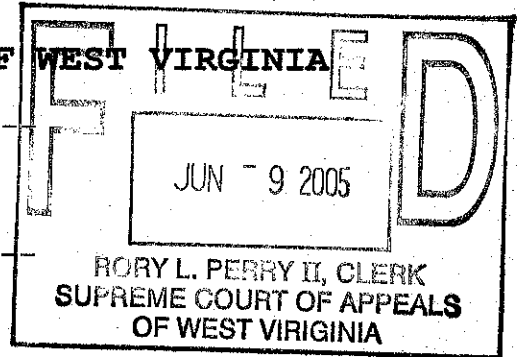


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32691



UNITED BANK, INC., as TRUSTEE
of the ALBERT M. PRICE TRUST,

Plaintiff below/Appellee,

v.

KENNETH N. DICKENS and RICHARD RANDALL
LAMBERT, JR., individually and
on behalf of those similarly
situated, and Unknown Heirs
of Albert M. Price, Jr.,

Defendants below/Appellants,

and

KENNETH N. DICKENS, and RICHARD
RANDALL LAMBERT, JR., individually
and on behalf of those similarly
situated,

Third-Party Plaintiffs below/Appellants,

v.

UNITED BANK, INC., a banking
corporation,

Third-Party Defendant below/Appellee.

**BRIEF OF APPELLANTS KENNETH N. DICKENS AND
RICHARD RANDALL LAMBERT, JR.**

Submitted by:

Mark W. Kelley, Esq.
(WV Bar No. 5768)
Christopher J. Winton, Esq.
(WV Bar No. 4096)
RAY, WINTON & KELLEY, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
Telephone: (304) 342-1141
Telecopier: (304) 342-0691

Timothy A. Bradford, Esq.
(WV Bar No. 5744)
BRADFORD LAW OFFICES
P.O. Box 2386
Charleston, WV 25328
Telephone: (304) 344-5700
Telecopier: (304) 344-2411

TABLE OF CONTENTS

I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL 1

II. STATEMENT OF FACTS 2

 A. Summary of the Case. 2

 B. The Parties. 4

 C. The 1957 Trust. 5

 D. The 1977 Complaint and Reformed Trust. 5

 E. The 1988 Conversion of the Assets of the 1957 Trust. 8

 F. The Venue Hearing Before Judge Hill. 9

 G. Summary Judgment. 13

III. ASSIGNMENTS OF ERROR 14

IV. POINTS AND AUTHORITIES RELIED UPON 15

V. DISCUSSION OF LAW 16

 A. The circuit court erred when it ruled as a matter of law that the term "blood relatives" as used by Dr. Price means "heirs at law" because such a construction eviscerates Dr. Price's undisputable intent to establish scholarships available to his descendants. 16

 B. The Circuit court erred when it failed to find that United Bank is estopped to claim that the "blood relatives" are heirs at law. 19

 1. Judicial estoppel. 20

 a. Inconsistent positions. 21

 b. Same parties. 23

 c. Benefit received. 23

 d. The new position injures Appellants. 24

 e. The elements of judicial estoppel have been met. 25

 2. Collateral estoppel. 25

 C. The circuit court erred in finding that venue was proper in Wood County because the evidence did not support such a finding and, if upheld, such a holding would permit any trustee anywhere to "forum shop" by simply declaring the situs of a trust to be in any county (or state) that it deems fit. 26

 D. The circuit court erred when it found that Appellants lack standing to sue United Bank and that the trust at issue is a "charitable trust." 32

 E. The circuit court erred in finding, without even a scintilla of evidence, that Patricia Milam is the sole surviving "blood relative" of Dr. Albert Price. . . . 34

VI. RELIEF PRAYED FOR 35

I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This litigation involves the interpretation and administration of a scholarship trust created by Dr. Albert Price, a deceased optometrist from Boone County, West Virginia, for his "blood relatives" which is managed by United Bank, Inc. as trustee. Appellants Kenneth M. Dickens and Richard Randall Lambert, Jr. are relatives of Dr. Price who sued, individually and on behalf of those similarly situated, alleging numerous breaches of trust committed by the trustee United Bank. The Circuit Court of Wood County, West Virginia in the civil action styled United Bank, Inc., as Trustee of the Albert M. Price Trust v. Robert C. Blosser, et als., Wood County Civil Action No. 03-C-342 (Judge Hill, presiding), entered rulings in favor of the trustee United Bank in two final orders: (1) *Order Denying Moving Respondents' Motion to Dismiss for Improper Venue and Granting Motion to Withdraw Previously Filed Motion to Dismiss for Improper Service*; and (2) *Final Order Granting Summary Judgment in Favor of Petitioner United Bank, Inc., Trustee and Dismissing the Complaint/Counterclaim of Plaintiff Kenneth M. Dickens, et als.* The Appellants have appealed to the West Virginia Supreme Court of Appeals certain of the rulings made by the circuit court in such Orders.

Specifically, this appeal challenges the circuit court's grant of summary judgment to United Bank based upon an erroneous conclusion that the term "blood relatives" as used in Dr. Price's trust means "heirs at law," thereby excluding the

Appellants and numerous other Price relatives from preferential treatment for college scholarships. This appeal also challenges the circuit court's ruling that venue and jurisdiction of this case is proper in Wood County, West Virginia, where the headquarters of the bank is, instead of in Boone County, West Virginia where Dr. Price's will was probated, where many of the defendants reside, and where prior legal proceedings were held. Finally, this appeal challenges the circuit court's entry of summary judgment holding that the Appellant's lack standing in this case because only one "heir at law" of Dr. Price is alive today, based solely on the unsupported assertions of United Bank's counsel and without any admissible evidence in the record to support such assertion.

II. STATEMENT OF FACTS

A. Summary of the Case.

Prior to his death, Dr. Albert Price established a trust (later modified by amendment) which had multiple purposes, one of which was to provide college scholarships for "worthy boys and girls." In the amendment to his trust, he specifically directed that his "blood relatives" be given preference for these scholarships. The scholarship "phase" of his trust was not to begin until his sisters who survived him had all passed away.

After his death, his remaining estate (which was substantial) was supposed to be paid into the trust. However, for tax reasons which did not exist at the time the trust was created, the trustee United Bank filed a "friendly" lawsuit in

the Circuit Court of Boone County, West Virginia (the county of Dr. Price's residence and the probate of his will) wherein it requested permission to divert the money from his estate into a court-authorized second trust. Importantly, this second trust eliminated the preference for college scholarships for Dr. Price's "blood relatives." However, United Bank asserted to the Boone County Circuit Court that the original trust would stay intact and that his "blood relatives" would receive preferential scholarships out of the existing trust. Based in part upon the Bank's assertions, the Boone County Circuit Court authorized the creation of the second, reformed trust.

