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214 Va. 573

Supreme Court of Virginia

JAMES B. MUMAW, Appellant	)	
v.	)	RECORD NO. 8250
MARY R. MUMAW, et al, Appellees	)	

APPENDIX

APPEAL FROM THE CIRCUIT COURT OF
SHENANDOAH COUNTY

Echols & Hyman
1419 North Courthouse Road
Arlington, Virginia 22201
Counsel for Appellant

Supreme Court of Virginia

JAMES B. MUMAW, Appellant	)	
v.	)	RECORD NO. 8250
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BILL OF COMPLAINT

TO THE HONORABLE ELLIOTT MARSHALL, JUDGE OF SAID COURT

Your Complainants' respectfully represent unto your Honor:

(1) That E. Aldine Mumaw departed this life testate on the 28th., day of July, 1959, after having made and executed both a joint will along with Mary R. Mumaw, one of your Complainants', and an individual will bearing date on the 12th., day of April, 1938, and the 19th., day of February, 1945, respectively; that said wills were duly offered for probate and probated in the Clerk's Office of the Circuit Court of Shenandoah County on the 24th., day of August, 1959, and admitted to record therein in Will Book 48, pages 404 and 405, respectively, certified copies of which are herewith filed and marked "Complainants' Exhibit-A" and "Complainants' Exhibit-B", respectively.

(2) That in said joint will of the said E. Aldine Mumaw and Mary R. Mumaw, there was created in Mary R. Mumaw a life estate in a certain tract of real estate containing 100 acres, more or less, situate about one-half mile South of Conicville, Virginia, on the West side of the Back Road, and known as the "Harpine Farm", as your Complainants' are advised and so believe.

(3) That in said individual will of the said E. Aldine Mumaw, as your Complainants' are advised and so believe, the said E. Aldine Mumaw again reaffirmed the devise of a life estate unto the said Mary R. Mumaw in said 100 acre tract of real estate, and that after her death said real estate be sold to the highest bidder and after the payment of a Five Hundred Dollar ($500.00) bequest to James B. Mumaw, if living, and a Two Hundred Dollar ($200.00) bequest to each Mrs. George W. Jones and Mr. and Mrs. Charles Hepner Two Hundred Dollars ($200.00) each, and that the rest and residue of said proceeds of sale be equally divided between the nephews and nieces of the said E. Aldine Mumaw.

(4) That your Complainant, Mary R. Mumaw, is now of the age of 69 years and alleges that said real estate is growing up in pines and other obnoxious growth and is no longer desirable for either cultivation or pasturing, and that your said Complainant, Mary R. Mumaw, is not in a position financially to have said real estate cleared and that while she understands that she has a life estate therein, the land is in no condition to return any rent or income to your said Complainant, Mary R. Mumaw, and that she desires that said real estate be sold now in accordance with the direction contained in the individual will of E. Aldine Mumaw, and that her life estate therein be commuted, based upon the age of 69 years and paid her in a lump sum, and that after the payment of the bequests set out in said will, that the rest and residue thereof be divided between the nephews and nieces of the said E. Aldine Mumaw.

(5) That your Complainants' allege that the nephews and nieces of the said E. Aldine Mumaw are as follows:

Norman Mumaw	Nephew
Dorothy I. Martin	Niece
Richard Frye	Nephew
Raymond Frye	Nephew

Landon Mumaw	Nephew
George Jones, Jr.	Nephew
William B. Hepner	Nephew
Leonard Hepner	Nephew
Reba Dellinger	Niece
Lorraine Kirby	Niece
Janet Ryan	Niece
Raymond A. Mumaw	Nephew
Russell Mumaw	Nephew
Eugene Mumaw	Nephew
Helen Glover	Niece
Lucille Crider	Niece
Diane Gochenour	Great Niece

(6) That your Complainants' have made parties to this suit, either as Complainants' or Respondents', all of the devisees named in the individual will of the said E. Aldine Mumaw, and all of the nieces and nephews of the said E. Aldine Mumaw, including any great nieces and nephews where the niece or nephew may be deceased.

(7) Complainants' allege and so aver that the intent of the said E. Aldine Mumaw as contained in his individual will is reasonably clear, but they desire the construction of the same by the Circuit Court of Shenandoah County and the advice and direction of said Court in the sale and distribution of the proceeds derived from the sale described herein and composing the subject matter of this Cause.

