deliberations, the jury determined the Will was improperly executed and found for the Appellants. Because the jury found the Will was improperly executed, the jury did not render a verdict on the issue of undue influence. It is the function of the jury to weigh the evidence with which it is presented and to arrive at a conclusion regarding damages and liability. Moreover, credibility determinations, the weighing of the evidence, and the drawing of legitimate

inferences from the facts are jury functions, not those of the judge. Pauley, 200 W. Va. at 464, 490 S.E.2d at 66.

The lower Court, after almost two (2) years from the jury's verdict, granted the Appellee's Motion for a New Trial based upon his concern over the credibility of the witness Rhonda Lawson, as well as the Appellee's opportunity to investigate and inquire as to Rhonda Lawson's credibility. Although the trial judge has the authority to weigh the evidence and consider the credibility of the witness, such authorization does not obviate the essential role of the jury in resolving the conflicting evidence. Id. Appellee made arrangements to have the witness, Rhonda Lawson, testify. Appellee simply did not like and was surprised by the evidence she presented. Appellee had every opportunity to cross-examine the testimony of Rhonda Lawson and could have sought a continuance in light of her testimony. The Appellee did not. Instead, Appellee had obviously relied upon the testimony of the notary, Cassandra Wilmoth, to satisfy her burden of proper execution of Biddie Ware's Will. The testimony of Cassandra Wilmoth conflicted with the testimony of both Rhonda Lawson and the Appellee. The jury in this matter resolved the evidence and the credibility of the witnesses and found that Biddie Ware's Will was improperly executed.

An essential element of our judicial system is the right of a party, in most cases, to request a jury of his or her peers to render a verdict based upon the evidence and testimony presented. Because of the jury's unique ability to see the evidence and judge the demeanor of the witnesses on an impartial basis, a jury verdict is accorded great deference. It is the province of the jury to weigh the testimony and to resolve questions of fact when the testimony conflicts.

Shiel, 203 W. Va. at 47, 506 S.E.2d at 84 (*quoting* McNeely v. Frich, 187 W. Va. 26, 415 S.E.2d 267 (1992)).

This Court in Brammer v. Taylor, 175 W. Va. 728, 338 S.E.2d 207 (1985), addressed circumstances substantially similar to those facts in this case. In Brammer the decedent, Howard Gillespie, went to Gulf National Bank, along with his associate, Joan Brammer, the plaintiff. While at the bank he prepared a codicil to his will. The decedent asked the assistant vice president, Geraldine Short, a defendant in the matter, to type a codicil. The decedent signed the codicil and gave it to the defendant, Ronald Taylor, the president of the bank. After signing the Codicil the decedent asked Taylor to have the codicil witnessed. Several days later Taylor had two other bank employees subscribe the codicil as purported attesting witnesses. Despite the fact the witnesses were not in the presence of the decedent when they signed his codicil, the defendant Short notarized the witnesses' signatures as if they had signed on the day the decedent signed the codicil. The decedent was not present at the bank when the witnesses subscribed the codicil. The codicil was found to be invalid and the plaintiff, the beneficiary under the codicil, brought a tort action against the bank, Taylor and Short to recover the value of the lost legacy. This Court found that not only was drafting a will for another person the practice of law, but also "supervising its execution are activities which constitute the practice of law." Id. 175 W. Va. at 733, 338 S.W.2d at 212. This Court stated:

If defendants had engaged in the unauthorized practice of law in this case, in violation of W. Va. Code, 30-2-4 [1931] and W. Va. Code, 30-2-5 [1972],¹ they would be *prima facie* negligent in their supervision of the execution of the codicil, and if such negligence proximately contributed to the invalidity of the codicil, defendants would be liable to plaintiff for the value of the legacy lost by invalidation of the codicil, unless plaintiff is barred from recovering from defendants by her own comparative negligence, if any.

¹W. VA. Code § 30-2-4 and W. Va. Code § 30-2-5 impose misdemeanor criminal penalties for the unauthorized practice of law by a natural person or by a corporation or association.

Id. 175 W. Va. at 733, 338 S.E.2d at 213. At no point did this Court indicate the codicil would be valid given the decedent's clear intention to create the codicil. Instead, the Court found the intended beneficiary's cause of action to be against those supervising the execution of the codicil which contributed to its invalidity. The beneficiaries in the Will took the legacy despite the decedent's clear intention to provide for the plaintiff in his codicil.

