No. 21-753

In the

Supreme Court of the United States

TRINA L. JANURA,
Individually and in capacity as Executrix,

Petitioner,

v.

JOHN J. JANURA, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Trina L. Janura,
Individually and in capacity as Executrix, Pro Se
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QUESTIONS PRESENTED

Justices Menis E. Ketchum, Allen H. Loughry II, Margaret L. Workman and Elizabeth D. Walker of the West Virginia Supreme Court of Appeals, were all sent notice on November 7, 2016 (App. 683) of impending investigations and potential conflicts concerning judicial actions and impeachment. 1st Circuit Court Judge Ronald E. Wilson, appointed by West Virginia Supreme Court continually 2005-2018 to the Judicial Investigation Commission (JIC), was its chairman 2009-2018, with the authority to determine violations of the Code of Judicial Conduct, to discipline, and to nominate Disciplinary Counsel (App 603). Complaints were filed against all justices above and investigated by JDC and JIC (same entity). In September 2018 Judge Wilson was appointed Acting Justice to sit by temporary assignment in matters relating to the above justices; he was motioned to self-recuse but did not. Neither he nor the Supreme Court of West Virginia disclosed this action and the relationship between the courts to petitioner, nor self-recused, denying her right to file objections to this conflict with her own case, where she filed motions/petitions in both circuit court with Judge Wilson and West Virginia's Supreme Court -- where the other case was proceeding – concurrently.

The questions presented are:

1. Did the non-disclosure and non-recusal from either the circuit court or the West Virginia Supreme Court of Appeals both violate the petitioner's rights under the
   a. Due Process Clause of the Fourteenth Amendment?
   b. United States Code; Title 28, Chapter §455?

2. Did the Supreme Court of Appeals of West Virginia, Circuit Court Judge Ronald E. Wilson, and special

commissioners appointed by Judge Wilson in the petitioner's case -- pursuant to West Virginia Code §53-1-1 having jurisdiction -- exceed their authority and jurisdiction, creating nullities of their findings and orders, and violate the Due Process Clause of the Fourteenth Amendment?

3. Did the Supreme Court of Appeals of West Virginia, Circuit Court Judge Ronald E. Wilson, and special commissioners appointed by Judge Wilson, follow existing law, both U.S. and West Virginia statutes -- intent of the testatrix, the power of her appointment, the clearly expressed provisions of her will, the opinions of her appointed executrix Trina L. Janura, submitted in writing and binding on the courts and parties in case 12-C-229 in all matters therein as decreed in *Moore v. Harper* -- when the circuit court canceled the petitioner's requested jury trial and then ordered the exclusion of her testimony as it concealed executrix' opinions from the commissioners, and then the West Virginia Supreme Court of Appeals concealed the executrix' opinions in their No. 20-0159 Decision — or did this violate the

a. United States Constitution's Seventh Amendment?
b. Due Process Clause of the Fourteenth Amendment?
c. United States Code, Title 9, §§ 1-307, the FAA?

PARTIES TO THE PROCEEDING BELOW

And

CORPORATE DISCLOSURE

All parties are named in the caption. Petitioner Trina L. Janura was appellant in the West Virginia Supreme Court of Appeals. Respondent John J. Janura, Jr. brought the suit (Plaintiff in the circuit court). Corporate disclosure does not apply.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Trina L. Janura, individually and as executrix, respectfully petitions for a Writ of Certiorari to review the decision of the West Virginia Supreme Court of Appeals in this case.

OPINIONS BELOW

The 3 decisions of the West Virginia Supreme Court of Appeals are unpublished.

JURISDICTIONAL STATEMENT

The West Virginia Supreme Court of Appeals issued its decision on February 2, 2021.

Petitioner's timely March 4, 2021 petition for rehearing (App. 1365-1410) was refused on April 22, 2021. (App. 1) This Court has jurisdiction based on 28 U.S.C. § 1257(a).

This petition is filed consistent with this Court's March 19, 2020 Order of extension.

CONSTITUTIONAL AND STATUTORY PROVISIONS

(*See* Volume 1, App. 189-214)

United States Constitution

Amendment 7 in relevant part: The right of trial by jury shall be preserved.

Amendment 14 (Section 1) in relevant part: "[n]o State shall...deprive any person of life, liberty, or property, without due process of law."

United States Statutes

9 U.S.C. §§ 1-307: Federal Arbitration Act

28 U.S.C. § 455 (a),(b)(1)(3)(5)(iii) (relevant parts): Any justice, judge...shall disqualify himself: impartiality questioned, bias, served, 3rd degree interest

28 U.S.C. §1654. Appearance personally or by counsel

West Virginia Constitution

W.Va. Constitution, Article III, Section 10 provides: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

Article III, Section 13 provides: Right of jury trial.

Article III, Section 17 : Justice administered speedily

Article VIII, Section 3, in pertinent part: "The Supreme Court of Appeals shall have original jurisdiction of proceedings in... mandamus, prohibition..."

Multi-Jurisdictional and West Virginia Statutes

UPC § 2-510. Uniform Probate Code:
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§2-2-10 (p): The word "land"
CHAPTERS:
§§37: Partition
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§§55: Actions, Suits
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§55-11-2 Notice of lis pendens.

Federal Rules of Civil Procedure (Correlate to WVRCP)

RCP Rule 2. One Form of Action
RCP Rule 38. Right to a Jury Trial

West Virginia Rules of Civil Procedure

Rule 1 §20.7 *Pro Se* parties – their cause not defeated by unfamiliarity with procedure
Rule 1 §40.7 Avoid form over substance
Rule 2.6 Ensuring the Right to be Heard
Rule 10(c) Form of Pleadings: adopted by reference
Rule 15 Amended and Supplemental Pleadings

STATEMENT OF THE CASE

This Court has emphasized that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.,* 393 U.S. 145, 150 (1968). This case affords the Court the opportunity to clarify the circumstances which create "bias" or an "appearance of bias" that is so significant that due process requires the recusal of the judge or judges who benefited ... - a question that is vitally important to preserving the "reputation for impartiality and non-partisanship" - and, ultimately, the "legitimacy" - "of the Judicial Branch." *Mistretta v. United States,* 488 U.S. 361, 407 (1989).