(8) That said real estate is described as containing 99-1/4 Acres, more or less, being situate in Ashby Magisterial District, Shenandoah County, Virginia, and being the same identical real estate which was conveyed to E. Aldine Mumaw by deed from John A. Mumaw and Arthur F. Mumaw, Executors of J. B. Mumaw, deceased, bearing date on the 18th., day of August, 1934, and of record in the Clerk's Office of the Circuit Court of Shenandoah County in Deed Book 114, page 442, a certified copy of which is herewith filed, marked "Complainants' Exhibit C", and asked to be treated as a part of this Bill of Complaint.

(9) That said real estate is assessed on the Land Books of Shenandoah County for the year of 1966 as follows:

Acres	Value of Land	Value of Improvements	Total	Tax
99-40	$1375.00	None	$1375.00	$33.00

(10) That said real estate is unimproved and is not subject to cultivation and is now growing up in pines and other obnoxious growth, and in order to put the same in the income producing category would require considerable expense in clearing said land and in fencing it and in fertilizing it so as to produce income.

(11) Complainants' allege that the parties to this suit are the co-owners in fee simple of the real estate herein described in the proportions set opposite

their names hereinafter set out, subject, however, to the life estate of the said Mary R. Mumaw in said real estate, and subject, further, to the individual bequests contained in the individual will of the said E. Aldine Mumaw, deceased, and the object of this suit is to procure a partition of said real estate in some method prescribed by law:

Norman Mumaw	1/17th
Dorothy I. Martin	1/17th
Richard Frye	1/17th
Raymond Frye	1/17th
Landon Mumaw	1/17th
George Jones, Jr.	1/17th
William B. Hepner	1/17th
Leonard Hepner	1/17th
Reba Dellinger	1/17th
Lorraine Kirby	1/17th
Janet Ryan	1/17th
Raymond A. Mumaw	1/17th
Russell Mumaw	1/17th
Eugene Mumaw	1/17th
Helen Glover	1/17th
Lucille Crider	1/17th
Diane Gochenour	1/17th

(12) Complainants allege that under the direction contained in the said individual will of E. Aldine Mumaw said real estate is to be sold at public auction and that in addition thereto, owing to the size and nature of said real estate and to the large number of co-owners therein, partition in kind would be impossible and that the only manner in which partition could be made would be to offer and sell real estate as a whole and divide the proceeds in accordance with the individual will of the said E. Aldine Mumaw and under the direction of this Court.

IN CONSIDERATION WHEREOF, and for as much as your Complainants' are remediless in the premises, save in a Court of Equity, they pray that Raymond Frye, Doris Frye, Richard Frye, Lottie Frye, Norman Mumaw, Florence Mumaw, Dorothy I. Martin, Theodore Martin, George Jones, Jr., Leonard Hepner, Ora Lee Hepner, Reba Dellinger, Warren Dellinger, Diane Gochenour, Donald Gochenour, James B. Mumaw, Sallie Jones, Ruth G. Hepner and Charles Hepner may be made parties Respondents' to this Bill of Complaint and be required to answer the same, but answers under oath are hereby expressly waived; that proper process may issue; that an Order of Publication may be duly entered, published and posted against the non-resident Defendants; that the Court doth construe both the joint will of E. Aldine Mumaw and Mary R. Mumaw and the individual will of E. Aldine Mumaw, and direct the manner in which the proceeds of sale of the subject matter herein shall be paid and distributed; that partition of the real estate herein described may be made and decreed in some manner prescribed by the Statute, preferably by a sale of the entire subject matter as a whole and the distribution of the proceeds thereof to those entitled thereto as determined

by this Honorable Court; that a reasonable and proper Attorney's fee be allowed Counsel for Complainants' for services rendered in instituting and prosecuting this suit; that all other necessary and proper proceedings may be had and taken for accomplishing the prayers of this Bill, and that your Complainants' may receive all such other and further general relief in the premises as to equity may seem meet, and the nature of the case may require.