The facts surrounding the execution of Biddie Ware's 1997 Will are similar in some respects. Biddie Ware signed her 1997 Will, essentially disinheriting all of her children except the Appellee, despite earlier expressed intentions to benefit all of her children equally. The 1997 Will was witnessed by Rhonda Lawson and Sandra Harman and notarized by Cassandra Wilmoth. The affidavit of the witnesses which was preserved with the Will indicated the witnesses signed their signature in the presence of Biddie Ware. Testimony at trial was otherwise. As in Brammer, the affidavit in this matter was false. This affidavit, however, "shall not be admissible in evidence in any case in which there is a contest over the will." W. Va. Code § 41-5-15 (2001). Because the 1997 Will was not executed properly, Biddie Ware's earlier executed will should be effective. The appellants, who are innocent litigants, should not be punished for the actions of those supervising the execution of the 1997 Will.

The trial judge's authority to grant a new trial is limited to findings that the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice. Asbestos Litigation, at syl. pt. 3. Instead, the lower court granted Appellee a new trial based upon his concern about Rhonda Lawson's credibility and Appellee's opportunity to investigate her credibility. Appellee had every opportunity to cross-examine Lawson's credibility and could have sought a continuance if she felt she was unable to investigate adequately. She

did not. None of the factors set forth in Asbestos Litigation are applicable in this instance. Consequently, the trial court abused its discretion in granting a new trial and should be reversed since the case was properly one for a jury determination. Because the trial court improperly set aside the verdict of the jury, the jury's verdict should be reinstated by this Court.

B. APPELLEE FAILED TO OBJECT TO APPELLANTS' MOTION TO AMEND THE NOTICE OF CONTEST TO ALLEGE BIDDIE WARE'S WILL WAS NOT VALIDLY EXECUTED AND DID NOT OBJECT TO INSTRUCTIONS REGARDING VALID EXECUTION OF A WILL, AND, THUS, WAIVED ANY RIGHTS TO OBJECT ON THOSE GROUNDS.

Rhonda Lawson's trial testimony was taken the Saturday before trial. Based upon her testimony that she did not witness Biddie Ware's Will in the presence of Biddie Ware, Appellants filed a Motion to Amend Their Notice of Contest to allege Biddie Ware's Will was not validly executed since its execution failed to meet the requirements set forth in W. Va. Code § 41-1-3.

W. Va. Code § 41-1-3 provides:

[n]o will shall be valid unless it be in writing and signed by the testator . . . the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; **and such witnesses shall subscribe the will in the presence of the testator, and of each other,** but no form of attestation shall be necessary.

(emphasis added).

Appellants also filed two supplemental jury instructions. Instruction No. 8 set forth the requirements of W. Va. Code § 41-1-3 and read:

No Will shall be valid unless it is signed by the testator, signed or acknowledged by the testator in the presence of at least two competent witnesses which are present at the same time, and such witnesses shall subscribe the will in the presence of the testator, and each other.

Instruction No. 9 instructed the jury the "burden of proving proper execution of the will rests on the Appellee, Almira Jane Howell, the proponent of the will." These instructions were presented to the jury for deliberation without objection.

Rule 15(b) of the West Virginia Rules of Civil Procedure allows a party to amend and supplement their pleadings to conform to the evidence presented and allows the amendment to be made upon motion of any party at any time, even after judgment. Rule 15(b) further gives the trial courts wide discretion in ruling on a motion to amend the pleadings and states the court "shall do so freely when the presentation of the merits of the action will be subserved thereby" The Appellee did not object to the Appellants' Motion to Amend or the supplemental instructions, amended special interrogatories and amended verdict form presented, nor did she seek a continuance based upon this additional evidence. Moreover, Appellee introduced evidence in an attempt to prove proper execution of Biddie Ware's Will.

The Appellee has waived any objections to the Motion to Amend the Notice of Contest and any objections with regard to the instructions since no objections were made at the time of trial and Appellee introduced evidence with regard to the execution of the will. See, State ex rel Cooper v. Caperton, 196 W. Va. 208, 470 S.E.2d 162 (1996); Proudfoot v. Dan's Marine Service, Inc., 210 W. Va. 498, 558 S.E.2d 298 (2001); McKinney v. Providence Washington Ins. Co., 144 W. Va. 559, 109 S.E.2d 480 (1959). Floyd v. Floyd, 148 W. Va. 183, 133 S.E.2d 726 (1963). Appellee again failed to raise any objections to Appellants' Motion to Amend and the supplemental jury instructions when she filed her post trial motions. Moreover, Appellee failed to raise in her post trial motions any assertion that she was prejudiced as a result of the amendment. Appellee's Motion to Alter or Amend Judgment or in the Alternative for a New