In the Supreme Court of Appeals of West Virginia Docket No. 20-0159, the Petitioner's brief details the complete Statement of the Case (App. 255-282), which she incorporated by reference into her Argument, App. 282: *The Petitioner incorporates by reference, (now abbreviated as "IBR") in the* ***Statement of the Case*** *above, into the* ***Arguments*** *below. The intention is to incorporate all pleadings, exhibits, offers of proof, law, case law, and footnotes contained therein and re-state them into the arguments below and above.*

This (App. 255-282) will afford this Court a complete history of the case and all actions, arguments, procedures, etcetera, during the past approximate 9 ½ years that are contained in the docket (which Judge Wilson took Judicial Notice of on March 9, 2018; (App.1135) during *Janura v. Janura*, No. 12-C-229.

The Petitioner in her capacity as executrix of the estate of Kathryn Janura filed a Notice of Lis Pendens September 25, 2012 (App. 337) by her then-attorney Holly Planinsic. Approximately 2 ½ months later the Respondent filed a partition action December 11, 2012. The case is *Janura v. Janura*, No. 12-C-229, assigned Judge Ronald E. Wilson.

Circuit Court Judge Ronald E. Wilson is the 2nd cousin-in-law of Respondent's attorney Daniel L. McCune. Judge Wilson disclosed this fact in an order entered December 2, 2016 (App. 88), approximately 4 ½ years after the start of the action. Attorney McCune is a partner with Judge Ronald Wilson's son-in-law, attorney Jeffrey Rokisky, and Judge Wilson's grandson is also in the Rokisky law firm. (App. 739). Petitioner notes that attorney David Wilharm, also a partner in the Rokisky firm, had testified as an unscheduled, undisclosed expert witness for the Respondent's attorney Daniel McCune at the commissioners' hearing on September 18, 2017 (App. 669) that the Circuit Court ordered, after canceling the scheduled jury trial.

Respondent never contested the will or accountings (Petitioner's Answer and Counterclaims, on January 14, 2013, App. 320-321) Petitioner re-stated this and cited established case law of "Doctrine of Election" in *Moore v. Harper,* 27 W.Va. 362 (1886) in her motion to compel arbitration March 17, 2014 (App. 365-366). Petitioner continued to cite this and WV Code §41-5-11 in the circuit court. She stated it September 12, 2014 in her first Notice of Appeal to the West Virginia Supreme Court (App.407) and continued to state it in 2 petitions for writ of Prohibition (App. 762) and in all 3 appeals. Both lower courts ignored it.

Petitioner's Answer and Counterclaims on January 14, 2013 also first stated that the will created a trust (App. 316), the Respondent damaged the Petitioner with his illegal gas lease (App. 321-325: conversion, trespass to minerals, and unjust enrichment). The lease (App. 334-335) was fraudulently concealed. *See* also, Petitioner's resulting lis pendens, App. 337. Both lower courts ignored this under one form of action.

On July 23, 2013 the parties met for a scheduled hearing on (Petitioner's) motion to dismiss for Failure to Join an Indispensable Party (Respondent's son) as remainderman in the trust. Instead the circuit court had already made rulings, without arguments, briefs, court reporter, discovery, and 3 months before his own scheduling order deadline. He ruled that the will's residue clause was merely an "attachment", together with the will it did not create a trust, the language was condition subsequent and an evidentiary hearing would have to take place (App. 35-37), scheduled for July 30, 2014. (This ruling wasn't entered until August 26, 2013.) Petitioner submitted a brief, offers of proof and witness list for this hearing (App. 372-391) on June 13, 2014 (where she first noted the way in which the Court ruled on July 23) which the Court denied on June 25, 2014 (App. 42). The Court canceled the hearing and scheduled a trial. Petitioner promptly requested a jury.

Petitioner first raised the issues of will and trust construction with her motion to compel arbitration under the FAA on March 17, 2014 (App. 340-370) and more detailed in her required pretrial conference memorandum on November 25, 2014 (App. 414-488),

where she listed West Virginia statutes and case law. The lower court denied arbitration (App. 371, 45)

Petitioner filed a Notice of Appeal (App. 392-413) and No. 14-0911 appellate briefs (App. 489-592). Her first Assignment of Error on December 14, 2014 (App.500) stated that Circuit Court denied her due process and Constitutional right to be heard. The Supreme Court of West Virginia dismissed May 29, 2015; it was not a final decision, but found the language at issue evidenced the intention that Petitioner was to be accorded substantial deference in how she interprets the will, citing *Moore v. Harper.* (App. 8). Footnote 4 stated Petitioner was free to continue to argue. In footnote 2 (App. 9-10) they cited *Woman's Club of St. Albans v. James*, (*infra*), RE: condition subsequent.

Adhering to *Moore,* Petitioner filed the executrix' written Opinion Memorandum on September 1, 2015. (Volumes 1 and 4 show this Opinion, App. 215-254, her motions to include it and her opposition to Respondent's motions to exclude her testimony, App. 922-1070, and transcript excerpts of the Court's refusal to admit it, Apps. 1136-1141, 1148-1149). March 10, 2016 circuit court order (73) began to continually ignore it, deny it, and give no conclusion of law to contradict it. The record is replete with circuit court denials (Apps. 78, 80, 84, 85, 99, 111, 118, 123.) Petitioner motioned to disqualify, then petitioned for writ of prohibition against Judge Wilson and for another writ against his appointed commissioners after he canceled a jury. All were REFUSED or DENIED by the newly seated Supreme Court justices. (Apps. 668, 675, 733)

December 17, 2019, Petitioner sent Chief Justice Beth Walker a letter with enclosed motion to Judge Wilson for his voluntary recusal (App. 741-747). Judge Wilson's order on December 19, 2019 (App.748-749) DENIED Petitioner's motion to recuse himself. On December 30, Chief Justice Walker also DENIED Petitioner's motion for his disqualification (App. 750).