(Signed)

DECREE

THIS CAUSE came on to be further heard this 17th day of August, 1972, upon the papers formerly read and the proceedings heretofore had; upon evidence heard ore tenus; upon the Supplementary Memorandum of Points and Authorities submitted by counsel for James B. Mumaw; upon Complainant's written Memorandum of Authorities filed by counsel for Complainant; and upon the written Opinion of the Honorable Elliott Marshall, Judge of the Circuit Court of Shenandoah County rendered on the 31st day of August, 1971; and upon argument of counsel.

UPON CONSIDERATION OF ALL OF WHICH and the Court, after having maturely considered the testimony of witnesses heard ore tenus, the pleadings and the authorities submitted by the respective parties, doth deny the prayer of the Cross Bill of the Respondent, James B. Mumaw, wherein the Respondent sought to have an alleged lost Will of the late E. A. Mumaw, dated September 14, 1948, established as his Last Will and Testament, or to have the Court admit to probate and treat as E. A. Mumaw's Last Will and Testament his letter to the Respondent, dated September 24, 1950, or to have the Court admit to probate and give testamentary effect to E. A. Mumaw's letter to the Respondent, dated September 24, 1950, as a revocation of E. A. Mumaw's Will of February 19, 1945, and the Court doth adjudge, order and decree that the said Cross Bill of the Respondent, James B. Mumaw, be and the same shall stand dismissed.

It is further adjudged, ordered and decreed that the Estate of the said E. A. Mumaw shall be distributed in accordance with the holographic Will of E. A. Mumaw dated on February 19, 1945, and probated in the Clerk's Office of the Circuit Court of Shenandoah County on the 24th day of August, 1959, and admitted to record therein in Will Book 48, page 406.

And this Cause shall continue.

ENTER:

/s/ Elliott Marshall, Judge

OPINION

In this case the decedent, E. A. Mumaw, made a valid holographic will in 1945. He was later committed to the Western State Hospital where he was

incarcerated until his death in 1959, suffering from dementia praecox.

He and his only living descendant, his son, James A. Mumaw, had been estranged for years and in his holographic will made in 1945 he disinherited his son except for a legacy of $500.00.

While incarcerated he received some communications from his son and wrote him on September 24, 1950 (in part):

> "I wish to inform you that on Sept. 14, 1948, I *bequeathed* to you by my last, *"Will"*, my farm (Harpine) south of *Conicville*, Va, on west side of *backroad* after my *wife's death*, (*Mary R. Mumaw*) and my *own* death. This *nullifies* the *one* in (Lock-Box) Mt Jackson, Va, - Bank:" (Underscoring decedent's)

Again, on October 8, 1950, (in part):

> "Write to me in your *next letter*, the *bequest* I had given you by *Will*, to you in my other letter so I know if *you* rec'd it as *written*." (Underscoring decedent's)

Again, on January 31, 1951, (in part):

> "I am glad to know you rec'd my letter about the *'Will'*, to you of the *Harpine* farm, after *myself & Mary's*, death. Take care of your *letters*, as I have it *written & sealed* here in my *letter box*." (underscoring decedent's)

The decedent mentioned the will and its contents to his wife in her visits frequently until shortly before his death.

There is a room at the Hospital where papers and other valuables of patients are kept. Each patient has a box, but he is not permitted to enter the room. The room is kept locked, an attendant retaining the key. If a patient desires to deposit or withdraw anything from his box the attendant brings it out to him and later returns it to its place in the room.

After the decedent's death his box was delivered to his widow who placed it in her attic.

The 1945 holographic will was probated in 1959.

About five years after the death of the decedent his widow, without examining them, destroyed all of the papers contained in the box.

The Court has held that the decedent was possessed of sufficient mental capacity to make a will on September 14, 1948, the date mentioned by the decedent in the letter of September 24, 1950.

This proceeding originated as a suit for partition of the Harpine farm brought by the remaindermen under the 1945 will.

The son filed an "answer averring that the decedent had left a valid holographic will dated September 14, 1948, which had become lost, and exhibiting the aforementioned letters to his son, praying for the affirmative relief of establishment of said lost will or, as an alternative the probate of the aforementioned letters as holographic testamentary papers, or, as a second alternate, probate of the letter of September 24, 1950, as a testamentary

revocation of the will of 1945.

