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Cary v. Riss: Protecting Due Process Concerns in West Virginia Probate

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CARY v. RISS: PROTECTING DUE PROCESS CONCERNS IN WEST VIRGINIA PROBATE

I. INTRODUCTION

Death is a certainty that is the inevitable result of the human condition. One's death has a profound effect on the living in both its obvious emotional impact as well as important financial ramifications.

As one passes on, and, presumably, has no further need for the material wealth that one has accumulated over the course of a lifetime, the law steps in to regulate and control what happens to the assets of a decedent. It is this area of "probate law" that serves as mankind's answer to problems created by something beyond its control.

In a decision affecting the sphere of probate law as well as that of constitutional law, the Supreme Court of Appeals of West Virginia addressed the notice due to named beneficiaries under a probated will in *Cary v. Riss*.[1] Decided in the form of two certified questions from the Circuit Court of Jefferson County, *Cary* essentially stands for three propositions that will have a profound effect on the probate of wills in West Virginia: (1) the requirement under West Virginia statutory law that the county clerk notify beneficiaries under a will "by mail or otherwise"[2] will be construed to ensure actual notice; (2) receipt of actual notice by a beneficiary under a will satisfies due process requirements; and (3) neither due process nor any West Virginia statute requires that a beneficiary, having received actual notice of a will's delivery to the county clerk, must also receive actual notice of the county commission's refusal to probate the will.[3]

The holding of *Cary* so changes the day-to-day operation of probate law in West Virginia that its true effects may not be known for some time. While many attorneys appreciate a "bright-line" rule with regard to the requirements of a frequently encountered area such as probate, there is clearly a lack of direction as to the manner in which many counties are going to implement a new procedure that arguably increases the burden on the county significantly in order to comply with the requirements of the decision. The purpose of this Comment is to (1) examine the requirements of notice to named beneficiaries under a will in light of the *Cary* decision; (2) discuss whether the court's approach went far enough in its protection of due process concerns in the probate process; (3) analyze the impact of the decision on West Virginia's county clerks; and (4) provide a model for use by the county clerks to comply with the requirements of *Cary*.

1. 433 S.E.2d 546 (W. Va. 1993).
2. W. VA. CODE § 41-5-2 (1982).
3. *Cary*, 433 S.E.2d at 552-53.

II. BACKGROUND OF THE LAW

A proper treatment of the relevant probate issues involved in the *Cary* decision begins with an analysis of probate procedure in West Virginia. The United States Supreme Court decided long ago that probate would be an area of law left to state statutory regulation.[4] Thus, it is important to be aware of the West Virginia's statutory scheme for the probate of wills. As a starting point, West Virginia Code Section 41-5-1 provides that:

> A person having custody of a will shall, within thirty days after the death of the testator is known to him, deliver such will to the clerk of the county [commission] having jurisdiction of the probate thereof, or to the executor named in the will, who shall offer it for probate, or deliver it to the clerk, within a reasonable time.[5]

After a will is presented to the county clerk, the clerk is then required to "notify by mail or otherwise the executor and the beneficiaries named in the will, of such delivery . . . ."[6] The will then remains in the county clerk's office until proceedings begin for the probate of the will.[7]

A. Probate In Solemn Form

West Virginia law provides for two procedures of probate: probate in solemn form[8] and ex parte probate.[9] The county commission[10] has

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4. In Ellis v. Davis, 109 U.S. 485, 497 (1883), the United States Supreme Court stated that "the original probate, of course, is mere matter of State regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; . . . ."
See also Cary, 433 S.E.2d at 549 n.6 (affirming this tradition).

5. W. VA. CODE § 41-5-1 (1982). According to the West Virginia court in *In re* Hawley's Estate, 189 S.E. 801 (W. Va. 1950), the "Revisers" of the 1931 Code included this provision as a recognition of the duty of a person who has knowledge of his nomination as executor of a will to the testator of that will.

6. W. VA. CODE § 41-5-2 (1982).

7. *Id.*

8. W. VA. CODE § 41-5-5 (1982).

9. W. VA. CODE § 41-5-10 (1982).

10. The county commission was formerly known as the county court, which explains

probate jurisdiction under both forms.[11] Probate in solemn form requires that, after a testator dies, an interested person must file a verified petition with the county commission stating: (1) the location and date of death of the testator; (2) the testator's last residence; (3) the nature of the testator's estate; and (4) the relationship to the testator and known addresses of all heirs, beneficiaries under the will, and the spouse, if surviving.[12] The county clerk will then issue and serve process upon all interested parties, requiring them to appear and show cause why the will should be refused probate.[13] Before a probate order is entered, any interested party may contest a will, by filing a notice of contest with the clerk.[14] Ultimately, the county commission will enter an order either admitting the will to probate or refusing to admit the will.[15]

B. Ex Parte Probate[16]

Alternatively, in an ex parte[17] probate proceeding, the probate of

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the references to the former name in the West Virginia Code. *See* Christopher J. Winton & Mark W. Kelley, *Laying Claim: A Practitioner's Guide to Will Contests in West Virginia*, 96 W. VA. L. REV. 123, 125 n.3 (1993).

11. W. VA. CONST. art. IX, § 11; W. VA. CONST. art. VIII, § 6; W. VA. CODE § 7-1-3 (Supp. 1993).

12. W. VA. CODE § 41-5-5 (1982).

13. *Id.*

14. *Id.*

15. *Id.*

16. The vast majority of wills that are probated in West Virginia are probated under this procedure. Interview with Bruce L. Stout, Partner, Huddleston, Bolen, Beatty, Porter and Copen, in Huntington, W. Va. (Aug. 3, 1995).

17. The court in *Cary* footnoted a Comment which offers a "concise explanation of the history of probate in common form, stating:

> In seventeenth century England, the ecclesiastical courts had jurisdiction over the administration of the personal estates of deceased persons. Under the practice of those courts, the Ordinary possessed authority to probate wills[.] . . . A will could be admitted to probate before the Ordinary either in common form or solemn form. Common form was an ex parte proceeding, consisting of the executor's presentation of the will and his testifying that it was duly executed by the decedent. No notice was given of the proceeding and it was essentially an administrative function, speedily accomplished. English law provided a thirty year period during which the probate could be contested by interested persons. When a caveat was presented, the probate of the will was contested in a formal hearing in solemn

a will may be had without notice to any party.[18] After the county clerk either admits or refuses to admit a will for probate, that decision is subject to confirmation by the county commission upon its next regular session.[19] Under the ex parte probate statute, although not entitled to notice, any person entitled to contest the probate of a will may object to a will's probate before the clerk of the court makes his or her determination or before the county commission enters an order confirming the action of the clerk of the court.[20] If anyone wishes to contest an order by the county commission admitting or refusing to admit a will to probate, she or he is given statutory authority to appeal the commission's order to the circuit court.[21] Additionally, any person

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form wherein citations were issued to heirs, legatees, and devisees. This procedure was carried to American colonies and was employed in the system of probate courts which came to be established in the states. The distinction between probate in common form and solemn form has been preserved in several states up to the present day and differs little from the procedures before the Ordinaries in England.