RELATIONSHIP TIMELINES

Supporting Documentation in VOLUME 3

The documents express the relationship between Circuit Court Judge Ronald E. Wilson, the Judicial Investigation Commission (JIC), the Supreme Court of Appeals of West Virginia justices, attorney Daniel L. McCune, and their timeline coinciding with Petitioner in *Janura v. Janura*, 12-C-229 in the 1st Circuit Court in West Virginia as stated therein (App. 593-750). The timeline (App. 593-598) and diagram (App. 599-602) express the circular relationship (*italicized*) unbeknownst to Petitioner until preparing this petition.

- *7/10/17 Ronald E. Wilson (JIC) Advisory Opinion, RE: Against disqualification, per se (App. 658-665)*
- 8/29/17 Judge Wilson letter to Chief Justice Loughry, RE: disqualification (App. 666-667)
- Chief Justice Loughry Administrative Order DENIES motion to disqualify (App. 668)
- 5/9/18 Supreme Court 5-0 (Workman/Walker) REFUSE petitioner writ against Judge Wilson

- *9/21/18 Ronald E. Wilson (JIC) exonerates Justices Workman(C.J.) and Walker (App. 693-705)*
- 10/4/18 Supreme Court (C.J. Workman, Walker) REFUSE petitioner 2nd writ against Wilson and commissioners (App. 733)
- *10/11/18 Temporary Justice Ronald Wilson grants Workman writ; halts Workman/Walker impeachments (App. 734-735)*
- 12/10/19 Judge Wilson letter to Chief Justice Walker, RE: disqualification (App.738-740)
- Judge Wilson's order December 19, 2019 (App. 748-749) DENIES Petitioner's motion to recuse himself.
- Chief Justice Walker Administrative Order DENIES Petitioner's motion for disqualification (App. 750).

Chief Justice Ketchum's Administrative Order (657) also resulted after Wilson's 12/21/16 letter (654).

The above appears to express Judge Wilson—or *Ronald Wilson, JIC chairman*—made a determination which the chief justices must follow regardless of evidence submitted by Petitioner or the law involved.

Judge Wilson advising Supreme Court through attorney McCune (App. 673-674, 716-717) also appears to influence their decision. Which Judge Wilson are they taking advisement from? 1st Circuit Judge Wilson 12-C-225, *or Ronald E. Wilson, JIC chairman?*

REASONS FOR GRANTING THE PETITION

I. United States Code Requires Recusal Pursuant to 28 U.S.C. § 455 (a),(b)(1)(3)(5)(iii)

Pursuant to West Virginia Judiciary Code of Judicial Conduct A. Rule 2.11: Disqualification, under A (1) and (2) is required.

Supreme Court of Appeals Justice Beth Walker had "a direct, personal interest" in the Petitioner's case and a substantial pecuniary interest. Circuit Court Judge Ronald Wilson was chairman of the Judicial Investigation Commission (JIC) investigating her and Justices Workman, Ketchum, and Loughry. The result of charges could lead to impeachment, disbarment, fines, arrest, loss of a continued judicial career and reputation, etcetera. As this Court has stated in *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927), the common-law rule requires recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, and in *Withrow v. Larkin,* 95 S.Ct. 1456 (1975), *Id.* at 47, this Court has stated that recusal is required where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

This Court has stated in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252 (2009), in Syllabus at 2254-2255:

> (a) The Due Process Clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial,

pecuniary interest" in a case, *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749, but this Court has also identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712. Two such instances place the present case in proper context. Pp. 2259 – 2262.

(1) The first involved local tribunals in which a judge had a financial interest in a case's outcome that was less than what would have been considered personal or direct at common law. In *Tumey,* a village mayor with authority to try those accused of violating a law prohibiting the possession of alcoholic beverages faced two potential conflicts: Because he received a salary supplement for performing judicial duties that was funded from the fines assessed, he received a supplement only upon a conviction; and sums from the fines were deposited to the village's general treasury fund for village improvements and repairs. Disqualification was required under the principle that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused,

denies the latter due process of law." 273 U. S., at 532, 47 S.Ct. 437. In *Ward v. Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267, a conviction in another mayor's court was invalidated even though the fines assessed went only to the town's general fisc, because the mayor faced a " ' possible temptation' " created by his "executive responsibilities for village finances." *Id.,* at 60, 93 S.Ct. 80. Recusal was also required where an Alabama Supreme Court Justice cast the deciding vote upholding a punitive damages award while he was the lead plaintiff in a nearly identical suit pending in Alabama's lower courts. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823. The proper constitutional inquiry was not "whether in fact [the justice] was influenced," *id.,* at 825, 106 S.Ct. 1580, but "whether sitting on [that] case ... ' "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true," ' " *ibid.* While the "degree or kind of interest ... sufficient to disqualify a judge ... '[could not] be defined with precision,' " *id.,* at 822, 106 S.Ct. 1580, the test did have an objective component. Pp. 2259 – 2261.

(2) The second instance emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but had determined in an earlier proceeding whether criminal charges should be brought and then proceeded to try and convict the

petitioners. *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942. Finding that "no man can be a judge in his own case," and "no man is permitted to try cases where he has an interest in the outcome," *id.,* at 136, 75 S.Ct. 623, the Court noted that the circumstances of the case and the prior relationship required recusal. The judge's prior relationship with the defendant, as well as the information acquired from the prior proceeding, was critical. In reiterating that the rule that "a defendant in criminal contempt proceedings should be [tried] before a judge other than the one reviled by the contemnor," *Mayberry v. Pennsylvania,* 400 U.S. 455, 466, 91 S.Ct. 499, 27 L.Ed.2d 532, rests on the relationship between the judge and the defendant, *id.,* at 465, 91 S.Ct. 499, the Court noted that the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or there is an unconstitutional " 'potential for bias,' " *id.,* at 466, 91 S.Ct. 499. Pp. 2261 – 2262.

(b) Because the objective standards implementing the Due Process Clause do not require proof of actual bias, this Court does not question Justice Benjamin's subjective findings of impartiality and propriety and need not determine whether there was actual bias. Rather, the question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or

> prejudgment that the practice must be forbidden if the guarantee of due process is tobeadequately implemented." *Withrow*, 421 U.S., at 47, 95 S.Ct. 1456.

