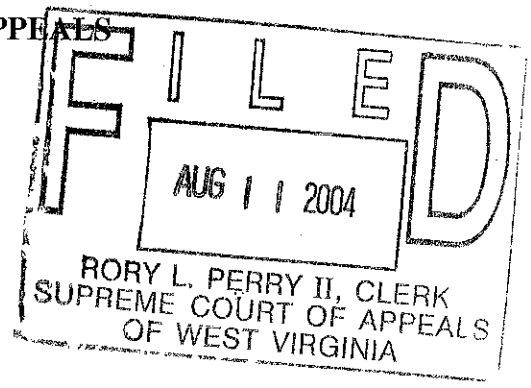
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
AT CHARLESTON



LYNETTE Y. BLEDSOE, individually and as executrix of the Estate of Margaret Nile Holiday Plumley,

Appellant,

v.

CASE NUMBER: 31764

RONALD L. PLUMLEY,

Appellee,

APPELLEE'S BRIEF

Paul W. Roop, II (#5406)
Roop, Smith & Roop, PLLC
109 East Main Street
P.O. Box 1246
Beckley, WV 25802-1246
(304)255-7667

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KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

Counsel for the Appellant served her Brief herein upon an unsuspecting client of the undersigned, wholly uninvolved with the instant case, while the said client was waiting in undersigned's reception area. Beyond the defective service of Appellant's Brief described in the foregoing sentence, Appellee stipulates to those matters set forth in the Appellant's lengthy rendition of the "Kind of Proceeding and the Nature of the Ruling in the Lower Tribunal."

STATEMENT OF FACTS

Appellee considers the Appellant's rendering of the facts herein to adequately demonstrate the basis for the judgment below, and, for the purpose of the Court's consideration of the Petition herein elects to provide no additional factual statement at this time. However, in the event that the Court grants the Petition, the Appellee reserves the right to supply additional factual information.

RESPONSE TO ASSIGNMENT OF ERRORS

1. The Circuit Court correctly applied the slayer statute, West Virginia Code §42-4-2 in light of this Court's prior holdings to the effect that a civil action can establish the necessary findings for application of the slayer statute.
2. The undisputed facts in evidence support the Circuit Court's finding that Larry Plumley intentionally and unlawfully killed his elderly mother, Margaret Plumley.
3. The Circuit Court correctly applied the slayer statute which required Margaret Plumley's will to be construed as if Larry Plumley predeceased her.
4. If the slayer statute is applicable, the Appellant is not entitled to inherit through her father, Larry Plumley.
5. The Court has not been required to address a wrongful death action against the estate of Larry Plumley and, as a result, the Appellant's fifth citation of error is moot.

POINTS AND AUTHORITIES

A. The Circuit Court correctly applied the slayer statute, West Virginia Code §42-4-2 in light of this Court's prior holdings to the effect that a civil action can establish the necessary findings for application of the slayer statute.

Metropolitan Life Insurance Company v. Hill, 115 W.Va. 515, 177 S.E. 188 (W.Va. 1934)

John Alden Life Ins. Co. v. Doe, 658 F.Supp. 638 (S.D. W.Va. 1987)

McClure v. McClure, 184 W.Va. 649, 403 S.E.2d 197 (W.Va. 1991)

W.Va. Code §42-4-2

B. The Circuit Court correctly found that Larry Plumley intentionally and feloniously killed his elderly mother, Margaret Plumley.

State v. Johnson, 142 W.Va. 284, 95 S.E.2d 409 (1956)

C. The Court correctly applied the slayer statute which required Margaret Plumley's will to be construed as if Larry Plumley predeceased her.

W.Va. Code §42-4-2

McClure v. McClure, 403 S.E.2d 197, 201 (W.Va. 1991)

D. If the slayer statute is applicable, the Appellant is not entitled to inherit through her father, Larry Plumley.

W.Va. Code §42-4-2

Bates v. Wilson, 313 Ky. 572, 232 S.W.2d 837 (1950)

KRS 381.280

KRS 391.010

KRS 391.030

E. The Court has not been required to address a wrongful death action against the estate of Larry Plumley and, as a result, the Appellant's fifth citation of error is moot.