Trial is based solely upon Appellee's allegation that the jury's verdict was against the weight of the evidence. (See paragraph 7, 8, and 9 of Appellee's Motion to Alter or Amend Judgment or in the Alternative for a New Trial). The trial court did not make any finding the verdict was against the weight of the evidence. Because appellee did not raise the prejudice issue at trial or in her post trial motions, the issue was not addressed in the post trial hearings before the lower court. Appellee has now waived any right to allege prejudice since she failed to object at trial to appellants' Motion to Amend, failed to object to jury instructions, introduced evidence at trial regarding proper execution of the will, and failed to raise these allegations in her post trial motions.

C. THE APPELLANTS' CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED BY UNDUE DELAY

The West Virginia Constitution, Article III, Section 17, mandates that "justice shall be administered without . . . delay." A circuit judge has "an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission." Frantz v. Palmer, 211 W. Va. 188, 564 S.E.2d 398, 402 (2001)(citing State ex rel Patterson v. Aldredge, 173 W. Va. 446, 317 S.E.2d 805, syl. pt. 1 (1984)). In State ex rel Cackowska v. Knapp, 147 W. Va. 699, 130 S.E.2d 204 (1963), this Court held that a delay of seventeen months in rendering a decision on a Petition for a Writ of Error to an Order of the County Court confirming the Final Report of the Commissioner of Accounts in an estate matter was "unreasonable." Id., 147 W. Va. at 700-701, 130 S.E.2d at 205. Because this Court found the delay unreasonable, a Writ of Mandamus was issued compelling the lower court to act in the matter properly before it. Id.

In Frantz v. Palmer, this Court commented upon the lengthy period of time which transpired between an administrative hearing and the issuance of the Tax Commissioner's ruling. This Court acknowledged the guarantees of Article III, Section 17 of our West Virginia Constitution which mandates that "justice be administered without . . . delay." Id., 211 W. Va. 188, 564 S.E.2d at 402. "When a litigant asserts constitutional violations predicated on decisional delay, the inquiry becomes one of whether the litigant can establish that his ability to prepare or defend his case has been substantially prejudiced as a result of the delay." Id.

In this matter pending before the Court, a hearing was held on Appellee's post trial motions on April 8, 2002. Although the lower court would not rule upon the motions, the Appellants chose not to file a Writ of Mandamus. Instead, the Appellants made several requests to the trial court concerning a ruling. It was not until the Appellants scheduled the matter for another hearing, twenty months after the jury rendered its verdict in favor of the Appellants, that the court decided to grant the Appellee's Motion for a New Trial based upon issues not raised in the Appellee's Motion for a New Trial. Specifically, the lower court granted the Motion for a New Trial based on its concern about the credibility of the witness, Rhonda Lawson, as well as the Appellee's opportunity to investigate and inquire as to Rhonda Lawson's credibility.

Not only has the Appellants' ability to prepare their case for another trial been substantially prejudiced as a result of the trial judge's delay in ruling on Appellee's Motion for New Trial, the Estate of Biddie Ware still has not been settled, and is well beyond the five years contemplated by W. Va. Code § 44-4-14a.² Biddie Ware executed the Last Will and Testament

² W. Va. Code § 44-4-14a provides that "every fiduciary for the estate of a resident decedent shall, within five years of appointment as fiduciary make a full and final settlement, report and accounting for the decedent's estate"

at issue on June 6, 1997 and died on September 26, 1998. It has been more than seven years since Rhonda Lawson, Sandra Harman, and Cassandra Wilmoth observed Biddie Ware execute the subject Will. At trial, approximately four years after the Will was witnessed, Sandra Harman had very little recollection of the events. Certainly a delay of seven years could have a significant impact upon the witnesses' memory if this matter would be tried again. One witness concerning the allegations of undue influence, Ralph Ware, has since died. His testimony was presented by deposition. One of the Appellants, Robert Ware, has recently died. At trial, Robert Ware's daughter, Gilda Wise, testified concerning her conversations with the decedent, Biddie Ware, since she was an uninterested party pursuant to the Dead Man's statute. If this matter is retried, there may be an issue on her status as an uninterested party. Although Appellee acknowledges Rhonda Lawson's mother is employed locally, Appellants have no knowledge where Rhonda Lawson currently resides. Finally, two of the Appellants' witnesses concerning the issues of undue influence traveled great distances (from the Chesapeake Bay area and Texas) to testify.