Id. at 872:

> Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

I

In August 2002 a West Virginia jury returned a verdict that found respondents A.T. Massey Coal Co. and its affiliates (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The jury awarded petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales (hereinafter Caperton) the sum of $50 million in compensatory and punitive damages.

In June 2004 the state trial court denied Massey's post-trial motions challenging the verdict and the damages award, finding that Massey "intentionally acted in utter disregard of [Caperton's] rights and

> ultimately destroyed [Caperton's] businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so." App. 32a, ¶ 10(p). In March 2005 the trial court denied Massey's motion for judgment as a matter of law.

Id. at 877:

> As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow,* 421 U.S., at 47, 95 S.Ct. 1456. To place the present case in proper context, two instances where the Court has required recusal merit further discussion.

Id. at 888-889:

> One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. Almost every State—West Virginia included—has adopted the American Bar Association's objective standard: "A judge shall avoid impropriety and the appearance of impropriety." ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004); see Brief for American Bar Association as *Amicus Curiae* 14, and n. 29. The ABA Model Code's test for appearance of impropriety is "whether the conduct would

create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Canon 2A, Commentary; see also W. Va.Code of Judicial Conduct, Canon 2A, and Commentary (2009) (same).

The West Virginia Code of Judicial Conduct also requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 3E(1); see also 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"). Under Canon 3E(1), " '[t]he question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.' " *889 *State ex rel. Brown v. Dietrick,* 191 W.Va. 169, 174, n. 9, 444 S.E.2d 47, 52, n. 9 (1994); see also *Liteky v. United States,* 510 U.S. 540, 558, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (KENNEDY, J., concurring in judgment) ("[U]nder [28 U.S.C.] § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute"). Indeed, some States require recusal based on campaign contributions similar to those in this case. See, *e.g.,* Ala.Code §§ 12–24–1, 12–

24–2 (2006); Miss.Code of Judicial Conduct, Canon 3E(2) (2008).

These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11. This is a vital state interest:

> "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn. v. White,* 536 U.S. 765, 793, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (KENNEDY, J., concurring).

It is for this reason that States may choose to "adopt recusal standards more rigorous than due process requires." *Id.,* at 794, 122 S.Ct. 2528; see also *Bracy v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (distinguishing the "constitutional floor" from the ceiling set "by common law, statute, or the professional standards of the bench and bar").

II. Petitioner was denied due process under the U.S. Constitution's 14th Amendment

a. W.Va. Code §53-1-1 and Jurisdiction

Both lower courts had not jurisdiction, or having jurisdiction, exceeded their legitimate authority.

The Petitioner incorporates by reference pages from the appendix record in the lower court docket

(A.R.#2; pp. 792-817), reproduced (*italicized*) below:

"Defendant Trina Janura's Response in Opposition to Plaintiff, John J. Janura, Jr.'s Motion for Summary Judgment on Partition Claim"

The Defendant Trina Janura does not waive or grant this Court any jurisdiction over the subject matter. That power is solely that of Executrix Trina L. Janura, as granted by the decedent Kathryn Janura, and affirmed by the West Virginia Supreme Court in Janura v. Janura,

Janura v. Janura, No. 14-0911 W. Va. Supreme Court of Appeals, filed May 29, 2015:

(stating in part):

> *[...] we find that the language at issue evidences an intention that petitioner, as executrix, be accorded substantial deference in how she interprets the decedent's will. See Moore v. Harper, 27 W.Va. 362, 373 (1886) (it is well settled that courts accord deference to "[t]he power of the testator to provide in [her] will the mode and manner of its interpretation and the force and effect of such interpretation.").*

Petitioner's Response, continued on A.R.#2; p. 795:

(stating in part):

> *We construe petitioner's argument to include the contention that the circuit court should have deferred to petitioner's interpretation (...) residuary clause (...)*

Moore v. Harper, 27 W.VA. 362 (1886), (Syllabus point 4) states in part:

> *4. A testator provides in his will that a certain person therein named shall decide all questions, which may arise among his devisees and legatees in relation to the construction of his will, and that the written opinion of such person shall be final, HELD:*
>
> > *That the written opinion of such person, if made without fraud and corruption, will be treated by the courts as final and conclusive of the matters decided as between the devisees and legatees affected thereby. (p. 373).*

Moore v. Harper, 27 W.Va. 362 (pg 374) further states:

> *The effect of such a provision is to make the person appointed to interpret the writing, or settle controversies growing out of it, an arbitrator chosen by the parties, and his determination may be made final or otherwise as the parties shall provide in the writing....Of course a will is not an agreement between two or more contracting*

Petitioner's Response, continued on A.R.#2; p. 795:

> *parties, but it is certainly no less binding upon the parties who take a benefit under it than if they had contracted with the testator for that benefit. The testator has full dominion over his property with the absolute right, subject only to the limitations fixed by law, to do with and dispose of it in any manner or to whomever his will or caprice may suggest. Within the rules of law he may subject it to any limitation, restriction or condition he chooses, and the devisee or legatee, if he elects to take under the will, will be bound to respect and observe the same. It, therefore, seems to me entirely clear that a testator has the power not only to appoint a person or arbitrator to interpret and settle difficulties among the devisees and legatees growing out of the dispositions made by the will, but that he has the right to make the decision of such arbiter, if made without fraud or corruption, final and conclusive upon the beneficiaries under the will.*

and contained in the Opinion of the Executrix Trina L. Janura (Defendant's ***EXHIBIT C-3****, the Opinion Memorandum) and the answers to questions presented to the Executrix Trina L. Janura regarding the subject matter as found in the documents and exhibits from the Court Record, attached hereto and listed below:*

Petitioner's Response, continued on A.R.#2;p. 796:

At the September 16, 2015 Scheduling Conference with transcript of the conference filed October 8, 2015, Defendant incorporates by reference the following below (from transcript page 6, line 19 through 24; and page 7, line 1 and 2) in which this Court stated:

> *THE COURT: "Okay. Let's – Mr. McCune, I haven't really considered this – the motion to amend pleadings to incorporate by reference – no, that's the same thing. That's the opinion memorandum and, of course, the Court's bound by that. The Court must consider that and must follow it. So there is no reason to incorporate it in anything. It's part of the law of the case now."*

This Court's Order of August 23, 2013 was void by the Court's above declaration.

