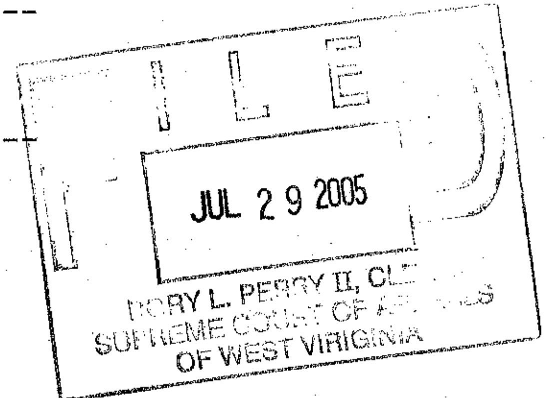
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

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

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I. POINTS AND AUTHORITIES RELIED UPON

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II. DISCUSSION

A. APPELLEE'S OWN ARGUMENT SUPPORTS APPELLANTS' CONTENTION THAT THE TERM "BLOOD RELATIVE" IS NOT SYNONYMOUS WITH THE TERM "HEIR AT LAW"

In the circuit court below 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. In doing so, the court completely eviscerated Dr. Price's clear overriding intent to provide scholarships for his youthful collateral kindred such as the Appellants. Appellants asserted below and in their Brief before this Court that 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 and especially those of college age.

Appellee asserts that "the term 'blood relatives' has an irrefutable definition equivalent to heirs at law." Appellee's Brief, at p. 19. Appellee's Brief devotes a full eleven pages of argument in an attempt to establish this "irrefutable definition." However, in none of these eleven pages

does Appellee cite a single case that holds, without limitation, that the term "blood relatives" means "heirs at law." Indeed, Appellee cites no cases which have specifically dealt with the term "blood relative." Instead Appellee cited various treatises and cases which have discussed the meaning of the term "relative." The inclusion of the adjective "blood" with the noun "relatives" is what Dr. Price used in his trust.

Indicative of the weakness of Appellee's argument is it's citation to § 282 of the treatise Harrison on Wills and Administration for Virginia and West Virginia for the proposition that the term "relatives" is *generally* confined to mean those persons who would take in the statues of distribution. Appellee's Brief, at p. 12. Harrison does not assert anywhere in its discussion that the term "relatives" has a definite legal meaning. Indeed, it states that the "popular meaning of 'relatives' is that of all persons within any degree of consanguinity or affinity." Harrison, at § 282. Moreover, Harrison does not address the term "blood relatives" at all.

In contrast, with respect to the term "heirs", Harrison states:

> The word "heirs" is a legal term having a definite meaning and expresses the person or persons appointed by law to succeed to the real estate of a deceased person in case of intestacy, and will ordinarily be given this primary and technical meaning when used in an instrument creating an estate or designating the person for whom an interest in an estate is intended. However, the term, when used in a will, is *flexible and at times subject to different meanings dependent upon the overall context of the will.* It should be construed and interpreted so as to give effect to the intent of

> the testator as disclosed from a full and careful consideration of all of the provisions of the will.

George P. Smith, Jr., Harrison on Wills and Administration for Virginia and West Virginia, § 279 "Heir, Heirs, Heirs of the Body, Issue" (3d Ed. 1986) [emphasis added]. It is in this context of the *overall meaning of Dr. Price's trust* that his phrase "blood relatives" needs to be construed.

Thus, according to Harrison, the term "heirs" has a definite legal meaning whereas the term "relatives" is only *generally* confined to mean those persons who would take in the statutes of distribution. Moreover, even the use of the term "heirs", which has a definite legal meaning, does not mean that the courts will not look to the testator's intent in applying the term.