ARGUMENT

A. The Circuit Court Correctly Applied the Slayer Statute, West Virginia Code §42-4-2 in Light of this Court's Prior Holdings to the Effect That a Civil Action Can Establish the Necessary Findings for Application of the Slayer Statute.

Appellant's first assignment of error is wholly without merit. This very court has made it clear that there need be no underlying criminal conviction of the presumed slayer as argued by the Appellant if a finding of unjustified, intentional homicide is made in a civil action.

In *Metropolitan Life Insurance Company v. Hill,* 115 W.Va. 515, 177 S.E. 188 (W.Va. 1934), this Court held that the language of the slayer statute barring a killer who had feloniously killed a victim did not alter the common law slayer rule barring one who had unlawfully and intentionally caused the death of another. Accordingly, a slayer convicted of involuntary manslaughter, a misdemeanor, would not be automatically exempt from the slayer statute merely because of the misdemeanor status of the crime. Rather, holding that the statute only established a felony homicide conviction as conclusive evidence, the Court held the test for whether a slayer would be affected by operation of the slayer statute would continue to be that of the common law - - unlawful, intentional causing the death of another. *Id* at 189. Thus, the trial court must, at some point, make a finding of unlawful (unjustified), intentional homicide to trigger the operation of the slayer statute.

While a local district court[1] held that the slayer statute did not apply in the absence of a criminal conviction, more recently, and more persuasively, this Court in *McClure v. McClure*, 184 W.Va. 649, 403 S.E.2d 197 (W.Va. 1991) squarely addressed the issue and concluded that the slayer statute applied, stating "Consequently, we conclude that W.Va. Code §42-4-2 is designed to permit proof of a judgment of a conviction for felonious killing to bar the slayer from obtaining property

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[1]*See, John Alden Life Ins. Co. v. Doe,* 658 F.Supp. 638 (S.D. W.Va. 1987)

or life insurance proceeds from the person killed. Where there is no such conviction, then evidence of an unlawful and intentional killing must be shown in a civil action." 403 S.E.2d @201.

The substance of Appellant's argument in her first assignment of error is that the relatively prompt suicidal death of Larry Plumley following his mother's murder somehow deprives the court of the jurisdiction to apply the legal fiction imposed by W.Va. Code §42-4-2 that Larry Plumley predeceased his mother. The presumption behind such an argument is that it is unfair to penalize a descendent of the slayer for the sins of the slayer. However, as set forth in Appellant's Brief, Larry Plumley had sexually abused his daughter, the Appellee, and even spent a term in the penitentiary for his misdeeds. It is not beyond possibility that Larry Plumley's intent was to directly benefit the victim of his past misconduct, the Appellant, by killing his own mother and then committing suicide with the mistaken belief that Appellant would then inherit his own otherwise distributable portion of his mother's estate. Were such a twisted plot the intention of Larry Plumley, the court would be an unwitting accomplice should it accept Appellant's argument. Parents regularly conduct themselves in ways to the detriment of their children. Some drink and are abusive; some gamble away money which could be used for food; some fail to pay taxes and lose their home; and some, thankfully few, commit murder and create financial hardship for their dependents and children. To rule in a manner contrary to the circuit court herein would be to lessen the heavy penalty associated with intentionally depriving another human of her life.

To hold in accordance with the Appellant's argument would likewise create a bar to the slayer statute working its intentionally harsh effect in a case where for example the slayer is killed by the police while being apprehended at the scene of a murder since, in that case, there is no conviction either. Such a result is incongruous with the policy behind the slayer statute to wholly remove any financial incentive from intentional, unjustified homicide.

In summary, contrary to the Appellant's assertions, the *McClure* case clearly supports the circuit court's application of the slayer statute to the facts at issue herein despite the absence of a criminal conviction of the slayer, Larry Plumley, since the court below found in a civil action that the slayer committed intentional and unlawful homicide of his mother.

B. The Undisputed Facts in Evidence Support the Circuit Court's Finding that Larry Plumley Intentionally and Unlawfully Killed His Elderly Mother, Margaret Plumley.