Petitioner's Response, continued on A.R.#2;p. 797:

On September 14, 2015 the Defendant Trina Janura filed a motion to vacate the above referenced August 23, 2013 Order. This Court has not acted on Defendant's motion to-date.

To the extent that further proof is required, the Defendant incorporates by reference the Plaintiff's EXHIBIT A and the Order of August 23, 2013 which clearly shows that the Court on its own authority usurped its authority over the subject matters contained therein:

Petitioner's Response, continued on A.R.#2;p. 797:

As stated in the following cases below:

"Jurisdiction" relates to the power of a court, board, or commission to hear and determine a controversy presented to it, and not to the right of recovery as between the parties thereto." Syl. Pt. 1, Fraga v. State Comp. Comm'r, 125 W.Va. 107, 23 S.E.2d 641 (1942). "To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction." West Virginia Sec. Sch. Act. Comm'n v. Wagner, 143 W.Va. 508, 520-21, 102 S.E.2d 901, 909 (1958). "[A]ny judgment or decree rendered without such jurisdiction will be utterly void." Syl. Pt. 1, in part, Schweppes U.S.A. Ltd. v. Kiger, 158 W.Va. 794, 794, 214 S.E.2d 867, 868 (1975), overruled on other grounds by S.R. v. City of Fairmont, 167 W.Va. 880, 280 S.E.2d 712 (1981). See also, Syl. Pt. 3, Duncan v. Tucker County Bd. of Ed., 149 W.Va. 285, 140 S.E.2d 613 (1965) ("Proceedings had in a court which has not acquired jurisdiction in a manner recognized by law are void and a nullity."); St. Lawrence Boom & Mfg. Co. v. Holt, 51 W.Va. 352, 41 S.E. 351, 356 (1902) ("the court itself cannot act except upon its own intrinsic authority in matters of jurisdiction; and every excess will amount to a usurpation, which will make its decretal orders a nullity, or infect them with a ruinous infirmity.").

Petitioner's Response, continued on A.R.#2;p. 797:

This instant case presents issues of clear error in that the Circuit Court of Hancock lacked subject matter jurisdiction. State ex rel. Vance v. Arthur, 98 S.E.2d 418 W.Va. 737 (1957) cited:

> *A void judgment is a mere nullity and is of no valid force or effect. Pettry v. Hedrick, 124 W.Va. 113, 19 S.E.2d 583; Rousey v. Stilwagon, 70 W.Va. 570, 74 S.E. 732, Ann.Cas.1914A, 1084; Roberts v. Hickory Camp Coal and Coke Company, 58 W.Va. 276, 52 S.E. 182; Waldron v. Harvey, 54 W.Va. 608, 46 S.E. 603, 102 Am.St.Rep. 959; Morgan v. Ohio River Railroad Company, 39 W.Va. 17, 19 S.E. 588; Fowler v. Lewis, 36 W.Va. 112, 14 S.E. 447; Hall v. Hall, 30 W.Va. 779, 5 S.E. 260; Livey v. Winton, 30 W.Va. 554, 4 S. E. 451; White v. Foote Lumber and Manufacturing Company, 29 W.Va. 385, 1 S.E. 572, 6 Am.St.Rep. 650; Sturm v. Fleming 22 W.Va. 404; Haymond v. Camden, 22 W. Va. 180; Grinnan v. Edwards, 21 W.Va. 347; Ambler v. Leach, 15 W.Va. 677.*

The Plaintiff John J. Janura, Jr.'s Motion for Summary Judgment on Partition Claim appears to rely completely on the void judgment of August 23, 2013, and he is asserting claims or rights from this void judgment. State ex rel. Vance v. Arthur, 98 S.E.2d 418 W.Va. 737 (1957) cited:

Petitioner's Response, continued on A.R.#2;p. 797:

*A void judgment, being a nullity, may be attacked, collaterally or directly, at any time and in any court whenever any claim or right is asserted under such judgment. 424*424 State ex rel. Lovejoy v. Skeen, 138 W.Va. 901, 78 S.E.2d 456, certoriari denied, 349 U.S. 940, 75 S.Ct. 786, 99 L.Ed. 1268; Bennett v. Bennett, 137 W.Va. 179, 70 S.E. 2d 894; Stephenson v. Ashburn, 137 W.Va. 141, 70 S.E.2d 585; Cable v. Cable, 132 W. Va. 620, 53 S.E.2d 637; Evans v. Hale, 131 W.Va. 808, 50 S.E.2d 682; Pettry v. Hedrick, 124 W.Va. 113, 19 S.E.2d 583; Perkins v. Hall, 123 W.Va. 707, 17 S.E.2d 795; Hayhurst v. Kenny Transfer Company, 110 W.Va. 395, 158 S.E. 506; New Eagle Gas Coal Company v. Burgess, 90 W. Va. 541, 111 S.E. 508; Jones v. Crim, 66 W. Va. 301, 66 S.E. 367; Roberts v. Hickory Camp Coal and Coke Company, 58 W.Va. 276, 52 S.E. 182; St. Lawrence Company v. Holt, 51 W.Va. 352, 41 S.E. 351; Hoback v. Miller, 44 W.Va. 635, 29 S.E. 1014; Fowler v. Lewis, 36 W.Va. 112, 14 S.E. 447; Haymond v. Camden, 22 W.Va. 180; Camden v. Haymond, 9 W.Va. 680; 11 Michie's Jurisprudence, Judgments and Decrees, Section 145; 11 Michie's Jurisprudence, Jurisdiction, Section 9.*

In 11 Michie's Jurisprudence, Jurisdiction, Section 9, the text contains these statements:

> *"If a court does not have jurisdiction, it is a matter of no importance, however correct its proceedings and decisions may be; its judgments are nullities, and may not only be set aside in the same court, but may be declared void by every court in which they are called in question. Any court may examine collaterally into the jurisdiction of another court to pass on questions of title to property, and if the other court has done an act coram non judice, it may be disregarded altogether.*
>
> *"If the court exceeds its jurisdiction over the subject matter, its decrees are nullities to that extent and may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner, and may be declared void by every court in which they are called in question. Want of jurisdiction affirmatively appearing on the face of the proceedings makes the judgment even of courts of general jurisdiction null, and they may be so treated by any court in any proceeding, direct or collateral."*

