

Not intended for print publication.

**IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**HUNTINGTON DIVISION**

BEREK GLUCKSBERG and  
ELSA GLUCKSBERG,  
husband and wife,

Plaintiffs,

v.

CIVIL ACTION NO. 3:99-0129

WILLIAM POLAN, as Co-Executor  
of the Estate of Lincoln M. Polan,  
CHARLES EDWIN POLAN, as  
Co-Executor of the Estate of Lincoln  
M. Polan, and WILLIAM POLAN,  
individually,

Defendants.

**MEMORANDUM OPINION AND ORDER**

Pending before the court is a motion by R. R. Fredeking, II and Kim Wolfe, Sheriff of Cabell County, in their capacities as co-administrators *de bonis non* of the estate of Lincoln M. Polan, to intervene in this matter pursuant to *Fed. R. Civ. P. 24* as true parties in interest and for relief from this court's judgment of January 28, 2002, against the estate of Lincoln M. Polan, pursuant to *Fed. R. Civ. P. 60*. For the following reasons, the motion to intervene is **GRANTED** and R. R. Fredeking, II and Kim Wolfe, Sheriff of Cabell County, in their capacities as co-administrators *d.b.n.* of the estate of Lincoln M. Polan, are **SUBSTITUTED** for defendants William Polan and Charles Edwin Polan. The motion for relief from judgment is **GRANTED**, and this court's judgment of January 28, 2002 is **VACATED**. Finally, William Polan, Charles Polan, and Scott Andrews are

hereby **ORDERED** to show cause why they should not be sanctioned for the reasons given in this memorandum opinion and order.<sup>1</sup>

**I. Background**

**A. *Glucksberg v. Polan***

In February of 1999, the plaintiffs, Berek and Elsa Glucksberg, filed suit against Lincoln M. Polan and his son, William Polan, regarding thirty-eight paintings sold to them by the Polans. The plaintiffs claimed that the Polans had misrepresented the authenticity of the paintings. On May 27, 1999, Lincoln Polan died. Counsel for Lincoln Polan did nothing to inform this court of Lincoln Polan's death, but continued to file documents on his behalf. Eventually, Lincoln Polan's counsel did inform the plaintiffs, and on October 15, 1999, the plaintiffs filed a motion to substitute Charles Polan, another son of Lincoln Polan, and William Polan as co-executors of the estate of Lincoln Polan in place of the deceased. Plaintiffs' counsel based the assertion that William and Charles Polan were co-executors of the estate of Lincoln Polan on their review of a partial copy of the codicil of the will of Lincoln Polan, which expressed an intent to appoint William and Charles Polan as co-executors. Based on plaintiffs' counsel's uncontradicted representation that William and Charles Polan were co-executors of the estate, this court granted the plaintiff's motion on November 17, 1999.

The case proceeded to trial and resulted in a jury verdict against the estate of Lincoln Polan in the amount of \$208,637.50. This court entered judgment on January 28, 2002.

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<sup>1</sup> While the court has substituted Mr. Fredeking and Mr. Wolfe as representatives of the estate, the court nonetheless retains jurisdiction over William and Charles Polan for the purpose of considering sanctions. In addition, William Polan's status as an individual defendant in this suit is unaffected by this ruling.

On March 6, 2002, R. R. Fredeking, II and Kim Wolfe, Sheriff of Cabell County (“the intervenors”), filed this motion to intervene and to set aside the judgment. In this motion they claimed that William and Charles Polan were not and had never been appointed in West Virginia as executors of the estate of Lincoln Polan. According to the intervenors, the Cabell County Commission, by order dated June 4, 2001, appointed them as the co-administrators *d.b.n.* of the estate of Lincoln Polan. The intervenors argue that they are the true parties in interest, that they should be substituted as parties to the action in the place of William and Charles Polan, and that the judgment should be set aside to give them the opportunity to perform their duties to defend the estate of Lincoln Polan.

By order dated March 7, 2002, this court referred the matter to a special master for investigation and recommendation. The special master’s report is discussed below.