Appellee cites only *one* reported case from West Virginia in support of its argument, and the West Virginia case actually supports Appellants' position. Appellee quotes a brief portion of the opinion of Darcy v. Kelley, 26 N.E. 1110 (Mass. 1890), which was cited by the West Virginia Supreme Court in Gallaher v. Gallaher, 146 S.E. 623 (W. Va. 1929). The Darcy case did not discuss the construction of the term "relatives" or any other term for that matter. Rather, it was a case in which it was alleged that a trust was void for uncertainty. The trust at issue in Darcy sought to establish a relief fund for the poor, with a preference to aid the poor relatives of the testator. In finding that the trust was valid, the Darcy court is quoted as follows:

> But it seems evident that the testator did not intend to limit his bounty to so small a class. This property is given 'for the purpose of a relief fund for the poor.' This broad statement completely describes the general nature of the gift. It includes all the poor, and opens to the discretion of the trustees a field as broad as the world. **He then provides more specifically that a preference shall be given to his poor relatives, 'if any such there be,' meaning such persons as may at any time in the future, while the trust continues, be related to him by blood.** The charity is obviously of a public nature, and it is in its terms within the familiar definitions of a public charity.

Gallaher v. Gallaher, 146 S.E. at 624.

This is precisely the position taken by the Appellants in the circuit court. Dr. Price in his trust clearly did not intend *to limit his bounty* by providing scholarships only for his older relatives who would be legal "heirs" against his younger relatives of college age whose parents' very lives cut them off from being an "heir" to Dr. Price. (No one is the heir of a living person.)

Appellee's eleven pages of argument on this issue are replete with quotes that the term "relatives" *ordinarily*, or *presumably* means heirs at law. What is missing from Appellee's brief is any authority which states, as a matter of law, that the term "blood relatives" has a definite legal meaning synonymous with "heirs at law." Appellee does not cite any such cases because there are none.

The fact of the matter is, the term "blood relatives" has no definite, fixed legal meaning. Therefore, a court must look to the intent of the testator and construe that term's meaning as used in the specific instrument in light of the

instrument as a whole and the testator's surrounding circumstances. Appellants were not given that opportunity as a result of the lower court's erroneous ruling that "blood relatives" means "heirs at law." Accordingly, the circuit court's ruling on this issue without any discovery being had is wrong and must be reversed.

B. JUDICIAL ESTOPPEL AND COLLATERAL ESTOPPEL DO APPLY TO THIS CASE.

In arguing on these issues, the Appellee asserts illogical positions to which this Court should simply not give any countenance.

First, Appellee incorrectly asserts that the question involving the meaning of the term "blood relatives" is an issue of law. It is not. The meaning of that term as applied to the specific trust established by Dr. Price is a mixed question of law and fact. The factual issue must necessarily involve a determination of Dr. Price's intent as gleaned from the instrument as a whole and his surrounding facts and circumstances.

Second, the stated notion that the term "blood relatives" was not in issue in the 1977 litigation is absurd. The Bank was attempting to secure a court order to divert hundreds of thousands of dollars away from a trust that, *inter alia*, gave a scholarship preference to Dr. Price's blood relatives, into a new court-approved trust without any such preference.

In the course of seeking this relief in 1977, the Bank caused letters to issue to Dr. Price's "blood relatives" authored by the Bank's trust officer which 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 the Bank's requested relief). The trust officer's letter also included a letter dated October 12, 1977 from attorney David Higgins which, *inter alia*, 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[.]"

Appellee admits in its brief that it joined "distant relatives" of Dr. Price as Respondents in the 1977 litigation. Basic jurisprudence requires that all interested parties in the trust had to be joined as either party plaintiffs or party defendants. This means that "blood relatives" had to be joined in the lawsuit. In naming "distant relatives', the Bank made an *admission* that it considered the term "blood relatives" broader than heirs at law.

Moreover, the Boone County Circuit Court undeniably relied upon the Bank's assertions that "blood relatives" would obtain preferential treatment after the scholarship phase began when the court created the new reformed trust and kept the 1957 version intact for the "blood relatives." In the 1977 litigation, the court and the parties had to understand the meaning of "blood relatives", and the Bank led Dr. Price's

relatives and the circuit court to believe that the term was broader than "heirs at law."