Several years later, Dr. Price's last surviving sister died, and his "blood relatives" should have started receiving preference for college scholarships from the first trust. However, despite its prior representations to Dr. Price's relatives and to the Boone County Circuit Court and without seeking any court approval, United Bank terminated the first trust, moved all assets of the first trust into the second trust, and refused thereafter to honor Dr. Price's instructions to provide his "blood relatives" with scholarships.

When it became apparent that this dispute would reach the courts, United Bank made it to the courthouse first by filing a declaratory judgment action in Wood County, West Virginia, seeking a ruling that its conversion of funds from the first trust into the second trust was a proper exercise of its fiduciary power. Contemporaneously, Appellants filed a complaint

in Boone County seeking, among other things, class action status and damages for the wrongs committed by the trustee United Bank. Appellants moved unsuccessfully for dismissal of the Wood County suit, and instead the Boone County action was ordered to be transferred to Wood County. Without any discovery occurring in the case, the Wood County Circuit Court then held, as a matter of law, that the term "blood relatives" as used in Dr. Price's trust means "heirs at law," ruled without any supporting evidence that there was only one remaining heir at law now living with standing to make a claim, found that Appellants had no standing in the case, and dismissed Appellants from the case. A more detailed recitation of the facts follows.

B. The Parties.

Dr. Albert M. Price was an optometrist who practiced for many decades in Boone County, West Virginia. Dr. Price was from a large family with strong roots in the Big Coal River area of Raleigh and Boone counties. Appellants are "blood relatives" of Dr. Price who died in 1976, a resident of Boone County.

Before his death, Dr. Price established a trust by a written agreement dated April 4, 1957 with Kanawha Banking and Trust Company. Kanawha Banking and Trust Company was a bank headquartered in Charleston, Kanawha County, West Virginia and doing business in Boone County. In 1986, United Bank, Inc. (then known as United National Bank) took over Kanawha Banking and Trust Company. United Bank (hereinafter, the "Bank") has its headquarters in Wood County, West Virginia, but still maintains

its Charleston office in the United Center, 500 Virginia Street, East, Charleston, Kanawha County, West Virginia. For the purposes of this appeal, it is important to note that United Bank continues to maintain a trust office at its Charleston, West Virginia branch.¹

C. The 1957 Trust.

In general, Albert M. Price's 1957 Trust directed that the income from the trust be distributed to Dr. Price's sisters during their lifetimes,² and upon the death of the last surviving sister, Dr. Price directed that the trust be held and administered as a trust to provide scholarships. Motion to Dismiss for Improper Venue, at Exhibit A. On January 14, 1969, Dr. Price amended the 1957 Trust by a supplemental agreement which established a priority for qualified "blood relatives" of Albert M. Price in the awarding of scholarships.³ Motion to Dismiss for Improper Venue, at Exhibit C.

D. The 1977 Complaint and Reformed Trust.

Dr. Price died on November 6, 1976. His will (including a handwritten codicil) was duly admitted to probate by

¹United Bank's main web site page is located at www.unitedbank-wv.com. At that page, one can click on an icon for the Bank's "Trust/Investment Services." That page notes where the Bank's trust offices are located throughout West Virginia. Importantly, those seeking additional information on the Bank's trust services are provided with a phone number for its **Charleston** offices (348-8355).

²Dr. Price had no wife or children.

³Hereinafter, the "1957 Trust" refers to the 1957 trust, as amended in 1969, unless otherwise indicated.

the County Commission of Boone County, West Virginia, and the Bank was appointed executor of his Estate. The will basically gave Dr. Price's probate estate to the 1957 Trust (commonly called a "pour over"). Dr. Price's probate estate was subject to federal estate tax, and the Bank as executor determined that because of changes made by the Tax Reform Act of 1969 the pour over of Dr. Price's probate estate which was given in his will to the 1957 Trust would not qualify for the federal estate tax charitable deduction. Specifically, the preferential treatment of the donor's relatives for scholarships as Dr. Price intended would disqualify the Trust. To correct this problem, on December 28, 1977, the Bank filed a complaint for declaratory judgment in the Circuit Court of Boone County, West Virginia to determine whether Dr. Price's will could be reformed so his estate would qualify for the federal estate tax charitable deduction (hereinafter, the "1977 Complaint").

The Bank's 1977 Complaint sought permission from the Boone County Circuit Court to place the funds from Dr. Price's probate estate into a *second, separate, and court-approved trust* which would be identical to the original 1957 Trust but which would be reformed so as not to contain the defective provisions which had adverse tax consequences. The preference for "blood relatives" in awarding scholarships was to be deleted. Among other things, ***the Bank represented to the Boone County Circuit Court in the 1977 Complaint that the 1957 Trust would continue on its own and would not be altered in any way, including the***

preference for awarding scholarships to the "blood relatives" of Albert M. Price.

The 1977 Complaint was a "friendly lawsuit" in which there was no true adverse party. See, e.g., State ex rel. Deputy Sheriff's Assoc. v. Sims, 513 S.E.2d 669 (W. Va. 1998). Indeed, in order to insure that there was no real opposition to the relief sought in the 1977 Complaint, the Bank caused a letter dated December 30, 1977 to be sent to the "Blood Relatives of Dr. Albert M. Price." Motion to Dismiss for Improper Venue, at Exhibit E.

Such letter, authored by the Bank's trust officer Doyle C. Parkins, mis-characterized the Complaint as a mere "formality" and encouraged the relatives to hire the same attorney who was representing Albert Price's then living sisters (who were not opposed to Petitioner's requested relief). Mr. Parkins' letter also included a letter dated October 12, 1977 from attorney David Higgins, who represented the Bank in the 1977 Complaint. Motion to Dismiss for Improper Venue, at Exhibit F.

Attorney Higgins' letter of October 12, 1977 began by recognizing, among other things, that Albert Price had the testamentary intent to provide scholarships "with particular emphasis on [his] blood relatives." The letter went on to explain the adverse tax consequences of placing Mr. Price's remaining estate into the 1957 Trust, recommended the court-ordered establishment of a second trust free from provisions with adverse tax consequences, and argued that Mr. Price's then-living

sisters and his blood relatives would not be adversely affected by allowing "the 1957 trust to continue undisturbed[.]" Although Attorney Higgins' letter disclosed that the 1957 trust had assets of approximately \$200,000, it failed to disclose that the value of the residuary probate estate was substantially greater, being approximately \$625,000.