**B. Lincoln Polan**

Lincoln Polan died on May 27, 1999, in Cabell County, West Virginia. At that time he was living at 2 Prospect Drive in Huntington, Cabell County, West Virginia, a property in which he possessed a life estate. (Stip. Tab 4, at 212.) In the years prior to his death, Lincoln Polan had lived both in West Virginia and in Florida. According to testimony before the Commission, for the past fifty years Lincoln Polan and his wife Nancy had spent winters in Florida and the remainder of the year in Huntington. *Id.* In the two years preceding his death, Lincoln Polan lived in Huntington from April to November and spent November to April in Florida. *Id.* He also maintained a business in Cabell County, West Virginia. *Id.* At the time of his death he was registered to vote in West Virginia, where he had most recently voted. In addition, Lincoln Polan had a valid West Virginia driver’s license, although according to William Polan, Lincoln Polan had suffered a debilitating stroke in November of 1997 and did not drive a motor vehicle thereafter. (Def. Memo. in Resp. to

Special Master, Exh. 1.) He did maintain ownership of a 1976 Cadillac, which at the time of his death was registered in Florida. *Id.* About twenty months before his death, on September 29, 1997, Lincoln Polan filed a declaration of domicile with the clerk of the Circuit Court of Indian River County, Florida, declaring that he was domiciled in the state of Florida, at the address of 2106 Club Drive, Vero Beach, Florida, and listing as a former residence 2 Prospect Drive, Huntington, West Virginia. He did not vote in an election after filing this declaration of domicile. At the time of the declaration, he owned a house in Florida located at 2106 Club Drive, Vero Beach. *Id.* On June 4, 1998, Lincoln Polan sold this Florida residence, although William Polan states that as part of the sale Lincoln Polan reserved the right to remain in the house for the next eighteen months.

In February of 1999, the plaintiffs instituted this lawsuit, involving solely state law claims, in federal district court. In the complaint, the plaintiffs alleged that they were residents of Florida, that Lincoln Polan and William Polan were residents of West Virginia, and that the amount in controversy exceeded \$75,000. In the answer to the complaint, Lincoln Polan admitted West Virginia residency. Lincoln Polan's initial death certificate indicates that his residence was 2 Prospect Drive, Huntington, Cabell County, West Virginia. (Intervenor's Memo. Exh. 15.) An amended death certificate lists Lincoln Polan's residence as 2106 Club Drive, Palm Beach, Indian River County, Florida. (Interv. Memo. Exh. 16.) Finally, a second amended death certificate again lists Lincoln Polan's residence as 2 Prospect Drive. (Interv. Memo. Exh. 18.)

### **C. West Virginia Probate Proceedings**

On August 19, 1999, Kirk Bottner, a creditor of Lincoln Polan, appeared before the Cabell County Commission and represented that more than thirty days had lapsed since the death of Lincoln Polan without the production of a will or the qualification of a fiduciary to represent the estate. (Interv. Memo. Exh. 7.) Under West Virginia law, "[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 court 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.”<sup>2</sup> W. Va. Code § 41-5-1 (West 2002). The statute provides that failure to deliver a will without reasonable cause is a misdemeanor punishable by fine. Upon a motion by Mr. Bottner, the Commission appointed him as administrator of the estate of Lincoln Polan. (Interv. Memo. Exh. 7.) On August 31, 1999, Mr. Bottner wrote a letter to the Commission indicating his intent to resign as administrator. (Interv. Memo. Exh. 8.) Mr. Bottner explained that subsequent to his appointment, he had discovered that a will existed.

On September 7, 1999, the Commission ordered William and Charles Polan, on penalty of criminal liability, to appear before the Commission and to present, within forty-eight hours, the last will and testament of Lincoln Polan to the County Commission for probate. On November 2, 1999, the Cabell County Commission accepted Mr. Bottner’s resignation as administrator based on its finding that “it appear[s] that in fact a conflict of interest . . . exist[s] that would prohibit him from proceeding as the administrator.” (Interv. Memo. Exh. 9.) William and Charles Polan provided a copy of the will but failed to provide the original. They also failed to appear before the Commission as ordered. Nothing further happened before the Commission in the matter of Lincoln Polan’s estate until May of 2001, when William Polan petitioned the Commission to resign his position as co-executor of the estate of Nancy M. Polan, Lincoln Polan’s wife. In response to this petition regarding Nancy Polan’s estate, the Commission held a hearing on May 23, 2001, regarding the

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<sup>2</sup> Under the West Virginia Constitution, “The office of county court . . . heretofore created is hereby continued in all respects as heretofore constituted, but from and after the effective date of this amendment shall be designated as the county commission . . . [and statutory references] to the county court . . . shall be read, construed and understood to mean the county commission.” W. Va. Const. art. 9, § 9. Thus, while the above-quoted statute confers probate authority on the county court, that entity is now referred to as the county commission.

estate of both Nancy Polan and Lincoln Polan. By order entered May 24, 2001, the Commission: (1) granted the resignation of William Polan as co-executor of the estate of Nancy Polan; (2) recessed the hearing until June 4, 2001, to permit all parties to present their case; and (3) appointed the Sheriff of Cabell County, West Virginia, as Interim Conservator of both the estate of Nancy Polan and the estate of Lincoln Polan. (Interv. Memo. Exh. 13.)