Cary, 433 S.E.2d at 549-50 n.7 (citing Nolan W. Carson, Comment, *Probate Proceedings — Administration of Decedents' Estates — The Mullane Case and Due Process of Law*, 50 MICH. L. REV. 124, 129-30 (1951) (footnotes omitted)).

18. W. VA. CODE § 41-5-10 (1982) (Providing in pertinent part:

At, or at any time after, the production of a will, any person may move the county [commission] having jurisdiction, or the clerk thereof in the vacation of the [commission], for the probate of such will and the [commission] or the clerk thereof, as the case may be, may without notice to any party, proceed to hear and determine the motion and admit the will to probate, or reject the same. The probate of, or refusal to probate, any will, so made by the clerk, shall be reported to the [commission] at its next regular session, and, if no objection be made thereto, and none appear to the [commission], the [commission] shall confirm the same . . . . [T]he only notice to the parties interested or process against them required in such case shall be upon the notice of the contest.).

19. W. VA. CODE § 41-5-10 (1982).

20. *Id.*

21. W. VA. CODE § 41-5-7 (Supp. 1994) (Stating:

Any person feeling himself aggrieved by any order or judgment of the county commission admitting or refusing to admit any will to probate may, within three months . . . file his petition in the circuit court of such county, or before the clerk thereof, appealing to the circuit court from such order or judgment . . . .)

Note that at the time of the *Cary* decision, Section 41-5-7 allowed the aggrieved party eight months to file a petition appealing the county commission's decision.

However, note also that the court recognizes that under *In re* Winzenrith's Will, 55 S.E.2d 897 (W. Va. 1949), there may also be an appeal under Section 41-5-7 to the circuit court when there has been neither an appearance nor a contest. *Cary*, 433 S.E.2d at 550 n.9.

interested in a will but who was not a party to the ex parte probate proceeding may file a "bill in equity"[22] to impeach or establish a will within six months[23] after the date of the county commission's order admitting or refusing to admit the will to probate.[24]

III. STATEMENT OF THE CASE

Bernhard M. Dennis died on October 27, 1980, at the age of 91.[25] By his Last Will and Testament, dated November 9, 1963,[26]

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22. *Cary*, 433 S.E.2d at 550 n.10 (noting that under Rule 2 of the *West Virginia Rules of Civil Procedure*, "all procedural distinctions between actions, suits and other judicial proceedings at law or in equity and in the forms of actions are abolished").

23. Note that at the time of the *Cary* decision, Section 41-5-11 allowed a party interested in a will who was not a party to the ex parte proceeding two years to file a bill in equity to impeach or establish a will. Subsequently, this provision has been amended *twice*: once in 1993, which shortened the time period from two years to one year, and again in 1994, in which the period was shortened from one year to six months. *See* W. VA. CODE § 41-5-11 (Supp. 1993 & Supp. 1994).

24. W. VA. CODE § 41-5-11 (Supp. 1994) (Stating:

> After a judgment or order entered . . . in a proceeding for probate ex parte, any person interested who was not a party to the proceeding, or any person who was not a party to a proceeding for probate in solemn form, may proceed by complaint to impeach or establish the will, on which complaint, if required by any party, a trial by jury shall be ordered, to ascertain whether any, and if any, how much, of what was so offered for probate, be the will of the decedent . . . . If the judgment or order was entered by the circuit court on appeal from the county commission, such complaint shall be filed within six months from the date thereof, and if the judgment or order was entered by the county commission and there was no appeal therefrom, such complaint shall be filed within six months from the date of such order of the county commission . . . .).

Note that in addition to changing the impeachment period from one year to six months (*see supra* note 23), the 1994 amendment of Section 41-5-11 also followed the language of the 1993 amendment, which substituted "complaint" for "bill in equity," and "county commission" for "county court." W. VA. CODE § 41-5-11 (Supp. 1993 & Supp. 1994).

25. *Cary*, 433 S.E.2d at 548.

26. Bernhard Dennis' 1963 will provided in pertinent part:

> I hereby will and bequeath to my wife: Sherlie Faye Dennis, all my real and personal property, for her use and benefit during the term of her natural life.
>
> I direct that all my debts and funeral expenses be paid promptly.

Mr. Dennis bequeathed all of his property to his surviving wife, Sherlie F. Dennis.[27] The clerk of the Jefferson County Commission admitted the 1963 will to probate on November 6, 1980, and the admission was subsequently approved by the Jefferson County Commission.[28] However, on November 19, 1980, Mildred Dennis Cary, who is Mr. Dennis's niece and the plaintiff in *Cary*, offered a second will into probate which was executed by Mr. Dennis in August of 1980,[29] while he was hospitalized in Martinsburg, West Virginia.[30]

Under the second will, Mr. Dennis created a life estate in his wife, with the remainder to Ms. Cary.[31] The Jefferson County clerk recorded the will, but refused to admit it to probate[32] on the ground that witnesses of the second will did not attest to the fact that Mr. Dennis was of "sound sense and memory" when he signed the will.[33] The

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I appoint, Sherlie Faye Dennis, Executrix of this will and direct that she administer without the necessity of entering a bond of security.

Brief of the Plaintiff at 4, Cary v. Riss, 433 S.E.2d 546 (W. Va. 1993) (No. 21562) [hereinafter Plaintiff's Brief].

27. *Cary*, 433 S.E.2d at 548.

28. *Id.*

29. Bernhard Dennis's purported second will provided in pertinent part:

FIRST: I direct my Executor hereinafter named to pay all of my just debts and all other expenses and costs with which my estate may be chargeable as soon as practicable after my death.

SECOND: I give and devise unto my wife, Shirley Turner Dennis, a life interest in and to my house and the adjoining lot on Filmore Street in Harpers Ferry for the remainder of her natural life, and upon her death, the remainder unto Mildred D. Cary.

THIRD: All the rest, residue and remainder of my property, both real and personal and wherever situated, I give, devise and bequeath unto my wife, Shirley Turner Dennis.

FOURTH: I hereby nominate, constitute and appoint the Bank of Harpers Ferry as Executor of this my Last Will and Testament.

Plaintiff's Brief at 4, Cary v. Riss, 433 S.E.2d 546 (W. Va. 1993) (No. 21562).

30. *Cary*, 433 S.E.2d at 548.

31. *Id.*

32. The *Cary* court noted that under Section 41-5-17, "wills are recorded by the county clerk when they are *admitted* to probate." 433 S.E.2d at 548. Thus, the court was perplexed as to why the clerk recorded the will after refusing to admit it to probate.