Based upon the affirmative representations of Appellee, and in the absence of any real objections by any *bona fide* defendants, the Circuit Court of Boone County entered an order granting the relief sought in the 1977 Complaint. Motion to Dismiss for Improper Venue, at Exhibit G. The 1957 Trust was left intact and unchanged as a private trust for the decedent's sisters and the "blood relatives."

E. The 1988 Conversion of the Assets of the 1957 Trust.

Albert M. Price's last surviving sister died on August 13, 1988. At that time, the scholarship phases of the 1957 Trust and the 1977 Reformed Trust began. Instead of administering the 1957 Trust in accordance with its terms by providing scholarships to the "blood relatives," the Bank simply merged and combined the assets of the 1957 Trust into the assets of the 1977 Reformed Trust.⁴ Such merger was done without any approval or consent of

⁴At this point, the 1957 Trust essentially ceased to exist, because it's *res* had been misappropriated. The surviving trust is the 1977 Reformed Trust. This becomes significant later, when in 2003 the Bank argues that it is administering the trust from Wood County, West Virginia. Without a *res*, it is impossible for the Bank to be administering the 1957 Trust *anywhere*, let alone Wood County.

the Boone County Circuit Court, any other court, or any parties interested in the trusts including the Appellants. As a result, the Bank thereafter violated the terms of the 1957 Trust and the order of the Boone County Circuit Court and deprived the "blood relatives" of the preferential treatment for scholarships as required under the 1957 Trust. Appellants contend that United Bank's actions constitute several serious torts including breach of fiduciary duty, conversion, negligent or intentional misrepresentation, and fraud. To this day, no blood relative of Albert M. Price has ever received a preferential scholarship.

F. The Venue Hearing Before Judge Hill.

From this background, on July 30, 2003, the Bank as plaintiff filed a *Petition for Declaratory Relief* against the Appellants and others as defendants in the Circuit Court of Wood County, West Virginia. Before answers were filed by any defendants, the Bank filed on August 6, 2003 an *Amended Petition for Declaratory Relief*. The Bank prayed for an "order stating that the Trustee of the Albert M. Price Trust has administered and is administering the trust properly."

On September 15, 2003, Appellants, who are some of the "blood relatives" joined as defendants in the Wood County action, filed a motion to dismiss on grounds of improper venue in Wood County. The sole basis for the Bank's claimed venue in Wood County is that the Bank's "headquarters" is in Wood County and that the trust res is therefore in Wood County. Appellants contend that no venue or jurisdiction properly lies in Wood

County. Venue and jurisdiction lie in Boone County where the settlor resided, the trust was accepted, the decedent died, the estate was probated, the Bank was appointed as executor, the Bank previously filed the action to create the 1977 Reformed Trust, and most of the defendants reside.

A hearing on the motion to dismiss was held on October 20, 2003. See generally, Transcript of 10/20/2003 hearing. At that time, the Bank conceded that the general venue statute in West Virginia, W. Va. Code § 56-1-1, requires a suit to be filed where a defendant resides or where the cause of action arose. Id., at p. 19. The Bank then contended that in this case the "cause of action" arose in Wood County because the trust is being administered in Wood County and the purpose of the declaratory judgment action is to obtain a decree that the trust has been administered properly. Id., at p. 20. Moreover, the Bank asserted proper venue under W. Va. Code § 35-2-2, which permits a trustee to bring an action in the county where the trust subject is when there is a question as to who are the beneficiaries of the trust. Id. The only **evidence** submitted by the Bank at this hearing that the trust *res* is present in Wood County was counsel's unsupported statement that the trust's current trust officer works in Parkersburg. Id.

The Bank has never previously contended that the 1957 Trust was located in Wood County. After the *res* of that trust was misappropriated into the 1977 Reformed Trust in 1988, the Bank held out that 1977 Reformed Trust had a situs in Kanawha

County. Appellants, even without conducting discovery, were able to produce for the circuit court several documents generated by the Bank which list the situs of the 1977 Reformed Trust as being in Kanawha County. These documents include: (1) a 1989 document filed with the Internal Revenue Service adopting rules and regulations of the trust; (2) a 2001 Return of Private Foundation; and (3) a letter from a trust officer to the Bank's counsel in 1994 seeking advice regarding the trust.⁵ In other words, at all other times *outside of this present litigation*, the Bank appears to have listed the trust's situs as Kanawha County. For whatever reason, the Bank has decided that this litigation should take place in Wood County.

Despite this evidence, Judge Hill simply chose to ignore the Bank's own admissions:

THE COURT: Well, they say the trust officer is here [Wood County], that administers it and does the work in it. And that is an important indicia.

MR. KELLEY: It is, but I think it is also an important indicia when you represent to the Internal Revenue Service that the situs is in Charleston, West Virginia, in 2001. When did that change, if there is a trust officer in Wood County, as they say, that was working this trust in 2001? But in 2001, they took the position, with their federal filings, that the trust was located in Charleston. How can they now, under the same set of facts, argue that the situs of the trust is here in --

⁵These documents were shown to Judge Hill at the venue hearing, and a discussion about them appears in the transcript from that hearing. However, they were not submitted as formal exhibits.

THE COURT: What is the difference? How does that make any -- how does the fact that the Internal Revenue Service thinks it is in Charleston have anything to do with the case?

MR. KELLEY: Because they have taken that position.

THE COURT: Yeah, but it is not a position that take, it is what the facts show, in my opinion. It is not the lawyers' positions that are going to control this motion. It is the factual situation.

MR. KELLEY: I would contend that their own filings constitute an admission, on the part of the bank, that the situs is in Charleston.

THE COURT: Why? What good is it? What purpose does it serve for the bank to have it here as opposed to anywhere else?

Transcript of 10/20/2003 hearing, at pp. 27-28.

Judge Hill denied the Appellants' motion to dismiss the proceedings from Wood County based upon nothing more than the Bank's assertion that the trust officer who oversees the 1977 Reformed Trust works in Parkersburg. In doing so, the Judge ignored the Bank's own prior admissions that the situs of the trust is in Kanawha County; the extensive history of both trusts with their historical connection to Boone County; the location of the trust officer in Kanawha County who was in charge when the 1957 Trust was raided in 1988; the residences of the "blood relatives," most of whom were and are from Boone County; a forum selection clause in the 1957 Trust indicated Kanawha County; and, the 1978 Order of the Boone County Circuit Court which called for future actions involving the 1977 Reformed Trust to be brought back in Boone County.

Again, despite all of this, the Judge refused to transfer the venue of the case to Boone County:

THE COURT: Now, in order for involuntary change of venue to occur, there has to be a showing that Boone County would better afford convenience to the parties and the witnesses likely to be called, and if the ends of justice would be better served by such change of venue. I mean, I have heard arguments both ways on this. I can't find anything, except for the fact that the bank, who is resident here, and apparently is administering the trust from here, has brought this action here. And I can't find any overriding reason, to serve the ends of justice, to change it.