The hearings before the Commission on May 23, 2001, and June 4, 2001, included eleven hours of testimony, arguments of counsel, and fifty-six documentary exhibits. Following these hearings, in an order filed June 8, 2001, the Commission found that Lincoln Polan was a resident of Cabell County, West Virginia, at the time of his death in Huntington, West Virginia. (Interv. Memo. Exh. 10.) The Commission based this finding on the facts that Lincoln Polan had assets in Cabell County, maintained a valid West Virginia driver's license, and was registered to vote in Cabell County. *Id.* Accordingly, the Commission determined that Cabell County, West Virginia, was the proper place for the probate of Lincoln Polan's estate. *Id.* The Commission appointed R. R. Fredeking, II and the Sheriff of Cabell County to serve as co-administrators *d.b.n.* of the estates of Nancy Polan and Lincoln Polan. *Id.* Because of delay associated with problems in gathering estate assets, Mr. Fredeking and Mr. Wolfe were not qualified as administrators *d.b.n.* of the estate of Lincoln Polan until February 27, 2002. (Interv. Memo. Exh. 12.)

#### **D. Florida Probate Proceedings**

On May 23, 2001, the same day as the initial hearing before the Cabell County Commission, William and Charles Polan filed a Petition for Administration of the estate of Lincoln Polan in the Circuit Court of Indian River County, Florida. (Stip. Tab 2, Exh. C.) As part of this petition, William and Charles Polan declared that “[d]omiciliary probate proceedings are not known to be

pending in another state or country.”<sup>3</sup> *Id.* William and Charles Polan also submitted to the Indian River County Circuit Court documents designating Ira Hatch as their agent for service of process and notice.<sup>4</sup> In three orders, all dated May 25, 2001, the Indian River Circuit Court appointed William and Charles Polan as co-personal representatives of the estate of Lincoln Polan and admitted Lincoln Polan’s will and codicils to the will to probate. (Stip. Tab 3, Exh. F, G & H.)

### **E. Special Master Recommendations**

Pursuant to this court’s instructions, the special master held an evidentiary hearing in August of 2002 and issued his findings and recommendation on the record. The special master recommended that the motion to intervene be granted, based on his finding that the Cabell County Commission had properly exercised jurisdiction over the estate in August of 1999. The special master explained that this jurisdiction continued up to and included the appointment of the intervenors as co-administrators. (Transcript of Hearing before the Special Master at 1 (August 8, 2002) [hereinafter Special Master Trans.]). In accordance with the finding that the intervenors were the proper parties to this lawsuit, the special master also noted that it might be necessary to set aside the verdict under Rule 60, although he offered no specific recommendation in that regard. The special master also found that Mr. Andrews, counsel to Lincoln Polan and then counsel for William and Charles Polan in their purported capacity as representatives of the estate, grossly violated his

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<sup>3</sup> Given William and Charles Polan’s refusal to appropriately respond to the Cabell County order to produce the will and to appear in 1999, and their presence on May 23 at domiciliary probate proceedings in Cabell County, this was clearly an affirmative misrepresentation. The petition is signed by William and Charles Polan and their attorney, Ira Hatch, and dated by them January 30, 2001. As noted above, however, it was not filed until May 23, 2001, at 12:06 p.m.

<sup>4</sup> As with the petition, these documents are dated on January 30, 2001 (William Polan) and February 16, 2001 (Charles Polan), but were not filed with the Indian River court until May 25, 2001. (Stip. Tab 3, Exh. D-1, D-2.)

duties to this court by: (1) failing to disclose to this court that Lincoln Polan had died, and in fact filing numerous documents with the court on behalf of Lincoln Polan for months after his death; and (2) failing to inform the court that William and Charles Polan were not, in fact, qualified as representatives of the estate of Lincoln Polan. The special master also found that plaintiffs' counsel was at least partially at fault for the mistake by failing to properly investigate and confirm that William and Charles Polan were the representatives of the estate.