It is unusual to see a partition suit turned into a suit for establishment of a lost will or probate of testamentary papers, but it appears that all necessary parties are present or have been served with process and no objection to the procedure has been noted.

Judge Lamb says that a Court of equity which "sets up" a lost will has no real authority to probate it but must refer the will to the court of law to probate it. However, he points out that in several cases the equity court, after setting up the lost will, then proceeded to probate it and the Court of Appeals tacitly approved. *Va. Probate Practice,* (1957) Sec. 78, p. 177, cf. *Ballard* v. *Cox,* 191 Va 654.

In no case in my knowledge has a court of equity ever admitted a will to probate, so anything said in this opinion concerning the probate of the three letters is academic and merely indicative of what I would decide were the papers properly offered for probate.

LOST WILL

> "In cases of lost or destroyed wills, the court requires the clearest of evidence to establish the same. In such cases it is the sufficiency of the evidence which must be carefully weighed. A court of equity will not establish a muniment of title without the clearest and most satisfactory evidence." *Tate* v *Wren,* 185 Va 773, 787, quoting Wills and Administration, Harrison Vol 1 p. 278. See also *Blalock* v *Riddick,* 186 Va 284, 294.

> "The burden of proof rests upon the proponents to establish by satisfactory evidence the due execution of the 1933 will; its loss, its contents and that it had not been revoked." *Tate* v *Wren,* 782.

In the instant case there is no evidence that the decedent ever executed a valid attested will as required by Code Sec. 64.1-49. If he executed any valid will it must have been holographic. While it is probable that he knew how to make a holographic will because of his success in the one of 1945, there is no direct proof that he did so. He did not say so in his letter of September 24, 1950. However, even if we were satisfied that he did make a valid holographic will on September 14, 1948, the insurmountable obstacle to its establishment is the language of the Statute, Code Sec. 64.1-49: (in part)

> "If the will be wholly in the handwriting of the testator that fact shall be *proved* by at least two disinterested witnesses." (Underscoring added)

In other words, the holographic will could not be *probated* without the sworn testimony of at least two disinterested witnesses. This, of course, in this case is an obvious impossibility. It could hardly be urged that a lost will could stand in better stead than one which is produced in Court. It would be futile to "establish" it if it could not be probated.

I expect that this accounts for the paucity of cases where a lost holographic will was established. There would be few cases where two disinterested witnesses saw the lost will and would be prepared to testify that it was "wholly in the handwriting of the testator".

Strangely, no reference is made to the above quoted language of the statute in *Tate* v. *Wren,* 185 Va. 775, which involved an attempted probate of a lost holographic will written in 1939. Only one witness, the cook (an interested witness) testified that the lost holograph was "wholly in the handwriting" of the decedent, a circumstance which would appear to be decisive in view of the statute. However the Court somewhat laboriously opined that sufficient proof of the contents of the will was lacking and rejected the will on that ground.

In the instant case I think that we may have sufficient proof of the execution and contents of the will, but the proof required by statute for probate is lacking, and therefore, the will cannot be established. Therefore it is unnecessary to decide whether the contents have been adequately proven or the presumption of revocation rebutted.

THE LETTERS OF THE DECEDENT AS DISPOSITIVE TESTAMENTARY PAPERS

All of the letters obviously refer to a will previously made, dated September 14, 1948. While in no uncertain terms they describe the property and estate to be devised to the son, none of them purports to be dispositive in effect, nor, collectively, can they be so construed. Accordingly, though wholly in the handwriting of the testator, none of them can be admitted to probate as dispositive testamentary papers.

In my opinion, neither can the letter of September 24, 1950, be probated as a testamentary paper serving to revoke the holographic will of February 19, 1945.

It refers to the will dated September 14, 1948, which obviously would serve to revoke the 1945 will and succinctly express his purpose:

> "I have the *'Will'* written and in my *letter box* here in *Attendants room*. This *nullifies* the *one* in (Lock-Box) Mt. Jackson, Va. - Bank." (Underscoring decedent's)

In other words, he is saying that the will of September 14, 1948, in the letter box at Staunton, not the letter itself, revoked the 1945 will.

While the letter might be proven for probate by two disinterested witnesses it does not revoke the 1945 will, but merely states that another document does so. It plainly is not a testamentary paper.