Appellee then attempts to justify its conduct by asserting that the trustee of the 1957 trust was not a party to the 1977 litigation and therefore estoppel cannot apply against the Bank. The Bank was both trustee of the 1957 trust and executor of Dr. Price's estate in 1977. The Bank admittedly initiated the litigation as executor. However, the Bank sought to divert hundreds of thousands of dollars away from the 1957 trust. Surely, if the 1957 trust had a different trustee at that time, the Court would have required the trust to be joined as a necessary and indispensable party. Why was that not done? Presumably because all parties concerned recognized that the executor and trustee were, in fact, the same entity. Moreover, in the litigation itself the Bank made representations regarding the future handling of the 1957 trust. If the Bank by its own wrong or mistake failed to name itself in its capacity as trustee, this Court cannot now permit the Bank to profit by its own wrong and escape accountability for the misappropriation of the 1957 trust and the misrepresentations to a circuit court. If the trustee was not present in the 1977 litigation, then how could the Bank honestly represent to the circuit court that if it received the relief sought in its Complaint, the original trust would continue unaltered?

C. APPELLANTS HAVE STANDING TO SUE UNITED BANK.

In its brief, Appellee asserts that the 1957 trust, which no longer exists, having been misappropriated into a separate, court-ordered trust, is a charitable trust and thus Appellants have no standing as mere "potential beneficiaries."

First, it must be noted that for income or estate tax purposes, a trust may not qualify as a charitable trust, but for state common law purposes, it may still be deemed a charitable trust.

> A "mixed trust" is usually defined as one which possesses private and public elements and is partly charitable and partly for the benefit of private individuals or non-charitable objects. It is not objectionable to have a mixed trust as such.

Syl. pt. 9, In Re: Teubert's Estate, 298 S.E.2d 456, (W. Va. 1982); see also Gallaher v. Gallaher, 146 S.E. 623, 624 (W. Va. 1929). Here, the preference for blood relatives in the 1957 trust constitutes a private element of an otherwise charitable trust. Stated another way, to the extent that the 1957 trust made provisions for the "blood relatives" of Dr. Price, it is a private trust.

Appellee does not, and indeed, cannot rationally assert that a private beneficiary lacks standing to enforce his or her right to the benefits of a trust. See generally, William E. Fratcher, Scott on Trusts, *The Administration of the Trust*, §§ 197-199.3 (4th Ed. 1988). Here, Appellants allege that they are members of a class, i.e., the blood relatives of Dr. Price, and that the trustee has, *inter alia*, wrongfully converted trust

assets which existed for their benefit. Appellants indisputably have standing to have their grievances heard by a court of competent jurisdiction.

D. THE BANK'S STRAINED ATTEMPT TO ESTABLISH VENUE IN WOOD COUNTY HAS NO MERIT.

Concerning venue of an action involving a trust, Appellee contends that if this Court adopts Appellant's argument it means that "a Trustee, in order to seek a declaratory judgment about the [status] of trust beneficiaries, would have to file separate lawsuits in every venue where a potential beneficiary resides." Appellee's Brief, at p. 39. This assertion is patently absurd. If the Bank filed suit in any county where any beneficiary resided, venue would have been proper in that county under the existing statute. That is not the case here.

Appellants further note that the purpose of the Bank's lawsuit was to seek a declaration that the trust has been properly administered. Which trust? The 1957 trust which is the subject of Appellant's lawsuit no longer exists. It ceased to exist when the Bank converted its *res* into a different trust. The Bank does not and cannot allege any connection between Wood County and the 1957 trust, and for these reasons and those outlined in Appellant's Brief, Wood County is not a proper venue for this dispute under any of Appellee's legal theories.

E. THE CIRCUIT COURT IMPROPERLY RULED THAT PATRICIA MILAM IS THE SOLE SURVIVING "HEIR AT LAW" OF DR. PRICE.

Appellee asserts that the circuit court properly held that Patricia Milam is the sole surviving heir at law of Dr.

Price. Appellee suggests that the circuit court entered a default order against her and further asserts that Appellants were never granted class action status.

It is false that the court granted a *default judgment* against Patricia Milam. The circuit court's order clearly holds, as a matter of *summary judgment* against Appellants, and without <u>any</u> evidence in the record, that Patricia Milam is the sole surviving heir at law of Dr. Price.