Finally, the special master found bad faith conduct on the part of William and Charles Polan. The special master described the Polans' attempt to secure appointment in Florida prior to the decision of the Cabell County Commission as a "fraudulent and reprehensible . . . attempt to evade the jurisdiction of the County Commission of Cabell County." (Special Master Trans. at 5 (August 9, 2002)). The special master also found that "from the date of the death of Lincoln Polan to the date of substitution [of William and Charles Polan], every time they came to court, every time they participated in a proceeding of any kind or signed an order or letter, they represented to this Court that Lincoln Polan was still alive when they knew . . . that he was not." *Id.* Moreover, "a monstrous misrepresentation . . . continued after the substitutions of William and Charles Polan as personal representatives when they had not qualified as personal representatives of the estate of Lincoln Polan. Every time they came to court or signed a document, wrote a letter, they . . . implicitly . . . represented themselves a being qualified and acting as co-executors of that estate when, in fact, they were not." *Id.* The special master concluded that this constituted "monstrous misconduct [which was] repeated many, many times all to the detriment of . . . the legitimacy of this proceeding." *Id.* The special master also found that William and Charles Polan's "conduct in this regard is the principal and efficient cause of the disastrous miscarriage of justice and interruption of legitimate and orderly judicial proceedings which have occurred in this matter." *Id.* at 6-7.

## **II. Discussion**

### **A. Motion to Intervene**

In order to resolve the intervenor's motion to intervene and for relief from judgment, the court must first determine the proper representatives of the estate of Lincoln Polan in West Virginia. After reviewing the law governing wills and administration, the court concludes that the intervenors, Mr. Fredeking and Mr. Wolfe, are the only proper parties to represent the estate in this suit. The Polans' Florida appointment, even if valid in Florida, has no legal effect in West Virginia, so the Polans lack standing to sue or be sued in this state. The law governing conflicts between states regarding probate of estates is complex. Nonetheless, this court will do its best to identify the relevant legal principals that determine the proper status of the litigants in this case.

Courts in both the states of West Virginia and Florida have appointed personal representatives for the estate of Lincoln Polan and, in the course of doing so, have decided that Lincoln Polan resided in the state of appointment at the time of his death. The Cabell County Commission appointed the intervenors, Mr. Fredeking and Mr. Wolfe, as co-administrators *d.b.n.* and determined that Lincoln Polan was a resident of West Virginia. The Circuit Court of Indian River County, Florida, appointed the defendants, William and Charles Polan, as co-executors and determined that Lincoln Polan was a resident of Florida.

The arguments presented by the Polans and by the intervenors follow the same general pattern. Both argue that Lincoln Polan was domiciled in State A at the time of his death, that they were appointed representatives of the estate in State A, and that this judgment must be afforded full faith and credit by State B. Of course, the Polans argue that State A is Florida and State B is West Virginia, while the intervenors argue the opposite. Both sides assume (1) that probate jurisdiction is available only in the state where the decedent was domiciled; (2) that either Florida or West

Virginia has exclusive jurisdiction over the estate; and (3) that either the Florida or the West Virginia appointment is valid, but not both. From this court's review of the caselaw and commentary regarding the probate of wills and the appointment of administrators, these assumptions are unwarranted. Accordingly, the court will first explain its understanding of the relevant principles of probate and administration, and will then turn to apply those principles to the case at hand.

The logical starting point is “the proper court or clerk’s office for the probate of a will.” George P. Smith, Jr., *Harrison on Wills and Administration for Virginia and West Virginia* § 175(1) (3d ed. 1985) [hereinafter *Harrison on Wills and Administration*]. West Virginia law governing the place of probate provides that:

The county court shall have jurisdiction of the probate of wills according to the following rules:

- (a) In the county wherein the testator, at the time of his death, had a mansion house or known place of residence; or
- (b) If he had no such house or place of residence, then in the county wherein any real estate devised thereby is situated; or
- (c) If there be no real estate devised thereby, and the testator had no such house or place of residence, then in the county wherein he died, or in any county wherein he had any property at the time of his death; or
- (d) If he died out of this State, his will or an authenticated copy thereof, may be admitted to probate in any county in this State, wherein there is property devised or bequeathed thereby.