33. *Id.*

county clerk's refusal to probate the will was never presented to the county commission for confirmation.[34]

On February 7, 1981, Mrs. Dennis, the beneficiary under the 1963 will, sold the property that she received under Mr. Dennis's will to Frederic D. Riss, the defendant in the *Cary* decision.[35] Mr. Riss received the property under a general warranty deed and had continued to own and possess the property from the time he had purchased the property from Mrs. Dennis in 1981.[36] Mrs. Dennis died in 1986 and three years later Ms. Cary initiated a civil action to revoke the 1963 will and to recognize the 1980 will as the Last Will and Testament of Bernhard Dennis.[37] Ms. Cary also sought an action in ejectment to remove Mr. Riss from the property that Mr. Riss had purchased from Mrs. Dennis and had possessed since 1981.[38]

At a pretrial conference early in the civil action, Mr. Riss moved to dismiss the case because Ms. Cary had not appealed the clerk's refusal to admit the 1980 will to probate within eight months[39] of the refusal.[40] Mr. Riss also moved for dismissal on the grounds that Ms. Cary failed to initiate proceedings to impeach the 1963 will within the two-year[41] statute of limitations.[42] Ms. Cary argued that the pertinent provisions of the West Virginia Code, as applied, deprived her of due process by not ensuring her notice of the probate proceedings.[43] The

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34. Section 41-5-10 requires that the refusal or admission of a will to probate by the clerk of a county commission be confirmed by the county commission as a proper action. *See also supra* note 18 and accompanying text.

35. *Cary*, 433 S.E.2d at 548.

36. *Id.*

37. *Id.*

38. *Id.*

39. At the time *Cary* was decided, Section 41-5-7 required that any person who wished to appeal either the county clerk's admission or refusal to admit a will to probate had to do so within eight (8) months after the clerk's action. *See supra* note 24.

40. *Cary*, 433 S.E.2d at 548.

41. At the time of the *Cary* decision, Section 41-5-11 set forth a two-year statute of limitations for the initiation of proceedings to impeach a disputed will. *See supra* note 24.

42. *Cary*, 433 S.E.2d at 548.

43. The court in *Cary* noted that the facts in this case are unusual in that Ms. Cary, while raising the issue of failure to give notice, is not only a beneficiary under the 1980 will, but also the person who submitted it to probate. Thus, the "merit of her assertion" that she was deprived of due process was questioned, as she "clearly had notice of the pendency

circuit court then requested that a set of certified questions be submitted to the Supreme Court of Appeals of West Virginia and directed that the parties file a joint motion for certification.[44] The circuit court entered an order certifying the following questions to the Supreme Court of Appeals of West Virginia:

> (1) Do the requirements of due process make it necessary that notice be given to the beneficiary under a will that has been refused probate, but that has been recorded[45] by the Clerk of the County Commission? [;and]
> (2) If so, does the failure to give such notice operate so as to toll the statutes of limitation[46] until such notice or knowledge of such refusal to admit to probate is gained by said beneficiary?[47]

IV. THE DECISION

One of the many functions of the Supreme Court of Appeals of West Virginia is to grant relief, through the process of certification, by accepting and deciding questions of law[48] that circuit courts submit to the court.[49] The *Cary* decision was the court's response to two certified questions from the Circuit Court of Jefferson County.[50] Justice McHugh delivered the opinion of the court.

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of the exparte probate proceedings." *Cary*, 433 S.E.2d at 553.

44. *Cary*, 433 S.E.2d at 548.

45. The Supreme Court of Appeals of West Virginia noted that although the term "recorded" was used by the circuit court in referring to the 1980 will, the term was not relevant to the court's decision of the certified question and, therefore, would be omitted from their discussion of the issue. *Cary*, 433 S.E.2d at 548 n.2.

46. Referring to the statutes of limitations found in Sections 41-5-7 and -11.

47. *Cary*, 433 S.E.2d at 548.

48. Under Section 58-5-2, the jurisdiction of the court is expressly limited to questions of law. *See* Leishman v. Bird, 128 S.E.2d 440 (W. Va. 1963). *See also* State v. Stout, 95 S.E.2d 639 (W. Va. 1956) (holding that the court has no jurisdiction to determine a question of fact on certificate).

49. W. VA. CODE § 58-5-2 (1966) (describing the certification process). The process is further outlined in Rule 13 of the West Virginia Rules of Appellate Procedure.

50. *Cary*, 433 S.E.2d at 548.

A. Certified Question One

In responding to the first certified question, the court was primarily charged with the task of determining whether due process requires that actual notice be given to a named beneficiary under a will that has been refused probate by the county clerk.[51] The will advanced by Ms. Cary was probated pursuant to the ex parte procedure,[52] which Mr. Riss argued did not require any notice by the clerk or the county commission in either admitting or refusing a will for probate.[53] On the other hand, Ms. Cary argued to the court that due process requires actual notice, and that the then current ex parte probate procedure[54] violated her right to due process.[55]

After summarizing the probate procedure in West Virginia,[56] the court moved quickly into its decision. Essential to the court's determination of the type of notice which must be given to named beneficiaries under a will were two United States Supreme Court decisions: *Mullane v. Central Hanover Bank and Trust Co.*[57] and *Tulsa Professional Collection Services v. Pope.*[58]

In *Mullane*, the Central Hanover Bank and Trust Company in New York petitioned for a judicial settlement of accounts which would be binding upon everyone having any interest in a common trust fund that it had established under Section 100-(c) of the New York Banking Law.[59] In the common trust fund,[60] the company invested assets of

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51. *Id.* at 549.

52. W. VA. CODE § 41-5-10 (1982).

53. *Cary*, 433 S.E.2d at 549.

54. W. VA. CODE §§ 41-5-10, -11 (1982) (outlining the then current ex parte probate procedure). For the current ex parte procedure, see *supra* notes 18 and 24 and accompanying text.

55. Plaintiff's Brief, *supra* note 26, at 17 (citing the Due Process Clause of the Fourteenth Amendment to the United States Constitution and of Article 3, Section 10 of the West Virginia Constitution, both of which state that "no person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers").

56. *Cary*, 433 S.E.2d at 549-50.

57. 339 U.S. 306 (1950).

58. 485 U.S. 478 (1988).

59. *Mullane*, 339 U.S. at 309.

60. *Id.* at 308 (Citing New York Banking Law Section 110-c as the relevant statutory

several trusts of which it was trustee and of which some of the beneficiaries were residents and some nonresidents of the State of New York.[61] The only notice that was given of the proceedings was the notice given via publication in a local newspaper in "strict compliance with the minimum requirements"[62] of state law.[63]

The impetus for the litigation in *Mullane* occurred when a beneficiary under one of the trusts, which had been co-mingled in the common fund, failed to receive notice of the judicial settlement of accounts through the publication and, much like Ms. Cary, brought an action to protect his interests.[64] The beneficiary made a special appearance and objected that the notice provided by the statutory provisions at issue[65] was inadequate to afford due process under the Fourteenth Amendment.[66] The United States Supreme Court noted:

> [A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[67]

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authorization for the creation of such a trust fund. Under the statute, a trust company can establish a common fund and invest the assets of trusts or other funds of which it is trustee, with approval of the New York State Banking Board.).