The concern expressed in the lower court's ruling is about the witness secured by the Appellee. The Appellants are innocent litigants who have been subjected to undue delay and now the expense of a new trial. Because of the significant delay in rendering this decision to grant Appellee's Motion for a New Trial, the Appellants' constitutional rights have been violated.

V. CONCLUSION

The lower Court abused its discretion when it granted Appellee's Motion for a New Trial based upon its concern over the credibility of the witness Rhonda Lawson, as well as the Appellee's opportunity to investigate and inquire as to Rhonda Lawson's credibility. The jury's

verdict finding Biddie Ware's Will was improperly executed was not against the clear weight of the evidence, was not based on false evidence, and would not result in a miscarriage of justice. It is the jury's function to weigh the evidence with which it is presented, make credibility determinations, and arrive at a conclusion regarding the evidence. The jury in this matter did so and found for the Appellants, indicating Biddie Ware's Will was not properly executed. Consequently, this Court should reverse the trial court and remand this matter for reinstatement of the verdict of the jury.

ROBERT JULIAN WARE, BETTY
JEAN WORKMAN, ALMONTA CREAK,
AND ROGER WARE,
Appellants,

By Counsel,



Bridgette R. Wilson
State Bar No. 6400

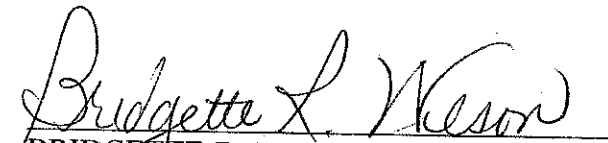
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CERTIFICATE OF SERVICE

I, Bridgette R. Wilson, counsel for Appellants Robert Julian Ware, Betty Jean Workman, Almonta Creak, and Roger Ware, do hereby certify the foregoing **Appellants' Brief** was served upon counsel of record by mailing a true copy thereof in the United States Mail, postage prepaid, addressed to:

David H. Wilmoth, Esquire
P.O. Box 933
Elkins, WV 26241

Dated this 4th day of November, 2004.


BRIDGETTE R. WILSON
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IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

ROBERT JULIAN WARE,
BETTY JEAN WORKMAN,
ALMONTA CREAK AND
ROGER L. WARE,

Plaintiffs,

vs.

CIVIL ACTION NO. 00-C-110

ALMIRA JANE HOWELL, Executrix
of the Estate of Biddie L. Ware,

Defendant.

E X C E R P T O F J U R Y T R I A L

of

November 5, 2001 through November 6, 2001

The above entitled and numbered cause came on to be heard in its regular order before THE HONORABLE JOHN L. HENNING, Judge, Twentieth Judicial Circuit, Elkins, Randolph County, West Virginia, and all preliminary matters having been disposed of the cause proceeded to hearing and the following proceedings were had, to-wit:

Taken and transcribed by:

Shirley J. Kittle, ERO
Twentieth Judicial Circuit
Randolph County Courthouse
Elkins, WV 26241

A P P E A R A N C E S

1
2 THE HONORABLE JOHN L. HENNING, JUDGE
3 Twentieth Judicial Circuit
4 Randolph County Courthouse
5 2 Randolph Avenue
6 Elkins, WV 26241

7
8 Appearing on behalf of the Plaintiff:

9 BRIDGETTE R. WILSON
10 WV State Bar ID #6400
11 BUSCH & TALBOTT, L.C.
12 Attorneys at Law
13 P. O. Box 1819
14 Elkins, WV 26241

15
16 Appearing on behalf of the Defendant:

17 DAVID H. WILMOTH
18 WV State Bar ID #5942
19 Attorney at Law
20 P. O. Box 933
21 Elkins, WV 26241
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I N D E X