W. Va. Code § 41-5-4. In this case, then, the Cabell County Commission had jurisdiction over the probate of Lincoln Polan’s estate because, as all parties agree, he “had a mansion house or known place of residence,” *id.* § 41-5-4(a), located at 2 Prospect Drive, Huntington, Cabell County, West Virginia. Similarly, Florida law provides:

The venue for probate of wills and granting letters shall be:

- (a) In the county in this state where the decedent was domiciled.
- (b) If the decedent had no domicile in this state, then in any county where the decedent’s property is located.
- (c) If the decedent had no domicile in this state and possessed no property in this state, then in the county where any debtor of the decedent resides.

Fla. Stat. Ann. § 733.101(1) (West 2002). The record suggests that Lincoln Polan also maintained a residence in Florida at the time of his death. He sold his residence at 2106 Club Drive, Vero Beach, Florida, on June 4, 1998, but William Polan testified that as part of the sale Lincoln Polan reserved the right to remain in the house for the next eighteen months. It appears, then, that Lincoln Polan still had a Florida residence at the time of his death, and the Indian River Circuit Court was also a proper venue for the probate of Lincoln Polan's estate.<sup>5</sup>

The parties correctly point out that a person can have only one domicile. "A man may have several residences, but only one domicile." *Lotz v. Atamaniuk*, 304 S.E.2d 20, 23 (W. Va. 1983). "Two things must concur to establish domicile – the fact of residence, and the intention of remaining." *Id.* (quoting *White v. Tennant*, 8 S.E. 596, 597 (W. Va. 1888)). That said, "[d]omicile and residence are not synonymous." *Id.* Decisions by different state courts declaring different domiciles for the same person are inconsistent, because a person may have only one domicile. Neither the West Virginia nor the Florida statute, however, restricts probate jurisdiction to the state of a decedent's domicile. The West Virginia statute does not mention domicile, and the Florida statute states that "[i]f the decedent had no domicile in this state, then [venue is appropriate] in any county where the decedent's property is located." Fla. Stat. Ann. § 733.101(1)(b). Obviously, both statutes contemplate local probate of an estate when the decedent owns property in the state, even when he is domiciled in another state. These statutes, like those of most states, "make[] no distinction between the probate of wills of persons domiciled [in state] and the probate of wills of persons domiciled [out of state]." *Harrison on Wills and Administration* § 175(1). Thus, the parties'

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<sup>5</sup> As explained below, this court need not determine the validity of the Florida appointment in order to resolve the issues in this case. Accordingly, throughout this analysis the court will assume, for the sake of argument only, that the facts mentioned above are true and that the Polans' Florida appointment is valid.

assumption that each state's exercise of probate jurisdiction necessarily implies a determination of domicile inconsistent with the other state's jurisdiction is unwarranted.<sup>6</sup>

As reflected in these statutes, any state in which a decedent leaves personal or real property may appoint personal representatives to administer the property of the estate located within that state. Appointments by different states of different personal representatives of an estate are not

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<sup>6</sup> It is not clear to this court whether the Florida and West Virginia courts made a determination of domicile. Both courts use the term residence rather than domicile. "Nonetheless, courts frequently interchange the words, as to legislatures." *Lotz*, 304 S.E.2d at 23. To the extent that both Florida and West Virginia did make inconsistent determinations of domicile, the West Virginia judgment controls as between the Polans and the proposed intervenors here. In the context of conflicting determinations of domicile, the United States Supreme Court has explained the relevant principles for determining which decision must be given full faith and credit under the federal Constitution. In *Riley v. New York Trust Co.*, 315 U.S. 343 (1942), the Court gave the following example:

A will is admitted to original domiciliary probate in state A. Thereafter an ancillary proceeding is commenced in state B based upon the domiciliary determination of A. At that point a beneficiary, a stranger to the proceeding in A, appears and asserts that the decedent was domiciled in B. The determination of domicile by state A will not be recognized by state B, but state B will take evidence and redetermine the issue of domicile. . . .

[However,] [i]f the objector was privy to the proceeding in state A, state B will not redetermine the issue of domicile. . . . [That is to say,] where the person seeking to establish domicile in state B, and to have original domiciliary probate there, was a party to the proceeding in state A, state B will not redetermine domicile.