61. *Id.* at 309.

62. N.Y. BANKING LAW § 100-c(12) (1975). The statute further provides:

> After filing such petition [for judicial settlement of the trust account] the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts, or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund.

Id.

63. *Mullane*, 339 U.S. at 309.

64. *Id.* at 311.

65. N.Y. BANKING LAW § 100-c (1975).

66. *Mullane*, 339 U.S. at 311.

67. *Id.* at 314 (citing Milliken v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385 (1914); Priest v. Las Vegas, 232 U.S. 604 (1914); and Roller v. Holly, 176 U.S. 398 (1900)).

Thus the majority of the United States Supreme Court held that the notice of the judicial settlement of accounts as required by New York law[68] was incompatible with the due process requirements of the Fourteenth Amendment as a basis for adjudication depriving persons, who not only were known, but also whose whereabouts were known, of substantial property rights.[69] In a brief dissenting opinion, Justice Burton argued that a common trust, such as the one at issue in *Mullane*, is available only when the instruments creating the trust permit participation in the common fund.[70] Justice Burton argued that whether the notice required by the statute was adequate was, thus, an issue "properly within the discretion of the State."[71]

After considering *Mullane*, the Supreme Court of Appeals of West Virginia examined the more recent case of *Tulsa Professional Collection Services v. Pope*.[72] In *Tulsa*, the United States Supreme Court examined a nonclaim provision of Oklahoma's Probate Code.[73] Under this provision, creditors' claims against an estate are generally barred unless presented against the personal representative within two months of the publication of notice of the commencement of probate proceedings.[74] After the death of her husband, JoAnne Pope initiated probate proceedings in the District Court of Tulsa County as personal representative of his will.[75] Upon the court's direction that she "immediately give notice to creditors,"[76] Ms. Pope published notice in the *Tulsa Daily Legal News* for two consecutive weeks beginning July 17, 1979, advising creditors that they must file any claim that they had against Mr. Pope's estate within two months of the first publication of the notice.[77]

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68. N.Y. BANKING LAW § 100-c(12) (1975).

69. *Mullane*, 339 U.S. at 320 (Jackson, J., writing for the majority).

70. *Id.* (Burton, J., dissenting).

71. *Id.*

72. *Cary*, 433 S.E.2d at 552 (citing *Tulsa*, 485 U.S. at 478).

73. *Tulsa*, 485 U.S. at 479.

74. OKLA. STAT. tit. 58, § 333 (1981) (requiring that claims "arising upon a contract" generally be presented to the executor or executrix of the estate within two months of the publication of a notice advising creditors of the commencement of probate proceedings).

75. *Tulsa*, 485 U.S. at 482.

76. *Id.*

77. *Id.*

Tulsa Professional Collection Services, Inc. (Tulsa Collection Services) was the assignee to a claim for medical expenses incurred by Mr. Pope in his final hospital stay.[78] Tulsa Collection Services, a creditor of Mr. Pope's estate, did not file a claim within the two-month time period following Ms. Pope's publication of notice.[79] The aggrieved creditor sought judicial relief from the statutory provisions and argued, much like Ms. Cary, that the nonclaim statute's notice provisions violated due process requirements.[80] After an extensive analysis of the scope of its holding in *Mullane*,[81] and subsequent case law,[82] the United States Supreme Court, in an opinion authored by Justice O'Connor, held that if the identity of a creditor is known or "reasonably ascertainable,"[83] then the Due Process Clause of the United States Constitution requires that the creditor be given "[n]otice by mail or other means as certain to ensure actual notice."[84]

It was the United States Supreme Court's focus on due process concerns that guided the Supreme Court of Appeals of West Virginia's decision in *Cary*.[85] The court focused on the exact interest that a named beneficiary under a will has in receiving notice of that will's probate, as a function of determining "how much" due process was necessary to protect that interest. The court noted that "[c]learly, because beneficiaries have a beneficial interest in the estate, they will

78. *Id.*

79. *Id.*

80. *Id.*

81. 339 U.S. 306 (1950).

82. *E.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (affirming that an intangible interest may be property protected by the Fourteenth Amendment); Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (posting and publishing of tax foreclosure sale notice was insufficient to satisfy due process interests of property owners whose addresses are reasonably ascertainable); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (holding that private use of state-sanctioned procedures does not rise to the level of state action, a requisite for due process protection); Texaco, Inc. v. Short, 454 U.S. 516 (1982) (holding that the state's involvement in the mere running of a general statue of limitations is insufficient to implicate due process).

83. *Tulsa*, 485 U.S. at 482 (citing *Mennonite*, 462 U.S. at 800).

84. *Tulsa*, 485 U.S. at 491 (citing *Mennonite*, 462 U.S. at 800).

85. Indeed, the Supreme Court of Appeals of West Virginia prefaced its examination of the first certified question by stating that "in responding to the first certified question, we are mindful of the due process concerns expressed by the Supreme Court in *Mullane* and *Pope*." *Cary*, 433 S.E.2d at 551.

inquire as to the outcome of probate proceedings."[86] Thus, the court's task became to determine whether the probate system already in place sufficiently protected this interest.

As the probate procedure in question is statutory in nature,[87] the court in *Cary* was required to employ certain rules of statutory construction.[88] As a preliminary matter, the court had to resolve an apparent incongruity between West Virginia Code Section 41-5-10,[89] which provides that no notice is required in probating a will, and West Virginia Code Section 41-5-2,[90] which reads to require actual notice be given to beneficiaries when any will is delivered to the county clerk.[91] The court began its resolution of the apparent inconsistency with a recognition of the presumption that when the legislature enacts legislation, it is familiar with its prior enactments.[92] It next explained that it is required[93] to "give meaning to all provisions in a statutory scheme and apply them in accordance with the objects of the general system of the law of which they form a part."[94]

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86. *Id.* at 551-52.

87. W. VA. CODE §§ 41-5-1 to -20 (1982 & Supp. 1994).

88. *Cary*, 433 S.E.2d at 552.

89. *See supra* note 18 and accompanying text.

90. West Virginia Code Section 41-5-2 (1982) provides:

> Upon delivery of a will unto him as provided in the next preceding section [(§ 41-5-1)], the clerk shall notify by mail or otherwise the executor and the beneficiaries named in the will, of such delivery, and shall keep the same safe in his office until proceedings may be had for the probate thereof, or until it is demanded by an executor or other person authorized to demand it for the purpose of having it proved according to law.

91. *Id.*

92. *Id.* (citing State *ex rel.* Foster v. City of Morgantown, 432 S.E.2d 195 (W. Va. 1993); Hudok v. Board of Educ., 415 S.E.2d 897 (W. Va. 1992)).