Id., at pp. 30-31.

G. Summary Judgment.

After the venue issue was decided by the Wood County Circuit Court, and again without any discovery in the case, United Bank filed a *Motion for Summary Judgment* which sought, in essence, rulings from the court: (1) that the term "blood relatives" as used by Dr. Price in the trust instrument means "heirs at law"; (2) that Patricia Milam (a named party who did not appear in the action) was the sole surviving heir at law; and (3) that, because Ms. Milam was the sole heir at law, Appellants as other and more distant relatives lacked standing to sue United Bank. After the briefing of the issues and oral argument, the circuit court entered a final order granting all of the relief requested by United Bank.

Appellants now seek (1) reversal of the circuit court's ruling that the term "blood relatives" means "heirs at law; (2) a ruling from this Court that "blood relatives" means

"descendants"⁶ or a remand for further factual development on the intent of Dr. Albert Price; (3) reversal of the circuit court's ruling that venue was proper in Wood County, West Virginia and a transfer of this case to the Boone County Circuit Court; and (4) reversal of the circuit court's ruling that Appellants have no standing to pursue their claims against United Bank as well as the ruling that Patricia Milam constitutes the sole remaining "blood relative" of Dr. Albert Price.

III. ASSIGNMENTS OF ERROR

- A. The circuit court erred when it ruled as a matter of law that the term "blood relatives" as used by Dr. Price means "heirs at law" because such a construction eviscerates Dr. Price's undisputable intent to establish scholarships available to his descendants.
- B. The circuit court erred when it failed to find that United Bank is estopped from asserting that the term "blood relatives" means "heirs at law."
- C. The circuit court erred in finding that venue was proper in Wood County because the evidence did not support such a finding and, if upheld, such a holding would permit any trustee anywhere to "forum shop" by simply declaring the situs of a trust to be in any county (or state) that it deems fit.
- D. The circuit court erred when it found that Appellants lack standing to sue United Bank and that the trust at issue is a "charitable trust."

⁶Black's Law Dictionary 231 (Abridged 5th ed. 1983) defines "descendants", *inter alia*, to mean "[t]hose persons who are in the blood stream of the ancestor." Albert Price was never married and had no issue. Here, Appellants use the term "descendants" to mean the descendants of Albert Price's parents, who would be the collateral kindred of Dr. Price. Black's Law Dictionary, in comments to the definition of the term "descent" notes that the term "collateral line" is "[a] line of descent connecting persons who are not directly related to each other as ascendants or descendants, but whose relationship consists in common descent from the same ancestor." Id. Such is the case here.

E. The circuit court erred in finding, without even a scintilla of evidence, that Patricia Milam is the sole remaining "blood relative" of Dr. Albert Price.

IV. POINTS AND AUTHORITIES RELIED UPON

Carter v. City of Bluefield, 132 W. Va. 881, 898, 54 S.E.2d 747, 757 (1949) 20

Charleston National Bank v. Thru the Bible Radio Network, 507 S.E.2d 708 (W. Va. 1998) 31

Christian v. Sizemore, 185 W. Va. 409, 407 S.E.2d 715 (1991) 25

Coberly v. Coberly, 580 S.E.2d 515 (W. Va. 2003) 33

Crawford v. Carson, 138 W. Va. 852, 78 S.E.2d 268 (1953) 29

Crispen v. West Virginia Secondary Schools Activities Commission, 525 S.E.2d 677 (W. Va. 1999) 29

Gardner v. Gardner, 144 W. Va. 630, 637, 110 S.E.2d 495, 500 (1959) 20

Goetz v. Old National Bank of Martinsburg, 140 W. Va. 422, 84 S.E.2d 759 (1954) 32, 33

Hall v. Ocean Accident & Guarantee Corp., 122 W. Va. 188, 9 S.E.2d 45 (1940) 28

King v. Riffée, 172 W. Va. 586, 589, 309 S.E.2d 85, 88 (1983) 22

MacDonald v. Long, 100 W. Va. 551, 552, 131 S.E.2d 252, 253 (1926) 20

Moore v. Sun Lumber Co., 166 W. Va. 735, 276 S.E.2d 797 (1981) 25

Security National Bank v. Willim, 152 W. Va. 27, 35, 158 S.E.2d 715, 720 (1968) 17

Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979) 27

Staats v. Co-Operative Transist Co., 125 W. Va. 473, 24 S.E.2d 916 (1943) 28

State ex rel. Deputy Sheriff's Assoc. v. Sims, 513 S.E.2d 669 (W. Va. 1998) 7

Tankovits v. Glessner, 563 S.E.2d 810 (W. Va. 2002) 33

<u>W. Va. Dep't of Transportation, Div. of Highways v. Robertson,</u> <u> S.E.2d</u> _____, 2005 WL 1124401 (W. Va., May 10, 2005)	19, 20
West Virginia Code § 35-2-2	10
West Virginia Code § 56-1-1	10, 28, 29
19 M.J. <u>Trusts and Trustees</u> §§ 105, 131 (2003)	33
<u>Blackstone Commentaries</u>	22
<u>Black's Law Dictionary</u> 231 (Abridged 5 th ed. 1983)	14

V. DISCUSSION OF LAW

- A. The circuit court erred when it ruled as a matter of law that the term "blood relatives" as used by Dr. Price means "heirs at law" because such a construction eviscerates Dr. Price's undisputable intent to establish scholarships available to his descendants.**

United Bank argued, and the circuit court agreed, that the term "blood relatives" as used in Dr. Price's trust means, as a matter of law, "heirs at law." The circuit court reached its conclusion without any discovery being had in the case and contrary to evidence that was before the court, and in doing so, the court completely eviscerated Dr. Price's clear overriding intent to provide scholarships for his collateral kindred such as the Appellants. The phrase "blood relatives" as used by Dr. Price in his trust clearly is an expansive definition and means descendants of his parents, i.e., his collateral kindred.

Dr. Price is no longer able to express his intent. The rules of construction, however, exist to allow the court to determine his intention from the words he used and from his surrounding facts and circumstances.

It is well established that words used in a will should not be confined to their strict meaning when it is clear from a reading of the entire instrument that a more flexible connotation was intended. . . . "In the construction of a will technical words are presumed to have been used in a technical sense and should ordinarily be given their strict meaning; but this rule is not absolute and when it appears from the context that another meaning was intended such words will not be applied in their technical sense."