The facts which support the circuit court's finding that Larry Plumley intentionally killed his mother are ample and were not refuted by any evidence whatsoever by the Defendant nor was the evidence of the following facts objected to by the Appellant. At a minimum, those facts **as related in the Appellant's own Statement of Facts** are as follows:

- For a year and a few weeks prior to Margaret's death, Margaret's son, Larry, had been living with her at Abraham. Appellant's Brief at 4.
- Larry Plumley was found dead March 24, 2002 on his boat at Mahogany Lane Landing Marina Slip, Escambia County, Florida, unmarried and intestate. Id. at 6.
- It was reported by the owner of the marina that Larry had made *res gestae* remarks at the marina that his mother had "just passed away." Id.
- The Appellant herself alerted the Escambia County Sheriff's office that the presence of the car in Florida was a suspicious circumstance not boding well financially or physically for her grandmother Margaret. Id.
- Shell casings found in the decedent's house indicated that a 16-gauge shotgun had been the instrument of Margaret Plumley's death. Id.
- A 16-gauge shotgun had been found in the green Subaru in Larry Plumley's possession in Florida. Id. at 6-7.

- The home of Margaret Plumley was in complete disarray with the exception of one bedroom, that being the room of Larry Plumley. Id. at 7.
- The ammo found in the 16-gauge shot gun in the green Subaru under the control of Larry Plumley was the same make, velocity, and shell size of that which inflicted the deadly wounds to the Decedent, Margaret Plumley. Id.
- There were no "defense" wounds on Margaret Plumley's body. (The implication of which is that the victim knew her assailant.) Id. at 10.
- Appellant believed Larry Plumley to be a danger to himself and others and even sought to have him committed for such. Id. at 11.

Based upon the foregoing evidence which was wholly unrefuted at trial (and largely introduced by the Appellant herself), the circuit court was within its discretion to make a finding that Larry Plumley had intentionally caused the death of his mother, Margaret Plumley. Appellant makes a number of arguments which, while suitable for the injection of reasonable doubt in a criminal trial, do not negate the overwhelming and uncontroverted evidence which the Court took into consideration in rendering its ruling. Even in the content of a homicide trial, malice and intent may be inferred from the slayer's use of a deadly weapon under circumstances which the trier of fact does not believe afforded the slayer excuse, justification or provocation of his conduct. *State v. Johnson*, 142 W.Va. 284, 95 S.E.2d 409 (1956). Thus, under the lower standard of a civil action, the above facts amply serve the support the trial court's finding, and, as a result, there was no abuse of discretion by the circuit court in its finding of intentional unlawful homicide.

C. The Circuit Court Correctly Applied the Slayer Statute Which Required Margaret Plumley's Will to Be Construed as If Larry Plumley Predeceased Her.

Appellant's reasoning behind her argument that the circuit court incorrectly applied the slayer

statute is flawed in that it implicitly encourages two mechanisms for adjudging the property rights of slayers: one for those who are convicted in a criminal proceeding and another for those slayers who are not so convicted. Such a mechanism is not only unnecessary, it also creates an unpredictable outcome and contravenes that intent of the Legislature.

First, Appellant argues that "Application of West Virginia Code 42-4-2 cannot be harmless error, because without a conviction, the Circuit Court cannot proceed to interpretation of the latter part of the statute as though it equates to the common law which should be applied in cases clearly outside the application of the statute." Appellant's Brief at 19. The argument presumes Appellant's first assignment of error is valid, that is, that the absence of a criminal conviction renders the statute inapplicable. However, a civil finding dispels the first assignment in accordance with the *McClure* case, 403 S.E.2d 197 (W.Va. 1991). The *McClure* decision makes ample sense as it would be inconsistent to require two different standards for impairing the rights of a slayer: one statutory the other under the common law, dependent upon whether a slayer is considerate enough to preserve his own life for trial rather than commit suicide as did Larry Plumley. Thus, the *McClure* case reveals this court's understanding of the Legislature's intent to create one standard for determining whether a slayer's rights are impaired.

The only other issue then is, if the Legislature intended one, exclusive standard for determining whether a slayer's rights will be impaired, did it also intend one mechanism for how such an impairment is to be accomplished by the application of the legal fiction that the slayer predeceased the slain? Appellee submits that the answer is clearly "yes."