93. This rule of statutory construction is well-stated in Syllabus Point 1 of State *ex rel.* Simpkins v. Harvey, 305 S.E.2d 268 (W. Va. 1983):

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

94. *Cary*, 433 S.E.2d at 552.

Thus, the court presumed that the West Virginia Legislature recognized that beneficiaries were entitled to actual notice that a will has been delivered for probate and, consequently, enacted West Virginia Code Section 41-5-2 in 1931.[95] In a creative fashion, the court then resolved the apparent incongruity between the two sections by concluding that there really is no inconsistency, stating:

> [T]he language in W.Va. Code, 41-5-10 which states that the county commission may hear and determine probate without giving notice is not in conflict with the notice requirements of W.Va. Code, 41-5-2 for one simple reason: the actual notice given to beneficiaries upon delivery of the will obviates the need for the county commission to give actual notice to beneficiaries of its action.[96]

The court concluded that the two statutory provisions were to be read together and applied to further the purposes of the probate laws.[97]

In responding to the first certified question, therefore, the Supreme Court of Appeals of West Virginia held that whenever any will is delivered to the county clerk,[98] the county clerk is required to notify by mail or otherwise[99] the beneficiaries named under the will.[100] Furthermore, in what is arguably the most important aspect of the *Cary* decision, the court held that "[n]otification 'by mail or otherwise' shall be construed as certain to ensure actual notice."[101] Finally, the court reasoned that when a beneficiary receives actual notice, due process requirements are satisfied "because beneficiaries have notice that the testator has died and that probate proceedings will be instituted."[102]

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95. *Id.* Although it is clear that this has not been the practice since 1931. Telephone Interview with Bruce L. Stout, Partner, Huddleston, Bolen, Beatty, Porter & Copen, in Huntington, W. Va. (Jan. 15, 1996). *Accord* Telephone Interviews with the county clerk of each county in West Virginia (conducted between Jan. 16, 1996 and Jan. 25, 1996) [hereinafter Telephone Interviews with county clerks].

96. *Id.*

97. *Id.*

98. W. VA. CODE § 41-5-1 (1982) (requiring that every will be delivered to the county clerk).

99. W. VA. CODE § 41-5-2 (1982).

100. *Cary*, 433 S.E.2d at 552.

101. *Id.*

102. *Id.* at 552-53.

The court held that neither due process nor any West Virginia statutory authority require that a beneficiary must also be given actual notice of the county commission's refusal[103] to probate a will.[104]

B. Certified Question Two

By answering the first certified question in the negative, the court avoided the need to answer the second question concerning the tolling of state statutes of limitations.[105]

V. ANALYSIS

The determination that notification "by mail or otherwise" shall be construed as certain to ensure actual notice, as an adequate safeguard of due process rights, leads one to ask whether this decision goes far enough to protect due process interests. Likewise, one must be concerned as to how the county clerks will implement the *Cary* notification mandate. This Part of the Comment addresses the questions left in the wake of *Cary* as well as the impact of the decision on the everyday practice of probate law in West Virginia.

A. Did the Court Go Far Enough?

The factual scenario of *Cary* involved a complaint by Ms. Cary, who was a beneficiary under both a superseded will[106] and the superseding will.[107] It is thus certain that, as a result of *Cary*, named beneficiaries under a will which is probated are certain to receive actual

103. W. VA. CODE § 41-5-10 (1982).

104. *Cary*, 433 S.E.2d at 553.

105. *Id.*

106. Under the 1963 will, Mr. Dennis created a life estate in his wife, Sherlie Dennis, yet did not designate a remainderman. *Cary*, 433 S.E.2d at 548. However, at that time, and subsequently, Ms. Cary was the only other heir at law of Mr. Dennis. Thus, presumably, she had an interest even under the 1963 will, by virtue of an interest that would vest by operation of intestate succession laws.

107. Under the 1980 will, Ms. Cary was expressly designated as remainderman to the life estate of Ms. Dennis. *Cary*, 433 S.E.2d at 548.

notice, "by mail or otherwise,"[108] of the will's delivery to the county clerk. Likewise, it is certain that the Due Process Clause of the United States Constitution, as interpreted by the Supreme Court in *Mullane*[109] and *Tulsa*,[110] requires that actual notice be given to creditors of an estate whose name and address are "reasonably ascertainable."[111] However, there are many other parties who have an interest in the probate of a particular estate, but are not currently given due process protection because they are neither a named beneficiary under the will nor a creditor of the estate.

1. Heirs

One such party, who clearly has a pecuniary interest in the probate of an estate, is an heir who would take part or all of the estate by intestate succession if the will were to be set aside. The vast majority of jurisdictions already recognize heirs as persons who have a vested interest in the probate of a will, as evidenced by the many jurisdictions holding that an heir who stands to gain a greater share of the testator's estate by intestate succession than by taking under the will has standing to pursue a will contest.[112] The property interest of an heir is well within the scope of the protection of the Due Process Clauses.[113] However, under the current status of West Virginia law, actual notice

108. W. VA. CODE § 41-5-2 (1982).

109. 339 U.S. 306 (1950).

110. 485 U.S. 478 (1988).

111. *Id.*

112. *See, e.g., In re* Will of Joyner, 242 S.E.2d 213 (N.C. 1977); Yarborough v. Yarborough, 43 S.E.2d 329 (Ga. 1947); Estate of Molera, 100 Cal. Rptr. 696 (Cal. Ct. App. 1972); Will of Basile, 313 N.Y.S.2d. 513 (N.Y. 1970); Hancock v. Frazier, 86 So. 2d 389 (Ala. 1956).

113. Mathews v. Eldridge, 424 U.S. 319 (1976) (providing that a balancing test serve as the current model for procedural due process). Under *Mathews*, the United States Supreme Court calls for the use of an equation which balances on one side both the strength of the private interest that would be affected by the proposed state action and "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 334. On the other side of the *Mathews* equation is "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

of a will's delivery to the county clerk is not required to be given to such parties.