I have given this case unusually mature consideration because I believe that the result I have arrived at may do an injustice and thwart the purpose of the decedent. I think it very likely that he made a perfectly valid holographic will which was inadvertently destroyed by his wife.

However, we cannot bend the law to fit hard cases. The Wills Statutes are designed to protect decedents as well as beneficiaries and there must be at

least substantial compliance with the law to establish and probate a testamentary paper.

/s/ Elliott Marshall, Judge

August 31, 1971

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Defendant James B. Mumaw, notes his appeal from the Decree entered August 17, 1972 and assigns the following errors:

1. The Court erred as a matter of law in not establishing as the Last Will and Testament of E. A. Mumaw a lost Will, dated September 14, 1948, referred to in his letter to James B. Mumaw, dated September 24, 1950, described in detail in that letter and confirmed as to its substance by Mary A. Mumaw, widow of the deceased, in her testimony at the trial of this cause.
2. The Court erred as a matter of law in not establishing as the Last Will and Testament of E. A. Mumaw his letter to James B. Mumaw, dated September 24, 1950, on the basis of E. A. Mumaw's letter to James B. Mumaw, dated October 8, 1950.
3. The Court erred as a matter of law in not giving testamentary effect to E. A. Mumaw's letter to James B. Mumaw, dated September 24, 1950, as a revocation of his Will, dated February 19, 1945.
4. The Court erred as a matter of law in decreeing that the Estate of E. A. Mumaw be distributed in accordance with his holographic Will dated February 19, 1945.

A statement of facts and incidents of the case will be presented to the Court for inclusion in the record.

SUMMARY OF EVIDENCE AND STATEMENT OF INCIDENTS OF HEARING HELD JUNE 9, 1971

There appeared before the Court counsel for the proponents of a holographic Will of E. A. Mumaw dated February 19, 1945, and their witness Mary A. Mumaw, widow of the deceased; also appearing, with his counsel, was James B. Mumaw the son of E. A. Mumaw, who offered certain letters as establishing a true later Will of E. A. Mumaw.

The parties stipulated that James Mumaw was the only surviving descendant of E. A. Mumaw.

James Mumaw testified as to the authenticity of letters which were admitted without objection, Exhibits 1, 2 and 3 for James Mumaw being letters dated September 24, 1950, October 8, 1950, and January 21, 1951.

James said that these letters were in his father's handwriting.

Dr. Grey further testified as to the physical arrangements of the wards in Western State at the time referred to in the deceased's letters and said that the "attendants' room" was a separate storage area where the valuables of

patients could be kept because they lived in large open wards rather than private rooms. He said that the attendants' room could not be entered by the patients alone but rather that a patient would request the attendant to get his box of possessions for him at any time the patient desired and that when the attendant was not there the room was kept locked.

Mary Mumaw then testified on behalf of the proponents of the holographic Will of 1945 and stated that the senior Mumaw and his son James had been estranged and she produced letters written in an angry temper by James to his father in 1938.

After her testimony, and in rebuttal, James Mumaw readily admitted having written the letters and said that they were written right after his father had refused to give him money and he went on to explain that he was very mad with his father at that time.

Shortly after argument of counsel commenced, Mary Mumaw interrupted and asked if she could be permitted to give additional testimony, explaining "I have to live with myself". The Court granted permission and she then stated that E. A. Mumaw had indeed told her that he had prepared a new Will leaving the Harpine Farm to his son James, that he had told her that he had "forgiven" his son and that he never spoke ill of his son after that time and up to and including the date of his death.

She further said that after his death she received from Western State a large box of letters and other papers but that because there were so many of them she had never gone through them but had rather put them on a shelf in her closet. She said she destroyed the entire contents "a couple of years ago" by burning without ever having read them.

After the conclusion of testimony the Court asked counsel for memoranda on the various legal points involved and extended the time for cross-examination of Dr. Grey should the proponents of the holographic Will of 1945 wish to do so after having examined all of the records at Western State Hospital.

Briefs of counsel were filed and there was no further cross-examination of Dr. Grey by counsel for the proponents of the 1945 Will.

Subsequent to the filing of the various memoranda the Court issued its opinion which became the basis of the decree appealed from.