Security National Bank v. Willim, 152 W. Va. 27, 35, 158 S.E.2d 715, 720 (1968) (citation omitted).

The Willim case involved the construction of a will. The Supreme Court considered the early vesting rule in connection with the testator's intent and the use of the word "then" to determine whether the estate vested at the death of the testator or at the death of the life tenant. The Willim Court opined that "[w]e believe that [the testator] clearly intended, by her use of the word 'then' and by the manner of disposition, to keep the assets of her estate within the sphere of blood relatives, to the exclusion of strangers." 152 W. Va. at 32, 158 S.E.2d at 719.

In the case *sub judice*, Dr. Price executed a Supplemental Agreement of Trust on January 14, 1969, which reads in part:

upon the later death of the last surviving sister of Grantor, the Trustee shall use and distribute the net income in the form of annual scholarships to **worthy boys and girls who are keenly interested in and capable to taking advantage of an opportunity for a college education**. Said scholarships shall be awarded under reasonable rules and regulations to be prescribed by the Trust, except that **first priority and consideration shall be given to qualified blood relatives of the Grantor**, regardless of the place of their residence, second consideration shall be given to qualified boys

and girls residing in Boone County, West Virginia, and third consideration shall be given to boys and girls residing in the other fifty-four counties of West Virginia. (emphasis added)

In its Motion for Summary Judgment and supporting memorandum of law, United Bank essentially contended, and the circuit court agreed, that Dr. Price intended that Patricia Lee Milam, an heir who is an adult of middle age, should be considered a girl "keenly interested in and capable of taking advantage of an opportunity for a college education" and his only blood relative with standing in this matter. This is absurd.

Typically, young people go to college and not older adults with established lives. Moreover, young people ("boys and girls") who want to go to college generally also have living parents who want their children to go to college. The living parents do not themselves want to go to college because they have already done so or do not need to do so because they have a career. Dr. Price clearly knew and understood all of this. His intention from the above language was not to cut off a lower generation of his relatives from getting a scholarship because their parents (Dr. Price's heirs) were still living, eliminating the "heirship" for the children.

The Bank's strained interpretation of "blood relatives" as equal to "heirs at law" attempts to limit the reach of Dr. Price's generosity, allowing only the older generation to qualify and cutting off the lower generation which actually needs the benefit. This argument flies in the face of the language of the 1957 Trust and Dr. Price's specific directions to benefit "boys

and girls." It escapes logic and is a crass attempt by the Bank to escape liability for breach of trust by reducing the class of beneficiaries of the trust.

For the reasons foregoing, the circuit court erred in ruling, as a matter of law, that the term "blood relative" means "heirs at law".

B. The Circuit court erred when it failed to find that United Bank is estopped to claim that the "blood relatives" are heirs at law.

Interpretation of the phrase "blood relatives" has already been addressed and determined in the prior litigation filed by United Bank involving the 1957 Trust. The doctrine of estoppel precludes United Bank from claiming that the phrase "blood relatives" means anything other than the descendants of the parents of Albert M. Price. The circuit court erred when it failed to find that United Bank was so estopped.

"Courts have recognized that '[t]here are several estoppel doctrines, including equitable estoppel, judicial estoppel, promissory estoppel, estoppel by record, estoppel by deed, and collateral estoppel.'" W. Va. Dep't of Transportation, Div. of Highways v. Robertson, ___ S.E.2d ___, 2005 WL 1124401 (W. Va., May 10, 2005) (citations omitted).

In the instant case, Appellants assert that United Bank is estopped by the doctrines of judicial estoppel and collateral estoppel to allege that the term "blood relatives" as used in the 1957 Trust means "heirs at law."

1. Judicial estoppel.

The West Virginia Supreme Court of Appeals has consistently held that "[p]arties will not be permitted to assume successive inconsistent positions in the course of a suit or series of suits in reference to the same fact or state of facts." MacDonald v. Long, 100 W. Va. 551, 552, 131 S.E.2d 252, 253 (1926); Carter v. City of Bluefield, 132 W. Va. 881, 898, 54 S.E.2d 747, 757 (1949). "A direct specific admission of fact in a pleading is binding and conclusive on the party making it." Gardner v. Gardner, 144 W. Va. 630, 637, 110 S.E.2d 495, 500 (1959).

These principles were recently reaffirmed by this Court's decision in W. Va. Dep't of Transportation, Div. of Highways v. Robertson, ___ S.E.2d ___, 2005 WL 1124401 (W. Va., May 10, 2005) which, in syllabus point 2, held as follows:

Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

Here, the doctrine is applicable to and must be applied to Appellee's position that "blood relatives" means "heirs at law".

a. **Inconsistent positions.** The first element of judicial estoppel involves an examination of whether the Bank assumed a position in the current litigation which was inconsistent with a position taken by it in the 1977 litigation. In the 1977 litigation, Appellee did not attempt to restrict the term "blood relatives" simply to those who were Albert Price's heirs at law. This is readily seen by the Bank's own pleadings.

On December 28, 1977, United Bank (then known as Kanawha Banking & Trust Company, N.A.) filed its reformation lawsuit in Boone County which created the second Price trust, the 1977 Reformed Trust. The 1977 Boone County lawsuit required that the Bank join as defendants all interested parties including all "blood relatives." In fact, the Bank did join the "blood relatives" as defendants in the 1977 lawsuit, and in paragraph 20 of its Complaint the Bank alleged as follows:

20. The defendants, Alma Collett, Denver H. Dickens, Quentin A. Dickens, James H. Dickens, Carson L. Dickens, E. D. Dickens, Pat Milam, Oran Kuhn, Victor Kuhn, Clyde Kuhn, Julian Kuhn, George Kuhn, Norman Kuhn, Dorsey Kuhn, Thirley Lambert, Lacy Dickens, Paul Dickens, Franklin Dickens, Harry Dickens, Agnes Miller, Ruth Henderson, Nine Massey, Rebecca Blosser, Betty Kitchen, Robert Kitchen, Jr., Barbara Fish, Peggy Sue Kitchen, and John Kitchen are the known living nieces, nephews, grandnieces, and grandnephews of the decedent [Albert M. Price] and **as such constitute the known blood relatives of the decedent.** (emphasis added)

In the 1977 Boone County lawsuit, just like the case *sub judice*, the Bank needed to define the phrase "blood relatives" as used in the 1957 Price Trust. In the 1977 Boone County lawsuit, the Bank did not define the term to mean the

"heirs at law,"⁷ but rather read the term in a much more expansive fashion to mean those persons related to Dr. Price by blood. The mere fact that United Bank named persons as "blood relatives" who were not Dr. Price's heirs at law in the 1977 lawsuit is conclusive proof that the Bank did not read that term as restrictively then as it seeks to do now.⁸

⁷In fact, it could not have done so as a living person can have no "heir at law." E.g., King v. Riffie, 172 W. Va. 586, 589, 309 S.E.2d 85, 88 (1983).