First, it would be anomolous and unreasonable for the *McClure* court to hold that the slayer statute could be triggered by a civil finding of intentional, unlawful homicide of another, yet conclude that the remainder of the statute establishing a mechanism for addressing the slayer's rights

did not apply. Second, Appellant would have the Court adopt an unpredictable mechanism which would vary the outcome according to such *post hoc* fortuities as to whether the slayer commits suicide, is killed in an auto accident fleeing from the scene or simple dies of old age while awaiting trial. Such an outcome was intended by neither the Legislature nor the *McClure* court.

While Appellant makes a lengthy and speculative dissertation on the motives of parents in disposing of their estates, it is equally clear that the slain Margaret Plumley, had she chose to benefit her granddaughter, the Appellant, could have easily provided anti-lapse language in her will with respect to her residual estate. In fact, the absence of such language is compelling evidence that the victim's intention was to benefit her own sons who survived her to the exclusion of any other descendants including the Appellant.

Appellant's next argument, raising the specter of the English law of corruption of blood and forfeiture of estates as a consequence of attainder, is equally spurious. There would be some merit to such an argument if the will of Margaret Plumley provided for the residual estate to be divided equally between the Appellee and the Appellant, and the trial court would have disqualified the Appellant from inheriting her share based on her father's homicidal actions. However, the application of the slayer statute below simply disqualified Larry Plumley from participating in the residual estate by employing to the fiction that he predeceased his mother. In light of the lapse language of the will, the beneficiary of Larry Plumley's share was accordingly the Appellee, Ronald Plumley. To further undercut the Appellant's corruption of blood argument, there is no question that Appellant is entitled to those gifts in the Will of Margaret Plumley expressly given to the Appellant. *See*, Appellant's Brief at 4. Were such a corruption occurring, those gifts would also have been disqualified.

In conclusion, the circuit court, having found that Larry Plumley intentionally and unjustifiably killed Margaret Plumley, properly applied the slayer statute to the will of Margaret Plumley.

D. <u>If the Slayer Statute Is Applicable, the Appellant Is Not Entitled to Inherit Through Her Father, Larry Plumley.</u>

While Appellant seeks to differentiate between probate and nonprobate assets for the purpose of her fourth assignment of error, the West Virginia slayer statute makes no such distinction, barring the taking or acquisition of "**any** money or property, real or personal, or interest therein, from the one killed or conspired against . . . ." W.Va. Code §42-4-2 (emphasis added). This specific, statutory prohibition and the legal fiction of being predeceased which is contained therein sets up a clear and predictable mechanism for the courts. First, all assets are embraced by the statute. Second, the court is to treat the disposition of all assets as if the slayer predeceased the victim.

The Appellant argues that since the Appellant, the descendant of Larry Plumley, did no wrong and, since Larry Plumley killed himself, thereby eliminating any possibility of profiting from his mother's slaying, the Appellant should be entitled to inherit through Larry Plumley's estate.

As a factual matter, the Appellant's argument neglects one factual detail -- the decedent, Larry Plumley, killed himself after a significant amount of time. That is, the killer had the opportunity to drive to Florida following the death of Margaret Plumley and remain there for up to five days before taking his own life. For Appellant's argument of lack of profit motive to have any force, it would require a situation where the slayer's death occurred almost simultaneously with that of the victim. In this case, however, there is no evidence whatsoever to suggest that Larry Plumley did not intend to profit from his mother's slaying and thereafter, overwrought with guilt, decided to take his own life.

From a policy standpoint alone, Appellant's argument must fail. While the obvious case is one involving a profit motive on the part of the slayer himself, the court cannot neglect that there are situations in which a slayer might intend to benefit his heirs through a wrongful act. Certainly, the courts cannot, and the Legislature did not, wish to countenance murder for profit, whether that profit is for the slayer himself or someone whom the slayer would seek to enrich.

Second, the statute clearly prescribes a mechanism for dealing with the slayer's portion of inheritable or otherwise entitled assets – the receipt of those assets is barred by imposing the fiction that the slayer predeceased the victim. In the Kentucky case cited by Appellant, the statute at issue was dramatically different and failed to spell out a mechanism for how the slayer was to be deprived. In *Bates v. Wilson*, 313 Ky. 572, 232 S.W.2d 837 (1950), the court refused to deprive the four-year old daughter of the slayer of her father's portion of his victim-parent's estate, applying KRS 381.280, which provided that:

> If the husband, wife, heir-at-law, beneficiary under a will, joint tenant with the right of survivorship or the beneficiary under any insurance policy takes the life of the decedent and is convicted therefor of a felony, the person so convicted forfeits all interest in and to the property of the decedent, including any interest he would receive as surviving joint tenant, and the property interest so forfeited descends to the decedent's other heirs-at-law, unless otherwise disposed of by the decedent.