It is true that Appellants were never granted class action status in any order entered by the circuit court. However, they never even had the chance. This case was improperly decided on summary judgment prior to any discovery having taken place. Once this Court vacates the summary judgment order and remands this case for further proceedings in a county having proper venue, Appellants will move forward with their efforts to obtain class action status.

F. APPELLANTS UNSUPPORTED ASSERTIONS ARE NOT "FACTS".

As a final note, Appellants note that throughout its brief Appellee has cited numerous "facts" which are not of record in this matter. For instance, in support of its argument against judicial estoppel, the Bank asserts as fact certain reasons why parties who were not Dr. Price's heirs at law were named in the 1977 lawsuit. <u>Appellee's Brief</u>, at p. 27. Later, the Bank offers its version of the facts leading up to its conversion of 1957 trust. <u>Id.</u>, at p. 28, n.1. The Bank offers as "fact" the assertion that it received no benefit from the granting of the

relief sought in the 1977 lawsuit,[1] yet if Appellants are rightfully granted the opportunity to conduct discovery, this "fact" will surely be disputed. The Bank alleges as fact that Appellants have not been harmed because, among other things, "they have neither applied for scholarships nor been admitted to either of the two designated colleges.[2]" Id., at p. 33. There are no facts of record upon which the Bank may rightfully make this assertion in this proceeding.

The simple "fact" of the matter is that this case was prematurely decided by the lower court without factual development because of the actions of the circuit court. Appellants were never afforded the opportunity to develop their case, and the circuit court improperly relied upon unproven allegations of the Appellee.

III. CONCLUSION

For the reasons set forth herein, Appellants respectfully request that the Court grant all of the relief sought by Appellants as set forth in Appellant's Brief.

Respectfully submitted this 29th day of July, 2005.

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[1]Appellee conveniently ignores the undisputed fact that in making the representations it made to the circuit court, it did receive a benefit; i.e., the relief it requested in its lawsuit.

[2]Appellants do not concede that the preferential scholarships are limited to two designated colleges.

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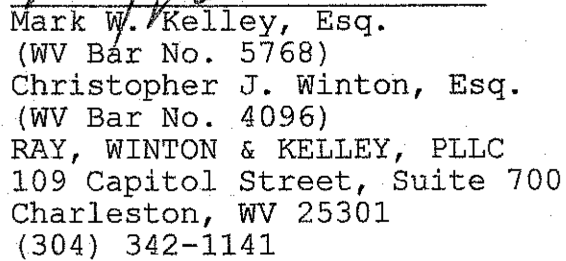
RICHARD RANDALL LAMBERT,
JR., individually and on
behalf of those similarly
situated,

By Counsel



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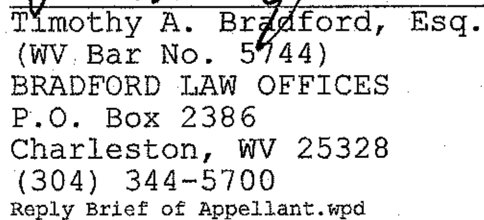

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Reply Brief of Appellant.wpd

CERTIFICATE OF SERVICE

I, Mark W. Kelley, Esq., counsel for Appellants Kenneth M. Dickens and Richard Randall Lambert, Jr., hereby state that on July 29, 2005, I served true and correct copies of the **"Reply Brief of Appellants Kenneth M. Dickens and Richard Randall Lambert, Jr."** on all parties by U.S. mail, postage prepaid, addressed as follows:

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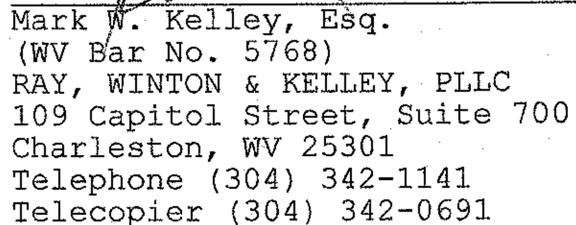

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