In King, the Supreme Court of Appeals made clear:

This entire question was settled long ago by Blackstone when he wrote: "It must first be observed, that by law no inheritance can vest, **nor can any person be the actual complete heir of another, till the ancestor is previously dead.** *Nemo est haeres viventis.* Before that time the person who is next in the line of succession is called an *heir apparent*, or *heir presumptive.*"

Id. (quoting, Blackstone Commentaries) (emphasis added).

Undisputably, in the 1977 Boone County lawsuit the Bank assumed the position that use of the phrase "blood relative" in construing the 1957 Trust included persons related to Dr. Price by blood and did not limit the phrase to mean only heirs at law. Dr. Price was survived by his then living sisters and the heirs of his deceased siblings. He could not have meant for the scholarships to be restricted to his "heirs at law" when by the terms of his own trust the scholarship was not to begin until all of his surviving sisters had died.

⁸The 1977 Complaint named numerous persons in addition to those disclosed in the probate records as being either will beneficiaries or heirs at law. Indeed, the probate records on file with Clerk of County Commission of Boone County demonstrate that there were no unknown "heirs at law", yet United Bank, in its Complaint, named as party defendants "other blood relatives of Albert M. Price presently unknown or unborn."

b. Same parties. The next element of the judicial estoppel test requires a determination of whether the inconsistent positions taken by Bank occurred in a proceeding involving the same adverse party. The record in this case is quite clear. The inconsistent positions taken by Appellee both relate to a class of persons, i.e., blood relatives, who are beneficiaries of the 1957 Trust.

c. Benefit received. The third element of the test for judicial estoppel is whether the Bank received some benefit from the original position it took in the case. The record clearly illustrates that Appellee benefitted from its original position. The Bank's 1977 Complaint sought permission from the Boone County Circuit Court to place the funds from Albert M. Price's probate estate into a *second, separate, and court-approved trust* which would be identical to the 1957 Trust but which would be reformed so as not to contain the defective provisions which had adverse tax consequences. Based upon the affirmative representations of the Bank that the original 1957 Trust would not be altered and that the "blood relatives" would receive their preferential scholarships once the scholarship phase began, the Circuit Court of Boone County entered an order granting all of the relief sought by the Bank in the 1977 Complaint, and several hundred thousand dollars was diverted away from the 1957 Trust and placed into the 1977 Reformed Trust, to the benefit of the Bank.

d. **The new position injures Appellants.** The final element of the judicial estoppel test requires a determination of whether the Bank's original position misled Appellants and whether allowing it to change its position would injuriously affect Appellants and the integrity of the judicial process. In 1977, the Bank represented to the Circuit Court of Boone County, West Virginia, through its Complaint, that if the court granted its requested relief and permitted the establishment of the 1977 Reformed Trust, Albert Price's "blood relatives" would not be prejudiced since the 1957 Trust would remain unaltered. The Bank presumably did not inform the circuit court at that time that it would, years later and without any substantive change in the law, unilaterally decide to ignore the blood relative preference, terminate completely the 1957 Trust, transfer all of its funds to the second trust, and then take a restrictive position of who constitutes a "blood relative." Moreover, the Bank sent letters to those it recognized at the time as "blood relatives" and lured them into a false sense of security by referring to the 1977 lawsuit a mere "formality" and assuring them that their interests would not be harmed. See Part 2(D), *supra*. Acting upon these representations and material omissions, the Circuit Court of Boone County entered an order granting all of the relief sought by the Bank in the 1977 Complaint, and Appellants have now been obviously injured by the Bank's attempt to change the definition of those persons constituting Albert Price's "blood relatives" in order to attack

their standing to make the Bank account for its unlawful conversion of the 1957 Trust.

e. **The elements of judicial estoppel have been met.** Having applied the facts of this case to the elements of the judicial estoppel test as the Supreme Court has defined, as a matter of law United Bank should be, and is, estopped to argue that the term "blood relatives" means "heirs at law." The proper construction of the term is collateral kindred.

2. **Collateral estoppel.**

The doctrine of collateral estoppel also comes into play in the case at bar. Collateral estoppel and *res judicata* are closely related doctrines. Whereas the doctrine of *res judicata* precludes the relitigation of the same cause of action, the doctrine of collateral estoppel precludes the relitigation of an issue. Christian v. Sizemore, 185 W. Va. 409, 407 S.E.2d 715 (1991). Three elements must be present for collateral estoppel to apply to prevent relitigation of an issue actually decided in a prior case:

1. The issue decided in the prior adjudication must be the same issue sought to be relitigated in the second action;
2. The first action must have resulted in a final judgment on the merits; and
3. The party against whom estoppel is asserted must have been a party, or in privity to a party, in the prior action. Moore v. Sun Lumber Co., 166 W. Va. 735, 276 S.E.2d 797 (1981).

All of the required elements of collateral estoppel are established in the present case. Here, the Bank already took a position as to the expansive meaning of the phrase "blood relatives" in the 1977 Boone County litigation. The issue was decided in 1977 upon the merits with a final order entered, and nowhere in such order can it be read or construed that "blood relatives" means "heirs at law".

For the reasons stated, under the doctrine of collateral estoppel, the Bank is now estopped in the present lawsuit from asserting any position that is inconsistent from its asserted position in the 1977 Boone County lawsuit which involved the same 1957 Price Trust and the construction of the term "blood relatives." Based on the doctrine of collateral estoppel, the Bank must remain consistent. In other words, the Bank is precluded from taking any position other than that "blood relatives" means persons related to Dr. Price by blood, i.e., his collateral kindred. Therefore, not only must this Court overturn the circuit court's decision to the contrary, Appellants are entitled to remand of this matter with instructions that United Bank is estopped from asserting that "blood relatives" means "heirs at law."

- C. The circuit court erred in finding that venue was proper in Wood County because the evidence did not support such a finding and, if upheld, such a holding would permit any trustee anywhere to "forum shop" by simply declaring the situs of a trust to be in any county (or state) that it deems fit.**

The circuit court's decision on venue, if allowed to stand, will essentially permit any institutional trustee to abuse

the venue statutes and possibly even divest the state courts of their proper jurisdiction over trusts established in this state. Essentially, the circuit court has ruled that all an institutional trustee must do to prove the situs of a trust is to simply allege that it exists in one location where that trustee maintains an office convenient to the trustee rather than any other office convenient to the settlor or beneficiaries. In this day of mergers and multi-state banking, institutional trustees could completely divest West Virginia courts of jurisdiction by merely declaring that trusts are being administered, and therefore have a situs, outside the State of West Virginia.