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NAME

DESCRIPTION

PAGE

R. MIKE MULLENS

Direct Examination
by Bridgette R. Wilson

4

COURT RECORDER

Certification

21

1 THE COURT: Mr. Mullens. (Witness sworn by the Clerk).

2 DIRECT EXAMINATION OF R. MIKE MULLENS BY BRIDGETTE R. WILSON;

3 Q. Tell us your full name, please?

4 A. Robert Michael Mullens?

5 Q. And where do you live?

6 A. Here in Elkins.

7 Q. And how are you employed?

8 A. I'm an Attorney.

9 Q. How long have you been an Attorney?

10 A. Since 1974.

11 Q. In your practice have you had an opportunity to draft
12 Wills of various individuals?

13 A. Yes, I have.

14 Q. How often do you typically draft Wills?

15 A. A lot.

16 Q. When you say a lot -- can you give the Jury some idea
17 of maybe how many a month or how many a year?

18 A. My guess would be an average of four (4) to six (6) to
19 seven (7) every month.

20 Q. Okay --

21 MS. WILSON: May I approach, Your Honor.

22 Q. (Cont'd) -- in front of you is what's been marked as
23 Plaintiffs' Exhibit Number One (1) which there's been testimony
24 that -- that is the Last Will and Testament of Biddie Lemon Ware
25 -- do you recognize that document?

1 A. It's a Will we prepared at our office.

2 Q. And have you had an opportunity to review -- well, let
3 me back up -- do you keep files with regard to various people
4 that you do Wills for?

5 A. Yes.

6 Q. Do you know if you have a file on Biddie Ware?

7 A. I really don't know -- I haven't looked for it.

8 Q. And does this appear to be what has been testified to
9 as Biddie Ware's Will?

10 A. Yes.

11 Q. Okay, and the witnesses listed at the end of the Will
12 are Sandra Harman and Rhonda Lawson -- they already testified
13 before you -- do they -- do they or did they work for you back
14 in 1997?

15 A. Correct -- yes.

16 Q. It's also notarized by Casandra Wilmoth does -- did she
17 also work for you?

18 A. Yes.

19 Q. Did you have an opportunity to meet with Biddie Ware
20 before she executed that Will?

21 A. I -- I don't have any recall -- I have a vague
22 recollection of meeting with either Mrs. Ware -- Mrs. Howell --
23 or Mrs. Howell -- I don't specifically recall.

24 Q. Now, you say Mrs. Howell -- who do you mean by Mrs.
25 Howell?

1 A. Well, I assume -- the Plaintiff or the Defendant in the
2 case.

3 Q. Jane Howell -- and did you have any other connection to
4 Jane Howell through her daughter-in-law or otherwise?

5 A. Well, her -- yeah, her daughter-in-law was a temporary
6 secretary at our office and her name was Susan -- and my
7 specific recollection of what happened -- and I can't tell you
8 if it was four (4) or five (5) years ago that we did this, but
9 Susan asked me if we would prepare a Will for her grandmother
10 and I said, "Yes, we'll -- we'll be glad to do it."

11 Q. And do you have a specific recollection of meeting with
12 Jane Howell?

13 A. I just have a vague recollection of meeting with Mrs.
14 Howell and Mrs. Ware or Mrs. Howell -- I just -- I really don't
15 remember specifically.

16 Q. Do you recall specifically whether or not you took Jane
17 Howell into your office and sat down with her and went over what
18 her mother wanted changed in her Will?

19 A. I went over it with someone and made notes of it -- I
20 remember that, but I don't remember who.

21 Q. Jane Howell has earlier testified here and I think the
22 testimony will -- it would be -- you know -- come out in
23 evidence that Biddie Ware her mother did not actually come and
24 meet with you?

25 A. Okay.

1 Q. If she would say that does -- does that help refresh
2 your recollection as to whether --

3 A. It really doesn't -- I -- I just -- I mean -- I really
4 don't have a specific recollection of -- of talking with
5 anybody.

6 Q. Okay -- and you said you may have met with Jane Howell
7 -- in that particular Will that was prepared in your office --
8 who does the bulk of the estate go to?

9 A. She leaves a dollar -- a dollar to each of the
10 following children -- Robert and Ralph -- Thelma -- Almonta --
11 Elmira -- Betty and Ruby, and then the balance goes to Elmira
12 Jane Howell.

13 Q. And in your practice in doing these Wills -- a
14 significant number of Wills every month -- is it typical for you
15 to sit-down with the person that's actually making the Will?

16 A. Yes.

17 Q. Do you know why this circumstance was different?

18 A. If it is different I don't -- I don't know why -- I
19 don't remember.

20 Q. Okay.

21 A. I mean I can tell you normally what we do and that
22 would be that I would sit down with the person who wants to make
23 the Will -- talk to them -- take notes -- give the notes to one
24 (1) of the secretaries to type the Will up -- I review it --
25 call the person and tell them the Will is ready, and they come

1 in and sign it.