/s/ Elliott Marshall, Judge

October 17th, 1972

Sunday morn.

Staunton, Va.,
C.S.H.
Sept. 24, 1950.

Dear son, James:-

A few lines to you this morn to surprise you and I hope it will be a pleasant one. I hope you are well.

I am about as well as can be expected. I am physically in a crippled condition and forevermore will be. Mentally I defy anyone to doubt it.

I rec'd your "Card" last Dec. 1949 thought I rec'd one other but at present I cannot find it. I was going to write to you before but decided to wait here but will state reason if I ever get to see you. I tried to get Mary (my wife) to see you but she could not. (No fault of hers)

I wish to inform you that on Sept. 14, 1948, I bequeathed to you by my last "Will" my farm (Corbin's) south of Capricorn, Va., on west side of Blackrock, after my wife's death (Mary R. Murnaw) and my own death; thereby, complying to our "Joint Will" as provisions as stated therein "Our Joint Will", disposing of my farm. (Corbin's) I have the "Will" written and in my letter box here in Attendant's room. This nullifies the one in (Lock-box) Mt. Jackson, Va., Bank.

I wish to state let no one deny that I have never forgotten you my daughter little Reva Lee Murnaw with my love and all.

Your little sister

I have prayed over 6000 prayers for each of you and you pray many prayers for yourself, also for little sister, taken away many years ago.

I will send this to address as given on Card, I, at present cannot locate.

I hope this letter is not delayed or destroyed; woe be to the one or ones that would have same done or do so.

Write to me if you get this letter all about yourself. If not, I shall believe then it was destroyed.

I will close by hoping you are well to hear soon.

With Love,
Your father,
E. A. Murnaw.

P.S. Be sure and keep this letter.
E. A. Murnaw

Sunday.

Staunton, Va.,
R.F.D. 7.
Oct., 8, 1950.

Dear son, James:-

A few lines today in answer to your welcome letter, dd 10-4-50 - and was real glad to hear and that you were well and getting along very well.

I am about as when I wrote you before.

Mary wrote to me, 10-6-50 - she had written to you but had not rec'd a reply yet. Write to her.

Write to me in your next letter, the bequest I had given you by Will, to you in my other letter so I know if you rec'd it as written.

There isn't anything I need, as Mary gives Mildred, or me, to send me things very frequently. Thanks you just the same. You save your money if you get more that you need not live on.

Tell me more in your next letter about yourself - if they had you in that last war, (1-1-2 - world) I could write for a month or talk for several days but will not but here in this place. One thing of knowledge to you, from me, is, I

have never been demented (let no one deny that) or committed a crime by laws of this Country, (let no one deny that) to be in prison a moment. Woe be unto any one stating otherwise.

I hope you get this letter & also the other act written by me.

I am writing to Mary, also, today. She rather expects to go to Butte, Mont, to Helena in the near future.

I will close, hoping you are well. Write me soon again.

With Love,
Your Father,
E. Moline Marman.

Staunton, Va.,
R.F.D. 7.
Jan., 31, 1951.

Dear son, James;-

A few lines this afternoon in answer to your welcome letter rec'd yesterday and was glad to hear as well as surprised and that you were well and getting along very good. I was wondering why you did not write before.

I am about as when I wrote you last time, 10-8-50. I can get on my feet but do not walk much.

Glad to know you have work and getting on well with it. Be careful with your car that you do not have an accident.

As for the war, I hope that this Country, has that much honor and justice, and never think of calling you to war, after doing us and leaving us, done like we have been and you being now in your, 34yr. of age.

Mary + Mildred, sends me some things, (but not since, Dec., 24, 1950.) so you take care of your earnings for your future. Many, many, thanks, just

the same.

I am glad to know you rec'd my letter about the "Gill" to you of the "Hardine" farm, after myself & Mary's death. Take care of your letters, as I have it written & recorded here in my letter box.

Yes, Mary has gone over to Balto., Md., to Roberts', several months ago. Her address is, 1427 - John, St., Balto., - 17, Md. I rec'd a letter from her this morn, she is well.

I will close. I shall always be glad to hear from you.

With Love,
Your father
Aldine.

P.S. You stated, you were not married, well, at your age, I would wait at least awhile yet. Father