(end of A.R.#2; pp. 792-817)

b. Doctrine of Election

The Respondent never contested the will or accountings (Answer and Counterclaims, App. 320-321)

Both lower courts violated West Virginia Statute, §41-5-11: "Complaint shall be filed within 6 months." The Supreme Court Decision is in direct conflict with "Doctrine of Election" which this Court and jurisdictions nationwide accept as axiomatic:

United States Supreme Court

Smithsonian Institution v. Meech, 169 US 398 18 S.Ct. 396 (1898) *Id.* at 414:

> It is said in 2 Redf. Wills, p. 298, in treating of the rule as to conditions against disputing the will, that 'acceptance of the legacy renders the condition binding upon the legatee, upon the well-known doctrine of election.' Election is thus defined by Sir William Grant, M. R., in Andrew v. Trinity Hall, 9 Ves. 525, 533: 'Where one legatee under a will insists upon something by which he would deprive another legatee under the same will of the benefit to which he would be entitled, if the first legatee permitted the whole will to operate.'

Id. at 415:

> In *Beall v. Schley*, 2 Gill, 181, 200, the court said: "It is only carrying out a plain intent of the testator, and giving to the residuary devisee that which the testator intended, and forbidding the heir from taking property not designed for him. From the earliest case on

> the subject, the rule is, that a man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it, so far as he is able to do so. He cannot take what is devised to him, and, at the same time, what is devised to another; although, but for the will, it would be his; hence he is driven to his election to say, which he will take."
>
> See also 1 Jarman on Wills, 415; 2 Story's Eq. Juris. § 1076.

Peters v. Bain, 133 U.S. 670, 10 S.Ct. 354 (1890)
Id. at 695:

> The doctrine of election rests upon the principle that he who seeks equity must do it, ... in other words, that one cannot take a benefit under an instrument, and then repudiate it.

Other Federal Jurisdictions

Silling v. Erwin, 885 F.Supp. 881, U.S. District Court, S.D. W.Va. (1995):

> If one has accepted benefits under a will, he "must adopt its whole contents, conforming to all its provisions, and renouncing every right inconsistent with it." *Moore v. Harper,* 27 W.Va. 362 (1886). "The general rule ... is that a beneficiary who accepts such benefits is bound to adopt the whole contents of that will and is estopped to challenge its validity." *Tennant v. Satterfield,* 158 W.Va. 917, 921, 216 S.E.2d 229, 232 (1975).

West Virginia

Jones v. Jones, 551 SE 2d 37 – W. Va.: Supreme Court of Appeals 2001:

> *1)* This Court has stated that: "The general rule with regard to acceptance of benefits under a will is that a beneficiary who accepts such benefits is bound to accept the whole contents of that will and is estopped to challenge its validity." *Tennant v. Satterfield*, 158 W.Va. 917, 921, 216 S.E.2d 229, 231-2 (1975); *see* also, *Moore v. Harper*, 27 W.Va. 362 (1886). This rule, which is sometimes referred to as the "doctrine of election", is the law in at least 34 other jurisdictions. See Randy R. Koenders, Annotation, Estoppel to Contest Will or Attack its Validity by Acceptance of Benefits Thereunder, 78 A.L.R.4th 90, 101-04 (1990).
>
> *2)* In Syllabus Point 1 of *Tolley v. Poteet*, 62 W.Va. 231, 57 S.E. 811 (1907), this Court reiterated a rule long-established in West Virginia, as well as in Virginia and England.
>
> *3)* *42 That Syllabus Point states that: "One entitled to any benefit under a will or other instrument must, if he claims that benefit, abandon every right and interest the assertion of which would defeat even partially any of the provisions of that instrument." See also, *Rau v. Krepps*, 101 W.Va. 344, 133 S.E. 508 (1926); *Upshaw v. Upshaw*, 2 Hening & Munford 381, 2 Va. 461 (1808); and *Streatfield v. Streatfield*, 23 Eng. Reprints 724 (1736).

4) An examination of these authorities indicates that a plaintiff estopped from challenging a benefit conferred upon a defendant under a document is also precluded from challenging or raising an outside transaction which might upset the benefit conferred under the document.

5) Lastly, the Court notes that the appellants claim that their acceptance of benefits under the will should not bar their claims for tortious interference with their expectancy interests, conversion and so forth.

Other Jurisdictions

Estate of Riley, 6 Wis. 2d 29 - Wis: Supreme Court (1959) *Id.* at 32-32:

> The doctrine of election is well established in equity juris-prudence and adopted by many states.

Lopez v. Lopez, 96 So. 2d 463 – Fla. Supreme Court (1957) *Id.* at 466:

> The doctrine of election in connection with testamentary instruments is the principle that one who is given a benefit under a will must choose between accepting such benefit and asserting some claim which he has against the testator's estate or against the property disposed of by the will. 57 Am.Jur., Wills, Sec. 1526.

c. Lower courts violated the plain language of the W.Va legislature and the testator's intent

The West Virginia Supreme Court acted as a super-legislature -- violating many of its own state's laws, as well as conflicting with other state legislatures, including the Uniform Trust Code, largely adopted in at least 34 states. (W.Va Code §§44D) and congruent Uniform Probate Code (UPC), adopted at least in part by 18 states. (The Rest and Residue Clause was incorporated by reference per UPC on March 17, 2014 in the circuit court, 351-355, and December 14, 2014 in the first appeal, (500, 510-512). The courts violated axioms and well-settled case law held in this Court and in many other jurisdictions. They violated the sacrosanct testator's intent and deprived Petitioner of her rightful property, specifically the will's provision #7, when it affirmed the orchard to Respondent. The Decision states that testator's intent is to be arrived at not by confining its meaning to a single provision. Then it makes a decision based on a single phrase in the will. Petition to rehear: 1365-1410.

Moore v. Harper, 27 W.VA. 362 (1886):

> A testator provides in his will that a certain person therein named shall decide all questions, which may arise among his devisees and legatees in relation to the construction of his will, ... the written opinion of such person shall be final.