2 Q. Do you recall if you were present when Biddie Ware
3 signed that Will?

4 A. I don't recall -- I don't think I was, but I don't
5 recall.

6 Q. You've told us what normally happens -- have you ever
7 had a situation where someone came in, and wanted to leave the
8 bulk of their estate to someone that happened with them?

9 A. Yes.

10 Q. Do you take any special precautions in such a
11 circumstance?

12 A. You know -- if I thought something was wrong I would --
13 if I felt like the person wasn't competent to make that decision
14 or if -- if -- you know -- if I just felt that they were being
15 influenced improperly -- yes, I would.

16 Q. Have you ever had a situation where you thought someone
17 was being influenced improperly?

18 A. Yes.

19 Q. What -- what did you do if anything because of that?

20 A. Well, I mean sometime -- several times we've actually
21 videotaped the signing of a Will. We may talk to some of the
22 other heirs about it -- just to confirm what the status is.
23 If I feel like somebody is not able or competent to sign a Will
24 or they don't know what they're doing we don't prepare it for
25 them.

1 Q. And in this particular circumstance you weren't there
2 when she executed it, and you just don't have a recollection of
3 meeting with her -- her being Biddie Ware?

4 A. That's correct.

5 Q. So as you sit here today you don't know if any special
6 precautions were taken since Biddie Ware was leaving the bulk of
7 her estate to Jane Howell, and Jane Howell is the one that came
8 in and said this is what she wants?

9 A. Well, I -- I'm not aware of any because evidently we --
10 we didn't feel like there was a need for any or we would have
11 done it.

12 Q. Now, you said that you recall taking notes?

13 A. Yes --

14 Q. Did I understand that?

15 A. -- that's normally what I would do.

16 Q. Do you recall taking notes with either Jane Howell --

17 A. I don't specifically recall it -- I mean I'm sorry --
18 I wish I did, but I just don't.

19 Q. Okay.

20 A. But usually I take the notes of what -- what they want,
21 and give them to one (1) of the secretaries.

22 Q. So let me make sure I understand your testimony --
23 normally you bring someone in -- you sit down with them and you
24 take notes, and then you give it to someone else to draft?

25 A. Correct.

1 Q. In this particular circumstance you just don't
2 remember?

3 A. I just don't remember and we -- like I said, we do a
4 lot of them and this was years ago -- we -- we do have a
5 procedure or protocol in the office of what we do and I think it
6 was followed in this case, but I don't specifically remember the
7 details of it.

8 Q. Do you know if you or anyone else in your office -- I
9 think you testified about you're not sure about you, but do you
10 know if anyone else in your office met with Biddie Ware before
11 that Will was actually drafted?

12 A. I don't -- I don't know.

13 MS. WILSON: I have no other questions, thank you.

14 THE COURT: Mr. Wilmoth?

15 MR. WILMOTH: I have no questions, Your Honor.

16 THE COURT: Thank you, Mr. Mullens.

17 THE WITNESS: Thank you.
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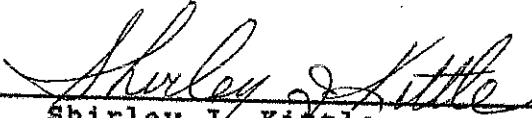
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2 STATE OF WEST VIRGINIA,

3 COUNTY OF RANDOLPH

4 I, Shirley J. Kittle, Electronic Recording Operator,
5 Twentieth Judicial Circuit, Randolph County, West Virginia,
6 hereby certify that I attended the Court proceedings had in the
7 cause named and numbered in the caption hereto on November 5,
8 2001 through November 6, 2001, reported the proceedings had upon
9 such cause by electronic audio recording, and that from the
10 electronic recording tapes I have caused to be transcribed under
11 my supervision the foregoing ten (10) pages, and that same
12 constitute the true and correct proceedings had on said cause to
13 the best of my skill and ability.

14 I hereby certify that the transcript within meets the
15 requirements of the Code of the State of West Virginia, 51-7-4,
16 and all rules pertaining thereto as promulgated by the Supreme
17 Court of Appeals.

18 WITNESS my hand this 12th day of October, 2004.

19
20 
21 Shirley J. Kittle
22 Electronic Recording Operator
23 Twentieth Judicial Circuit Court
24 Randolph County Courthouse
25 Elkins, WV 26241