Although West Virginia does not currently protect the property interests of heirs by requiring actual notice, several states do. One state that has considered the due process concerns of heirs and now requires that notice be given to heirs of a will's delivery to the county clerk is Iowa. In 1965, the Iowa legislature enacted Iowa Code Section 633.304, which requires that heirs of an estate receive actual notice by mail to ensure that they are made aware of the time limitations of the contest period.[114] Explicitly acknowledging the United States Supreme Court's concern with due process protection, the Supreme Court of Iowa, in construing Section 633.304, stated that "[c]learly, the purpose of the legislature's amendment of Section 633.304 is to increase due process in light of *Pope*, which only applied to creditors."[115]

A similar conclusion was drawn by the Court of Appeals of Oregon in *Lawver v. Beesley*.[116] In *Lawver*, nephews of a decedent brought an action against the estate's personal representative, claiming that they had failed to receive the notice due to them under Oregon Revised Statute Section 113.155.[117] Although the nephews did receive notice by publication in a local newspaper, they asserted in their cause of action that they had been deprived statutory notice.[118] The Oregon court engaged in extensive statutory construction and held that "published notice under ORS 113.155 is intended to afford published notice to unknown heirs."[119] More importantly, the court held that "[b]ecause petitioners were *known* heirs, they should have received mailed or delivered notice . . . ."[120]

Of particular note is a decision of the Supreme Court of Ohio in which the court was faced with the situation in which a nonresident heir had been afforded notice only by publication of the admission of

114. IOWA CODE § 633.304 (1965).
115. Matter of Estate of Weidman, 476 N.W.2d 357 (Iowa 1991).
116. 740 P.2d 1215 (Or. Ct. App. 1987).
117. *Id.* at 1220.
118. *Id.* at 1219-20.
119. *Id.* at 1220.
120. *Id.*

his grandfather's will to probate in a local newspaper and brought an action to contest the will almost twenty years after the testator's death.[121] The grandson argued that the current notice provisions of the Ohio Probate Code were unconstitutional in that they inadequately protected his due process rights.[122] Although the court denied that the petitioner had standing to contest the constitutionality of the statute, the court pronounced in dictum that:

> [T]he constitutionality of notice by publication to resident and nonresident heirs whose whereabouts are known to the applicant are questionable under the doctrines announced in *Mullane* and its progeny.[123]

Furthermore, the Ohio court issued a subtle invitation to the Ohio General Assembly to address the due process problem, stating:

> In response to *Mullane*, some states have acted to amend their statutes to require mailed notice of probate proceedings. The legislatures of other states have been urged by their courts and the commentators to do likewise. The time appears ripe for this issue to receive the attention of the General Assembly.[124]

2. Devisees and Legatees Under Prior Wills

According to West Virginia law, there are a number of ways in which a prior will of a testator may be given effect and effectively "republished" over a subsequent will. For instance, the Supreme Court of Appeals of West Virginia has addressed and recognized the doctrine of "dependent relevant revocation," providing:

> If a testator obliterates, deletes, or cancels a will, having a present intent to make a new will as a substitute for the old, and the new will is not made, it is presumed that the testator preferred the old will to an intestacy and the first will be given effect.[125]

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121. Palazzi v. Estate of Gardner, 512 N.E.2d 971 (Ohio 1987).

122. *Id.* at 977.

123. *Id.*

124. *Id.*

125. Nelson v. Ratliffe, 69 S.E.2d 217, 218, Syl. Pt. 3 (W. Va. 1952). *See also* Miller v. Todd, 447 S.E.2d 9, 14 (W. Va. 1994) (reaffirming the dependent relevant revocation

Likewise, a testator may execute a Last Will and Testament and subsequently execute a revocation of that will and proffer a second will in its place. Normally, the first will would be revoked and the second writing effective. However, if the testator were to be deemed to be incompetent in executing the second writing, thus invalidating the document, then the revocation clause of that document would also be invalidated. The Supreme Court of Appeals of West Virginia faced this exact situation in *Miller v. Todd.*[126] The court acknowledged that "[i]f Mrs. Todd [testator] lacked the requisite testamentary capacity to execute the 1986 will, then it follows that she also lacked the 'intent to revoke' as required by W. Va. Code, 41-1-7 [1923]."[127] Thus, the first will of the testator in *Miller* was recognized as the effective will and "republished."[128]

In such situations, it is clear that a party may stand to gain a share of a testator's estate from the operation of law setting aside a subsequent will and bringing the prior will into probate. Again, many jurisdictions have recognized that such a party has standing to contest a will, thus implying that devisees under a prior will have a significant property interest.[129] Considering the direct pecuniary gain that a beneficiary under a prior will stands to derive from the outcome of a will's probate, such a party has a very compelling argument that he or she deserves actual notice of a will's delivery to the county clerk. However, even in the wake of *Cary*, the county clerk is not required to provide actual notice to such a party in West Virginia.

At least one jurisdiction has extended due process protection by actual notice to devisees and legatees under a prior will. In *McKnight v. Boggs,*[130] the Supreme Court of Georgia examined this property interest and consequent due process protection to which a devisee un-

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doctrine).

126. 447 S.E.2d 9 (W. Va. 1994).

127. *Id.* at 13.

128. *Id.*

129. *See, e.g.*, Estate of Powers, 154 Cal. Rptr. 366 (Ct. App. 1979); Thomas v. Gaines, 165 S.E.2d 883 (Ga. 1969); Wells v. Salyer, 452 S.W.2d 392 (Ky. 1970); Sigmund Sternberger Found., Inc. v. Tannenbaum, 161 S.E.2d 116 (N.C. 1968); and Caswell v. Lerman, 88 N.E.2d 405 (Ohio 1948).

130. 322 S.E.2d 283 (Ga. 1984).

der a prior will was entitled under the existing Georgia Probate Code.[131] The Georgia court began its examination with the premise that "[a]n inchoate interest in real property 'as a devisee under [a] will is a legally protected interest.'"[132] Next the court opined that "[u]nder *Mullane v. Central Hanover Bank and Trust Co.* [(citation ommitted)], it is clear that due process prohibits deprivation of property without notice and an opportunity to be heard."[133] The court concluded that:

> OCGA section 53-3-13 violates our due process requirement insofar as it fails to require that notice be given to propounders and beneficiaries of another purported will of the decedent which has been filed previously for probate within the same county.[134]

3. Disclaimers

Under the West Virginia Uniform Disclaimer of Property Interests Act,[135] a party may "disclaim" property that devolves to him or her "under a testamentary instrument or by the laws of intestacy"[136] and allows his or her issue to take the property as if the disclaimant had predeceased the decedent.[137] The purpose of the disclaimer statute is "to permit the heir of an intestate decedent to disclaim or renounce his share of the estate in favor of other heirs or distibutees after the decedent's death, an act which was not permitted at common law."[138]

Often used for tax advantages,[139] disclaimers provide for another scenario in which a party may have a sufficient property interest to warrant notice of a will's delivery for probate. Suppose at a decedent's death, his or her sole child was the sole named beneficiary under the decedent's will, and three living grandchildren were contingent benefi-

131. *Id.*
132. *Id.* at 283 (citing Allan v. Allan, 223 S.E.2d 445 (Ga. 1976)).
133. *Id.* at 283.
134. *Id.*
135. W. VA. CODE §§ 42-6-1 to -8 (1982).
136. W. VA. CODE § 42-6-3(a) (1982).
137. W. VA. CODE § 42-6-5 (1982).
138. Webb v. Webb, 301 S.E.2d 570, 574 (W. Va. 1983).
139. Interview with John W. Fisher, II, Professor of Law, West Virginia University College of Law, in Morgantown, W. Va. (Jan. 12, 1996).

ciaries. The decedent's child could "disclaim" his or her share of the decedent's estate and allow the grandchildren to take the property directly from the decedent's estate. Thus, the grandchildren, as parties who have a legitimate, although remote, interest in the admission of a decedent's will into probate, may be entitled to have that interest protected by a requirement that they be notified of the will's admission.