Pray v. Belt, 26 U.S. 670 (1828) *Id* at 673:

> 'Whereas my will is lengthy, ...I do therefore authorize and empower ... whatever they may determine is my intention *shall be final and conclusive*, without any resort to a Court of Justice.'

The Testatrix intended her three children, the beneficiaries, to equally share the benefits under the structure of a trust, the only possible vehicle when considering the four corners her will -- all provisions, in plain language -- to effectuate her clear intent without condition. She used no words ("*undivided*", *tenants in common*", "*in fee-simple*", "*absolutely*", "*forever*") to contravene trust intent. The "equal share" provision does not stand alone. In both instances, the subsequent qualifying specific intention dominated at the end of the sentence:

1) *"...to take equally, share and share alike, **as per my attached Rest And Residue Clause."***

2) *"I (Kathryn Janura) want all my land to stay in the family and not be divided and sold."*

3) *"share equally **and I want Trina to have final say on any decisions or disputes."***

4) *"I want my home (5114 Wylie Ridge Road) to be turned into a group home or health related facility and Trina is to be in charge of running it.*

5) *"I want her to open a corporation for the express purpose of operating this home."*

6) *"Also I want to establish "the Emerald Acres Estate Fund". The garage apt rent, the sale of timber and any income generated by the whole estate is to be deposited here. ...*

7) *"Orchard to be equally divided into three plots (approximately to the spring house) for each sibling for their homes, to be surveyed with monies from estate fund at a later time."*

This Court has stated in *Stanley v. Colt*, 72 U.S. 119 (1866), *Id.* at 132:

> No State legislature has power to alter the express conditions of a will. Such an attempt is contrary to the principles of natural right and justice which no legislature can contravene.

Will and Trust Construction Case Law

Federal, States, and United States Supreme Court

"The words 'share and share alike' do not always indicate a vested, inheritable estate." *Walker v. First Trust & Savings Bank et al*, 12 F.2d 896 (1926) at 902; "The words 'in equal shares and proportions' do not signify that the children and grandchildren are to take as tenants in common but have reference to the division of the income..." *Meserve v. Haak*, 191 Mass. 220, 77 N.E. 377 (1906) at 223; "But the word is qualified and made several by what precedes it. ...It is qualified also by what follows it." *Cruit v. Owen*, 203 U.S. 368, 27 S.Ct. 71 (1906) at 371; "...in equal shares. There is no provision beyond this. The gift is absolute." *Cropley v. Cooper*, 86 U.S. 167 (1873) at 172; "The first part of the clause... would undoubtedly, if standing alone, give it to her absolutely. ... The difficulty is produced by the subsequent words.... " *Smith v. Bell*, 31 U.S. 68 (1832) *Id.* at 79.

Smith continues, *Id.* at 83-84:

> In finding this intent every word is to have its effect... 4 Ves. 329, 57, 311.
>
> The court said in Sims v. Doughty, 5 Ves. 247, 'and if two parts of the will are totally irreconcileable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention.'
>
> Blackstone, in his Commentaries, Vol. II. 380, asserts the same principle. The approved doctrine, however, unquestionably is, that they should, if possible, be reconciled, and the intention be collected from the whole will.
>
> In the case before the court, it is, we think, impossible to mistake the intent. ...This intention can be defeated only by expunging, or rendering totally inoperative, the last clause of the will. In doing so, we must disregard a long series of opinions, making the intention of the testator the polar star to guide us in the construction of wills, because we must find words ..."

The testatrix' use of the word "want" was a devise. (App. 356-358)

Chief Justice John Marshall delivered the opinion of the Court in *Smith v. Bell, supra*, at 75, cited by *Colton v. Colton*, 127 U.S. 300, 8 S.Ct. 1164 (1888) *Id. at 309*:

> The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. Doug. 322; 1 Black. Rep. 672. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically ***the will*** of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death.' 2 Black. Com. 499.

Trusts:
United States Supreme Court Cases

Colton continues (*Id.* at 310-315), discussing trusts, in pertinent part:

> No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. ... The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator...deduced from a consideration of the whole instrument and a comparison of its <u>various</u> parts ... No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words 'upon trust' or 'trustee,' if the creation of a trust is otherwise sufficiently evident. ... 'All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where

several parts are absolutely irreconcilable, the latter must prevail.' Section 1321.

'A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, ...' Section 1322. '... 'The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.' Section 1325. ... In relation to trusts, the Code also provides, in respect to real property, that they must be either in writing, or created by operation of law, (section 852;) subject to which condition, it is further provided that 'a voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty (1) an intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust.' Section 2221. ... The existing state of the law on this question, as received in England, and generally followed in the courts of the several states of this Union, is well stated by GRAY, C. J., in *Hess* v. *Singler*, 114 Mass. 56, 59, as follows: 'It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. ... But by the latter cases in this, and in all other questions of the interpretation of wills, the intention of

> the testator, as gathered from the whole will, controls the court. ... If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed *cestuis que trust* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee,—the just and reasonable interpretation is that a trust is created which is obligatory...'

" It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects, and the beneficiaries." *Chicago/M. /St.P. Ry. v. Des Moines Union Ry.,* 254 U.S. 196, 41 S.Ct. 81 (1920) *Id.* at 208, citing *Colton.*

Wilson v. Snow, 228 U.S. 217 (1913), *Id.* at 223 stated:

> "...nor was the word "trust" used by the testator. But the power to sell was coupled with the active and continuing duty of managing the property, ...",

and *Id.* at 225:

> "For where the duties imposed upon the executors are active and render the possession of the estate convenient and reasonably necessary, they will be deemed trustees for the performance of those duties to the same extent as though declared so to be in the most explicit terms."

Trusts: West Virginia

Starting with her December 12, 2014 appellate brief (App. 491), Petitioner has continuously cited *Ball v. Ball,* 136 W.Va. 852, 69 S.E.2d 55 (1952) *Id.* at 61-62:

> "Where a testamentary trust is intended to be created, although words of devise in trust are lacking, the court will, nevertheless, honor and enforce the trust."