In this case the Wood County Circuit Court erred in ruling that Wood County was a proper venue for an action regarding a trust created by a Boone County resident, drafted by a Kanawha County lawyer, administered until its conversion in Kanawha County, involving numerous Boone County beneficiaries, and over which the Boone County Circuit Court has previously exercised jurisdiction. In the case at bar, Appellants contend that venue for litigation involving the 1957 Trust properly lies in Boone County. Alternatively, Appellants contend that Kanawha County is an appropriate venue.

United Bank filed this case as a declaratory judgment action involving a testamentary trust. "The general venue statutes for civil actions fix venue in declaratory judgment proceedings." *Syl. pt. 4, Shobe v. Latimer*, 162 W. Va. 779, 253

S.E.2d 54 (1979). The general venue statute in this case is West Virginia Code § 56-1-1(a)(1) which provides that:

Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the Circuit court of any county . . . [w]herein any of the defendants may reside[.]

In the present case, absolutely no defendants reside in Wood County. The bulk of the defendants reside in Boone County which is also the place of probate and the location of the prior civil action which created the 1977 Reformed Trust.

The Supreme Court of Appeals has held that the venue statute is mandatory. "While our statute Code, 56-1-1, says an action 'may' be brought in the county where the defendant resides, the action **must be brought there** even where the cause of action arises in a different county, unless the defendant is sued and served with process therein, as provided by Code, 56-1-2." Hall v. Ocean Accident & Guarantee Corp., 122 W. Va. 188, 9 S.E.2d 45 (1940) (emphasis supplied).

Moreover, it is the right of the defendant to be sued in his or her home county. "In the absence of a statute to the contrary, every defendant has **the inherent right to make defense in his own county** (if a corporation, in the county where it could be sued alone), and any statutory provision abridging this right is to be strictly construed in favor of the defendant." Staats v. Co-Operative Transist Co., 125 W. Va. 473, 24 S.E.2d 916 (1943) (emphasis supplied).

Here, based upon the summonses issued in the case, the bulk of the those persons named as defendants by United Bank reside in or near Boone County, and other than the plaintiff Bank, no one is present in Wood County. The named defendants have the right to make defense in their own county and properly filed with the Wood County Circuit Court their motion to dismiss for improper venue. The judge's denial violates the general venue statute together with the above cited case law and therefore exceeds the jurisdiction of the Wood County Circuit Court.

The sole basis for claimed venue in Wood County is the fact that Petitioner has its *headquarters* based in Wood County which they claim means that the trust is administered in Wood County. By law, this is insufficient for proper venue.

"Venue of an action exists by virtue of law. The residence of a plaintiff, without more, is not a valid ground of venue in the absence of a statute or other principle of law authorizing it, as provided in Code, 56-1-1, subparagraph (b)." *Syl. pt. 2, Crawford v. Carson*, 138 W. Va. 852, 78 S.E.2d 268 (1953); *Syl. Crispen v. West Virginia Secondary Schools Activities Commission*, 525 S.E.2d 677 (W. Va. 1999). "W. Va. Code 56-1-1 prescribes that a civil action shall be brought where the individual defendants reside, where the cause of action arose, or where a corporate defendant has a principal place of business." *Crispin*, 525 S.E.2d at 680.

Moreover, it is a mere fortuity that anyone involved in this case is from Wood County. Dr. Price was a Boone County resident who created a trust with a Kanawha County bank which was doing business in Boone County. He died a resident of Boone County, and the Bank commenced a lawsuit in Boone County to create the 1977 Reformed Trust. Thirty years after the creation of his trust, the bank (Kanawha Banking & Trust Company) was bought out and merged. United Bank only entered the picture because of a takeover occurring in 1986. United Bank has its headquarters in Wood County. United Bank, however, did not close out its operations in southern West Virginia. It still has and maintains a large presence in the "United Center" in downtown Charleston, West Virginia. Tax returns which the Bank has filed for the Price Trust reflect its address in Kanawha County at the United Center. It is a mere manipulation for the Bank to claim that the Trust is "mobile" because of a bank merger. If venue can change because of a merger and follow the headquarters of the acquiring bank, the defendants are lucky that Kanawha Banking & Trust Company was not taken over by Citibank, thereby moving the 1957 Trust to its headquarters in South Dakota!

It is the Appellants' position that in 1988 the Bank unlawfully converted the funds from the 1957 Trust and moved those assets into the 1978 Reformed Trust. At such time, the 1957 trust actually ceased to exist because it no longer had a res. It is undisputed that in 1988 the Trust was being managed not from Wood County, but Kanawha County. Moreover, the 1957

Trust contains a forum selection clause that mandates any actions to terminate the trust be brought in Kanawha County, West Virginia. In 1988, the Bank unilaterally and improperly "terminated" the 1957 Trust by transferring its assets into the 1977 Reformed Trust. It would indeed be an anomaly at law if a party could "gerrymander" venue through its own illegal and improper conduct.

The intent of Dr. Price should have something to say about the location of the trust. The cardinal rule in the construction of wills and trusts is that the intent of the testator and grantor controls. Charleston National Bank v. Thru the Bible Radio Network, 507 S.E.2d 708 (W. Va. 1998). Dr. Price lived and died in Boone County. He had numerous Boone County relatives whom he clearly wanted to benefit through his trust planning. He selected a Kanawha County bank which was present in Boone County to act as his trustee. His inter vivos trust agreement contains a forum selection clause for Kanawha County. Then thirty years after all of Dr. Price's planning and ten years after his death, the Bank merges in 1986 and starts to claim that all assets in the trust have now by metaphysics been moved to its headquarters in Wood County. The testator and grantor Dr. Price certainly had no expectation or intent that an institutional trustee would cut off his home county and transfer it up north merely for the convenience of the Bank.

The ruling of the Wood County Circuit Court in refusing to dismiss the proceedings in Wood County is clearly wrong as a

matter of law. The Appellants ask this Court to overturn the ruling of the circuit court and remand the case with instructions that it proceed in either the Circuit Court of Boone County or, in the alternative, the Circuit Court of Kanawha County.

D. The circuit court erred when it found that Appellants lack standing to sue United Bank and that the trust at issue is a "charitable trust."

Contrary to the Bank's conclusory assertion and the circuit court's ultimate finding, this litigation does not involve a "charitable trust" but involves a "private trust." The trust involved is the original 1957 Trust which the Bank wrongfully terminated and converted in 1988.