4. The State

The state itself may have a property interest that is not yet protected by the requirement of actual notice of a will's delivery to the county clerk. The state is the potential escheator for the property of citizens who die intestate, and thus has something to gain if the will of a decedent with no heirs is set aside. Although the county clerk's acceptance of the will is sufficient for state action in a procedural due process context, the same may not be sufficient to put the potential escheator on notice to adequately protect the state's property interest. The state's property interest is analogous to that of any other intestate successor in that both parties stand to gain by the operation of the state's intestacy provisions. It is thus a logical extension that the state may be entitled to actual notice of a will's delivery to any county clerk, for the same reasons that any other heir deserves to have his or her property interests protected.

B. Has West Virginia Been Here Before?

This is not the first time that the Supreme Court of Appeals of West Virginia has considered the protection of due process on one hand and the resulting burdens imposed on the state entities who must implement the decision on the other. A similar concern has been explored with the practical ramifications of the court's mandates in the area of tax sales of forfeited and delinquent lands.[140] In addressing

140. Two articles in particular explore this area of law and are highly recommended as excellent references to understand the topic of forfeited and delinquent lands in West Virginia: John W. Fisher, II, *Forfeited and Delinquent Lands — The Unresolved Constitutional Issue*, 89 W. VA. L. REV. 961 (1987) [hereinafter Fisher]; and Carla W. Tanner, *Forfeited and Delinquent Lands: Resolving the Due Process Deficiencies*, 96 W. VA. L. REV. 251

the amount of notice deserved by a delinquent property owner before a sheriff's sale,[141] the Supreme Court of Appeals of West Virginia has held that the property interest of a beneficiary of a deed of trust warrants due process protection.[142] Furthermore, the court held that:

> Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or otherwise means as certain to ensure actual notice . . . .[143]

The court's holding that "notice by mail or otherwise means as certain to ensure actual notice" is virtually identical to the central holding in the *Cary* decision.[144] The benefit of having such a prior ruling is that the practical effects of the *Lilly* decision can be examined as a foreshadowing of the problems that can be expected with the implementation of the *Cary* decision. For example, the *Lilly* decision has been criticized because "the court did not explain what level of reasonableness is appropriate in a state's attempt to identify an interested party's name and address."[145] Likewise, a major criticism of *Cary* is that it fails to explain necessary issues such as the manner in which it is to be implemented.[146]

(1993) [hereinafter Tanner].

141. One component of the land sales procedure is a sheriff's sale of delinquent land to the highest bidder. *See* W. VA. CODE §§ 11A-3-1 to -44 (1991 & Supp. 1993). For an excellent overview of the tax sales procedure in West Virginia, see Tanner, *supra* note 140, at 253-55; Fisher, *supra* note 140, at 961-85.

142. Lilly v. Duke, 376 S.E.2d 122 (W. Va. 1988).

143. *Lilly*, 376 S.E.2d at 125.

144. *See supra* note 100 and accompanying text.

145. Tanner, *supra* note 140, at 265.

146. However, in her dissenting opinion in *Mennonite*, Justice O'Connor argued that:

> Without knowing what state and individual interests will be at stake in future cases, the Court espouses a general principle ostensibly applicable whenever any legally protected property interest may be adversely affected. . . . The Court, citing Mullane, now holds that constructive notice can never suffice whenever there is a legally protected property interest at stake.

462 U.S. 791, 801 (O'Connor, J., dissenting).

Justice O'Connor was concerned about such a "broad ruling," noting that the majority of the Court:

> [I]gnor[ed] the fact that it is the totality of the circumstances that determines the sufficiency of notice [and that the Court also] neglects to consider that the consti-

Perhaps realizing the open-endedness of its mandate in *Lilly*, the Supreme Court of Appeals of West Virginia has fortunately made efforts to pronounce limits on the state's duty to notify delinquent property owners in the context of forfeited and delinquent lands. In *Citizens National Bank v. Dunnaway*,[147] the court "clarified *Lilly* a step further . . . setting a standard of reasonableness by which to judge a state's efforts in ascertaining an interested party's name and address."[148] The real import of *Dunnaway* is not that it is a landmark case in tax sales law, but rather that the case evidences that the court is both aware of real impracticabilities that arise from its decisions and willing to "establish[] parameters against which to gauge tax authorities efforts toward due process."[149]

The court's willingness to address the need for parameters will hopefully motivate the court to follow *Cary* with a subsequent case much like it did to *Lilly* with *Dunnaway*.

C. Implementation of "Actual Notice" Under Cary

The decision that notification "by mail or otherwise" under West Virginia Code Section 41-5-2 "shall be construed as certain to ensure actual notice,"[150] represents a drastic change in the practical aspects of probate in West Virginia. Prior to the court's decision in *Cary*, the usual probate practice in West Virginia was that beneficiaries were often afforded no notice of a will's delivery to a county clerk.[151] Thus, there was no certain protection whatsoever of the property rights of named beneficiaries under a will.

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tutional obligation on the state may itself be defined by the party's ability to protect its interest.

Id.

147. Citizens Nat'l Bank v. Dunnaway, 400 S.E.2d 888 (W. Va. 1990).

148. Tanner, *supra* note 140, at 271.

149. *Id.*

150. *Cary*, 433 S.E.2d at 552.

151. Telephone Interviews with county clerks, *supra* note 95.

1. Problems With Implementation

Explicit in the court's decision in *Cary* was the requirement that actual notice was thereafter required to be afforded to named beneficiaries under a will.[152] The court did not, however, delineate any procedures by which the county clerk's were to effectuate this actual notice to named beneficiaries under a will. In many instances, the task could be completed simply by resort to a local directory or tax records.[153] However, there will inevitably be situations in which the address of a named beneficiary will be impossible to determine or ascertainable only through an exhaustive inquiry.

The problem with imposing such a requirement on the West Virginia county clerks is that some counties are inevitably more rural in nature or have less tax revenues with which to operate. As a result, the court's decision in *Cary* may have a disproportionate impact on various counties within the state based on individualized procedures already in place and monetary resources at their disposal. For instance, those counties who have a more extensive probate system will have more staff personnel as well as the monetary resources to facilitate notice to the named beneficiaries under a will. One county employee related a recent experience in which her office received a will with over forty named beneficiaries.[154] Between "postage, costs, and our time," she found the process to considerably burden the office and described it more succinctly as "a nightmare."[155] The county clerk of a more rural West Virginia county explained that his office had only two employees for clerical tasks, who were already too "overworked and underpaid" to implement yet another task.[156] Perhaps the true effect of *Cary* on county probate proceedings in West Virginia will not be clear until each county's response to the new requirements can be examined.