Trusts (Other Jurisdictions)

United States v. Smither, 205 F.2d 518 5th Circuit (1953), *Id.* at 519:

> "The trial court recognized the well-established and understood fundamental rules that no technical language is necessary for the creation of a trust, and that it is not essential to the creation of a trust that the words "in trust" or "trustee", or words of similar import be used if the intention of the testator to create a trust is otherwise sufficiently disclosed by the instrument."

Herman v, Edington, 118 NE 2d 865, Mass S.C. (1954), *Id.* at 314:

> "It was said in *Walker v. Close*, 98 Fla. 1103,1113, 125 So. 521, 525, 126 So.289, that 'There is no prescribed form for the declaration of a trust; whatever evinces the intention of the party that the property of which he is the legal owner shall beneficially be another's is sufficient.'"

"No particular form of words is required to create the trust, if it is reasonably certain as to the property, its object, and the beneficiary." *Tomlinson v. Tomlinson,* 960 S.W.2d 337, 338 (Tex.App.1997), *In re Marshall*, 392 F. 3d 1118 U.S. Ct. Appeals, 9th Cir. (2004) at 1124; "...comprehensively and forcibly, expressed by Lord Alvanly, Master of the Rolls, in Malim v. Keighley, 2 Ves. Jr. 335, where he says: 'Wherever any person gives property, and points out the object, the property and the way it shall go, that does create a trust...' " *Harrison v. Harrison's Adm'x*, 43 Va.1, 44 Am. Dec. 365 (1845), Id. at 14; "...subject-matter and the objects of the trust are beyond cavil and dispute." *Seefried v. Clarke*, 113 Va. 365 (1912) Id. at 372; "Nor is it material whether a settlor is cognizant that the intended relationship is called a trust..." *Masterson v. Plummer*, 343 SW 2d 352 (1961) at 355; "The word 'trust' is not found in the will, but the fact that testator did not use express words creating a trust is not controlling." *Black v. Black*, 286 Ala. 233 (1970) at 238; "No particular words are necessary to create a trust if the purpose is evident." *Morris v. Morris*, 246 N.C. 314 (1957) at 317; "The existence of a trust does not depend upon the terminology used." *Rugo v. Rugo,* 91 NE 2d 826 - Mass: Supreme Court (1950) at 617; "No special form of words is required to create a trust;... and the fact that the word `trust' is not used is in no sense controlling..." *Schuldt v. Reading Trust Co. et al.*, 270 Pa. 360, 363 (1921); "Nor is it

> material whether a settlor is cognizant that the intended relationship is called a trust or knows the precise characteristics of a trust relationship. Restatement of Trusts 2d, § 23, comment a, p. 66;." *Masterson v. Plummer*, 343 SW 2d 352, Mo (1961); "Indeed, '[a] trust may be created although the settlor does not use the word "trust * * *."' Restatement (Second) of Trusts § 24, Comment *b* (1959)." *Eychaner v. Gross*, 779 NE 2d 1115, Ill S.C. (2002), *Id.* at 254-255;

Condition Subsequent

The testatrix did not devise her property upon any "condition subsequent". She used no language of condition, reversion, or proviso. *Woman's Club of St. Albans v. James*, 158 W.Va. 698, 703, 213 S.E.2d 469, 472-73 (1975) (App. 241)

This Court discussed in-depth in *Stanley v. Colt*, 72 U.S. 119 (1866) at 127-130, 142, 145-149, and at 166:

> "It is true that the word 'proviso' is an appropriate one to constitute a common law condition in a deed or will, but ... it will be seen that the testator had in his mind a settlement of the estate in trust for the beneficiaries, and with this view established a code of regulations to guide the trustees...which is wholly inconsistent with the idea that the estate might be defeated by a breach of any one of them."

Common Law

Morris v. Morris, 246 N.C. 314 (1957), *Id.* at 316:

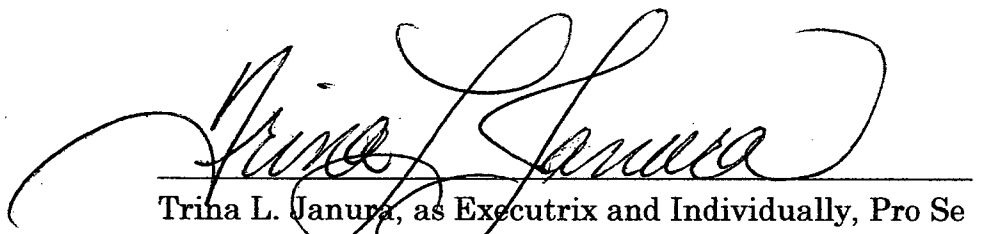
> "In discovering and giving effect to the testator's intent the will must be examined from its four corners, and in the process consideration must be given to every word and expression used. This rule of construction came to us from the mother country. In 1725 the English Chancery Court held: "It is a certain rule in the exposition of wills especially that every word shall have its effect and not be rejected if any construction can possibly be put upon it." Baker v. Giles, 2 Peere Williams, 280, English Chancery Reports, 24 Reprint 730. "The testator's meaning must be collected from the will itself by attending to the different parts of it and comparing and considering them together." *Strong v. Cummin* (1759) 2 Burrus 770, King's Bench Reports, 97 Reprint 552. "Every part of a will is to be considered in its construction and no words ought to be rejected if any meaning can be possibly put upon them. Every string should give its sound." Edens v. Williams, Ex'r, 7 N.C. 27; Hinson v. Hinson, 176 N.C. 613, 97 S.E. 465; Snow v. Boylston, 185 N.C. 321, 117 S.E. 14; Roberts v. Saunders, 192 N.C. 191, 134 S.E. 451; Bell v. Thurston, 214 N.C. 231, 199 S.E. 93; Williams v. Rand, 223 N.C. 734, 28 S.E.2d 247; Citizens Nat. Bank v. Corl, 225 N.C. 96, 33 S.E.2d 613; Coppedge v. Coppedge, 234 N.C. 173, 66 S.E.2d 777; Voncannon v. Hudson Belk Co., 236 N.C. 709, 73 S.E.2d 875."

West Virginia, the United States Supreme Court, and Common Law clearly support Petitioner's arguments.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,



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