The Supreme Court addressed the issues of private and charitable trusts in Goetz v. Old National Bank of Martinsburg, 140 W. Va. 422, 84 S.E.2d 759 (1954). The Goetz Court held:

It is essential that a charity be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of legal charity. (citations omitted) One requisite of a charitable trust is that the beneficiaries of the trust as distinguished from the object or purpose of the trust must be indefinite. (citations omitted). . . . But, the beneficiary of a private trust must be definite. (citation omitted)

140 W. Va. at 431-32, 84 S.E.2d at 767.

While a trust that is set up for scholarships is arguably charitable, the restriction by Dr. Price that his blood relatives be given preference undisputably renders the trust a private trust. While it is true United Bank, as trustee, terminated the 1957 Trust by transferring all of its assets into the 1977 Reformed Trust, the legality of this action by the Bank

is the crux of this case and a material fact at issue which is adamantly disputed by Appellants.

Appellants assert that the Bank should have sought a court's authority, as it did in 1977, before it changed or otherwise disturbed the original 1957 Trust which was ordered in 1978 to continue with its own terms and conditions. See Goetz, 140 W. Va. at 439, 84 S.E.2d at 771 (trustee may seek advice from the court to determine the legality of a proposed action).

Despite having previously sought and received court approval to create the 1977 Reformed Trust, when the issue arose in 1988 concerning the treatment of the 1957 Trust upon the death of the last surviving sister, the Bank decided not to go to court and unilaterally terminated the private 1957 Trust and transferred all of its assets in the 1977 Reformed Trust. This was a breach of trust committed by the Bank. The Bank illegally terminated a private trust and transferred it into a charitable trust. The illegal conversion by the Bank of the assets in a private trust by sticking them in a charitable trust does not make the terminated trust a "charitable trust." The Bank cannot use its own wrong in its own defense to attempt to eliminate the standing of Appellants, who are admittedly interested parties in the 1957 Trust, from objecting to the improper actions of the Bank. Injured beneficiaries have standing to sue a trustee for breach of trust. See generally 19 M.J. Trusts and Trustees §§ 105, 131 (2003); Tankovits v. Glessner, 563 S.E.2d 810 (W. Va. 2002); Coberly v. Coberly, 580 S.E.2d 515 (W. Va. 2003).

Moreover, Appellants have standing in this action because the Bank has sued them and made them parties to the action. It is absurd for the Bank to join dozens of relatives as party defendants, claiming that they are interested parties in the lawsuit, and then file a motion to deny their standing.

The circuit court's ruling that Appellants lack standing must be reversed.

- E. The circuit court erred in finding, without even a scintilla of evidence, that Patricia Milam is the sole surviving "blood relative" of Dr. Albert Price.**

The Bank asserted in its Motion for Summary Judgment and supporting memorandum of law that an individual named Patricia Milam (a named party-defendant who has failed to appear in the case) is the sole surviving "blood relative" of Dr. Albert Price.

Other than its bare assertion, United Bank failed to present even a scintilla of evidence to support this contention. It presented an argument regarding the status of Patricia Milam as the alleged sole surviving "blood relative", but submitted no evidence in support thereof. The Bank tendered no affidavit, deposition, or testimony under oath of any knowledgeable person or persons to support this "fact." Based upon the bare allegation, and no submission of evidence in support thereof, the circuit court simply adopted United Bank's position.

It is axiomatic that a court may not grant summary judgment on a factual issue without some evidence submitted to support the fact. An unsupported allegation is not a fact. The

Circuit court erred in ruling without any evidence that Patricia Milam is the sole surviving "blood relative" of Dr. Albert Price.

VI. RELIEF PRAYED FOR

For the foregoing reasons, Appellants pray that the Supreme Court enter an order that:

1. Vacates the Wood County Circuit Court's grant of summary judgment to United Bank;

2. Decrees that the term "blood relatives" as used in the 1957 Albert M. Price Trust is more expansive than the term "heirs at law" and that it means the collateral kindred of Albert M. Price (that is, the descendants of the parents of Dr. Price) or, in the alternative, remand the matter for further proceedings to determine Albert Price's intent with respect to the term "blood relatives;"

3. Decrees that United Bank is estopped to assert that the term "blood relatives" means "heirs at law" with respect to the 1957 Albert M. Price Trust;

4. Vacates the Wood County Circuit Court's ruling on venue and transfers the case to the Boone County Circuit Court or, in the alternative, to the Kanawha County Circuit Court;

5. Decrees that the 1957 Albert M. Price Trust was and is as a matter of law a "private trust" and not a "charitable trust;"

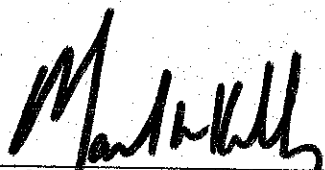
6. Decrees that Appellants have standing to sue United Bank over the issues presented in the pleadings; and

7. Vacates the Wood County Circuit Court's ruling that Patricia Milam is the sole remaining "blood relative" or heir at law of Dr. Albert M. Price.

Respectfully submitted this 9th day of June, 2005.

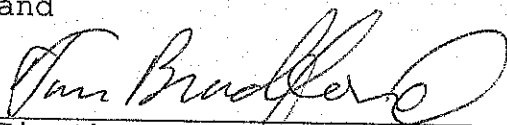
KENNETH N. DICKENS, and
RICHARD RANDALL LAMBERT,
JR., individually and on
behalf of those similarly
situated,

By Counsel



Mark W. Kelley, Esq.
(WV Bar No. 5768)
Christopher J. Winton, Esq.
(WV Bar No. 4096)
RAY, WINTON & KELLEY, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
(304) 342-1141

and




Timothy A. Bradford, Esq.
(WV Bar No. 5744)
BRADFORD LAW OFFICES
P.O. Box 2386
Charleston, WV 25328
(304) 344-5700
Brief of Appellant4.wpd

Certificate of Service

I, Mark W. Kelley, Esq., counsel for Appellants Kenneth M. Dickens and Richard Randall Lambert, Jr., hereby state that on June 9, 2005, I served true and correct copies of the "Brief of Appellants Kenneth M. Dickens and Richard Randall Lambert, Jr." on all parties respondent by U.S. mail, postage prepaid, addressed as follows:

Bruce L. Stout, Esq.
HUDDLESTON, BOLEN, BEATTY, PORTER
& COPEN, LLP
Post Office Box 2185
611 Third Avenue
Huntington, West Virginia 25722-2185
Counsel for Appellee United Bank, Inc.,
Trustee



Mark W. Kelley, Esq.
(WV Bar No. 5768)
RAY, WINTON & KELLEY, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
Telephone (304) 342-1141
Telecopier (304) 342-0691