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152. *Id.*

153. These records are also usually in the possession of the county clerk.

154. Telephone Interview with Ms. McCord, Head of Probate Department, Harrison County Clerk's Office (Jan. 22, 1996).

155. *Id.*

156. Telephone Interview with anonymous county clerk (Jan. 22, 1996).

2. A Statewide Poll — The Problem Realized

Between January 16, 1996 and January 25, 1996, the author conducted a survey of all of West Virginia's fifty-five (55) counties to determine the counties' current practice regarding the notice given to named beneficiaries under a probated will. The author began the survey by creating three groups into which the current practice of every county must necessarily fall: (1) those counties who still do not give actual notice to named beneficiaries (Group 1); (2) those counties who have begun to give actual notice to named beneficiaries within the last year (Group 2); and (3) those counties who have been giving actual notice for more than one year (Group 3). Upon contacting the county clerks of each county, the results were as follows:

Group 1 — 25 counties — 45.46%

Group 2 — 23 counties — 41.82%

Group 3 — 7 counties — 12.72%

a. Group One Counties

The most persuasive evidence that there is a problem with the practical implementation of the court's holding in *Cary* is that close to one-half of the counties still do not comply with the court's holding some two-and-a-half years later. The overwhelming response of the clerks of the Group 1 counties as to why they were affording no notice, in violation of *Cary*, was that they had never heard of such a requirement.[157] There is clearly a communication breakdown between the court and the clerks. The second most frequently cited reason for non-compliance with *Cary* was a lack of staffing and/or funding to undertake the notification required.[158]

157. Telephone Interviews with county clerks, *supra* note 95.

158. *Id.*

b. Group Two Counties

Fortunately, a sizable portion of West Virginia's counties have implemented a notification procedure within the last year so as to comply with the *Cary* decision. Invariably, the overwhelming majority of Group 2 counties credited Huntington attorney Bruce L. Stout[159] as the reason behind their implementation of a notification procedure.[160] Mr. Stout addressed the West Virginia Association of Circuit and County Clerks at its August 1995 assembly in Huntington, West Virginia.[161] At the conclusion of his address, Mr. Stout commented on the *Cary* requirement that county clerks give actual notice to named beneficiaries under a probated will and stated his impression that the court's ruling was not being observed in the majority of West Virginia counties.[162]

c. Group Three Counties

Only seven of West Virginia's counties have been in compliance with the holding of *Cary* for more than one year. These counties credit their punctuality in compliance on a number of motivations including a capsulized positivist belief ("It's the law, you know"[163]) as well as an equally concise naturalist philosophy ("I've always done it because I think it is the right thing to do"[164]). Regardless of what prompted these counties, their sheer minority attests to the fact that, for whatever reason, the laws are not flowing freely from the court to the county governments.

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159. Partner, Huddleston, Bolen, Beatty, Porter and Copen, Huntington, W. Va.

160. Telephone Interviews with county clerks, *supra* note 95.

161. Telephone Interviews with county clerks, *supra* note 95. *Accord* Telephone Interview with Bruce L. Stout (Jan. 15, 1996).

162. Telephone Interviews with county clerks, *supra* note 95. In fact, many of the county clerks expressed their gratitude that Mr. Stout had made them aware of their court-imposed duty and their displeasure that they had not been afforded notice of their duty until two years after the *Cary* decision and solely because of the thoroughness of one member of the West Virginia Bar. *Id.*

163. *Id.*

164. *Id.*

VI. CONCLUSION

The Supreme Court of Appeals of West Virginia decided in *Cary v. Riss*[165] that the statute[166] requiring the county clerk to notify named beneficiaries under a will "'by mail or otherwise' shall be construed as certain to ensure actual notice," and furthermore, that such actual notice satisfied due process requirements.[167] The court's decision issued an explicit mandate to the counties regarding the manner in which probate proceedings are required to be undertaken. In doing so, the court has balanced the property interests of named beneficiaries under a will and the resulting administrative burdens that have been forced upon the counties. In this instance, the court found that concerns for the potential deprivation of property rights by a system that does not afford actual notice of a will's delivery outweighed any burden(s) that the new system might impose. Although the court found this balancing test to weigh decidedly in favor of ensuring actual notice, its decision stopped short of supplying the counties with suggestions for implementing its decision. Thus, the burden of having to now afford actual notice to named beneficiaries under a will is, in effect, compounded by the additional task of having to formulate some sort of administrative system in which to perform the court's mandate with no guidance whatsoever.

Additionally, the court's commitment to protecting due process rights under the probate procedure noticeably omitted an extension of protection to, or even a discussion of, other parties who have, arguably, property rights that are just as deserving of protection. Whether the party is an heir who would gain property over a will by intestacy, a devisee or legatee under a prior will, an assignee of an heir or beneficiary, or the State of West Virginia itself, there are clearly other parties who stand to gain from the probate or refusal to probate a will, and whose property interest is not extended protection by the *Cary* decision. With an opportunity to establish the exact due process con-

165. 433 S.E.2d 546.
166. W. VA. CODE § 41-5-2 (1982).
167. *Cary*, 433 S.E.2d at 552.

cerns that would be protected by the relevant provisions of the West Virginia Code on probate proceedings, it is somewhat disappointing that the court left unresolved so many pertinent questions in an area of law that, by its nature and topic, requires a very clear understanding by West Virginia practicing attorneys.

Chad S. Lovejoy[*]

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* The author wishes to express his sincere thanks to Mr. Bruce L. Stout, Partner, of Huddleston, Bolen, Beatty, Porter & Copen, Huntington, W. Va. and Professor John W. Fisher, II, of the West Virginia University College of Law, for their help and guidance in the preparation of this article.

Appendix

Many of the county clerks that were contacted by phone for the survey included in this Comment expressed an overwhelming level of concern that they had no idea of how to comply with the notice requirements of *Cary v. Riss*. In order to provide a model for county officials who want to implement such a procedure, the following form should serve as a model for notice to named beneficiaries under a probated will. The form was submitted by the office of Ben A. Bagby, Clerk of the Cabell County Commission. Its brevity and clarity attest that compliance may be possible without an undue burden on the counties of West Virginia.

The Cabell County Clerk currently uses two forms to comply with the notice requirements of *Cary v. Riss*. The first form is used in the instance of a sole beneficiary who actually delivers the will to the clerk, and states only:

_____, 19__

Estate of: *[decedent]*_____

The undersigned person(s) is hereby given notice that a will has been filed in the Cabell County Clerk's office.

[signature of party delivering will]

In the second, more common scenario, there are a number of beneficiaries who are each entitled to actual notice under *Cary*. In this instance the Cabell County Clerk utilizes the following notice:

_____, 19__

RE: Estate of_____

Dear Beneficiary:

You are hereby notified that on_____, 19____, the Will of the above named estate was recorded in our office, and you are named as an heir/beneficiary of this estate. If you have any questions please contact_, the Personal Representative, at_____, W.V.____.

Sincerely,

PROBATE OFFICE

_____

Deputy Clerk