Although the Kentucky Court of Appeals did conclude that the proper treatment of the slayer was to consider him to have predeceased his victims, the application of the Kentucky laws of descent and distribution (KRS 391.010 and 391.030) by which distribution was expressly prescribed required the infant to receive the one-half share of her slayer parent. *See*, *Bates v. Wilson*, 313 Ky. 572, 232 S.W.2d 837, 838 (1950). While the *Bates* case produces the result sought by the Appellant, the law

applicable to that case is wholly different from that present herein where the victim expressly preferred the Appellee over the Appellant for purpose of the residual estate in her will and the West Virginia statute sets forth the mechanism by which such will is to be construed.

For these reasons, the Appellee urges that the circuit court was correct.

E. The Court Has Not Been Required to Address a Wrongful Death Action Against the Estate of Larry Plumley And, as a Result, the Appellant's Fifth Citation of Error Is Moot.

The circuit court below was not confronted with a wrongful death action nor any need to consider a wrongful death action against the estate of Larry Plumley. For that reason, any error which might pertain to actions taken or to be taken by the Appellee with the respect to the estate of Larry Plumley are not preserved and are not properly to be considered by this court[2].

CONCLUSION

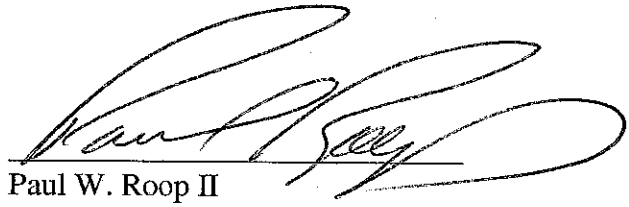
West Virginia Code §42-4-2 addresses a grim situation – that is, one in which someone presumably close enough to share in the accumulated wealth of another kills the very one who would otherwise bestow gifts upon him. When Larry Plumley pulled the trigger on his 16-gauge shotgun as it was pointed into the stomach of his elderly mother, he gave up any rights under her will to which he would have been entitled had he survived his victim. Had Ms. Plumley's will been silent

[2]It is unclear how the statute of limitations would be tolled for the purpose of the estate of Margaret Plumley to pursue a wrongful death action against the estate of Larry Plumley of which the Appellant is the administratrix. Given that the Appellant herself is the executrix of the estate of Margaret Plumley, the Appellant is the proper party to file any wrongful death action, although there appears to be no reason why the statute of limitations for such action would not have already passed.

as to a situation wherein either son predeceased her, the Appellant would be entitled to inherit a portion of the residual estate under the laws of descent and distribution. However, the construct of the law as it stands now bars the Appellant from any recovery in light of the decedent's will which clearly preferred her son over the Appellant for purposes of inheritance of the residual estate.

For this reason, the circuit court of Raleigh County correctly decided this case, and the Appellee prays the judgment below be AFFIRMED.

RONALD PLUMLEY
By Counsel



Paul W. Roop II
ROOP, SMITH & ROOP, PLLC
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Beckley, WV 25802
WV State Bar #5406
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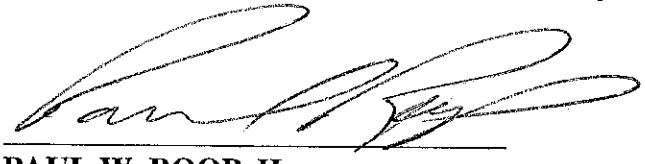
CERTIFICATE OF SERVICE

I, Paul W. Roop, II, counsel for the Appellee, do hereby certify that I have served the foregoing "**APPELLEE'S APPEAL**" upon the Defendant by United States Mail, postage prepaid, on this the 10th day of August, 2004 at the following address:

Karen Acord, Esquire
PO Box 377
Beckley, WV 25802



PAUL W. ROOP, II
ROOP, SMITH & ROOP, PLLC
P.O. Box 1246
Beckley, West Virginia 25802
Counsel for Appellee