*Riley*, 315 U.S. at 353 n.13. In this case, Mr. Fredeking and Mr. Wolfe were not parties to the proceeding in Florida, and thus cannot be bound by the Florida determination of domicile. In contrast, William and Charles Polan *were* parties to the proceeding in West Virginia, and thus are bound by the West Virginia court's determination of domicile. See *Loewenthal v. Mandell*, 170 So. 169, 173-74 (Fla. 1936) ("[N]o party to the prior litigation [in another state] can deny a finding of domicil there, since the court had jurisdiction to find domicil for the purpose of disposing of the estate there, and parties are therefore bound."); *Biederman v. Cheatham*, 161 So.2d 538, 542 (Fla. App. 1964) ("The decision of the court of one state to the effect that the testator is domiciled there is not binding, in the courts of other states, upon persons who are not parties to the proceedings in the first state – even under the full faith and credit clause of the Federal Constitution. . . . On the other hand, one who was a party to the proceedings in the first state is bound by the judgment of such court even upon the question of the testator's domicile.").

inconsistent, because “[n]othing is better settled than that letters testamentary or letters of administration have no legal operation out of the state from whose court they issue.” *Harrison on Wills and Administration* § 200(1). Accordingly, assuming the validity of the West Virginia appointment of the intervenors and the Florida appointment of the Polans, each group is qualified only within the state of appointment. The Polans’ Florida appointment (if valid) has legal force only within the state of Florida, and the intervenors’ appointment has legal force only within the state of West Virginia. Because an appointment as a representative of an estate only has force within the state of appointment, it is often necessary for each state in which the decedent owned property to appoint its own representative of the estate. The administration of all of a decedent’s property is thus “accomplished by [an] administration in the domicile of decedent known as the principal or domiciliary administration, and by [an] administration in the state where there are assets known as ancillary administration.” *Harrison on Wills and Administration* § 200(1). *See, e.g.*, Fla. Stat. Ann. § 734.102 (providing for ancillary administration).

Important legal consequences attach to the determination of domicile. For example, the law of the domicile governs matters such as the construction of the will and succession of personal property. *See Lotz*, 304 S.E.2d at 22; *Harrison on Wills and Administration* § 10(1). Nonetheless, “the domiciliary and ancillary personal representatives are wholly independent.” *Harrison on Wills and Administration* § 200(1). “Each independent sovereign considers itself competent to confer, whenever there is occasion, probate authority, whether by letters testamentary or of administration, which shall operate exclusively and universally within its own sovereign jurisdiction, there being property of the deceased person or lawful debts owing within reach of its own mandate and judicial process.” *Id.* § 191.

“It follows as a necessary corollary from this principle [that an appointment only has force within the state of appointment] that an executor or administrator who qualified in another state or jurisdiction can neither sue nor be sued as such in any other state or jurisdiction.” *Id.* § 200(1). In the words of Justice Story, “it has become an established doctrine, that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due to his intestate, in the courts of another state; and that he is not liable to be sued in that capacity, in the courts of the latter, by any creditor, for any debts due there by his intestate.” *Vaughan v. Northup*, 40 U.S. 1, 6 (1841). The Supreme Court of Appeals of West Virginia has likewise stated that “a foreign executor cannot maintain a suit in this state, unless authorized so to do by . . . statute.” *Winning v. Silver Hill Oil Co.*, 108 S.E. 593, 595 (W. Va. 1921).

Thus, unless the Polan’s Florida appointment is given force in West Virginia by statute, that appointment has no effect in West Virginia. Apart from certain limited circumstances, West Virginia has not generally authorized foreign executors to sue and be sued in local courts, as have some other states. *Compare* Va. Code § 8.01-328 (West 2002) (defining “person” for purposes of Virginia long-arm statute to include “an individual, his executor, administrator, or other personal representative . . . whether or not a citizen or domiciliary of this Commonwealth”) *with* W. Va. Code § 56-3-33 (not including executor or personal representative in definition of “nonresident” for purposes of West Virginia long-arm statute).<sup>7</sup> Therefore, West Virginia has not altered the common law rule that “an executor or administrator who qualified in another state or jurisdiction can neither sue nor be sued as such in any other state or jurisdiction.” *Harrison on Wills and Administration* §

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<sup>7</sup> Contrast this with W. Va. Code § 56-3-31, which provides, in the limited circumstance of cases related to motor vehicle accidents involving the decedent, that a foreign executor may be sued directly in the state courts of West Virginia.

200(1). Accordingly, even if William and Charles Polan were properly appointed by a Florida court as representatives of the estate of Lincoln Polan, they lack the capacity to sue and be sued in West Virginia state courts (and thus in a federal district court sitting in diversity in West Virginia). *See, e.g., Pantano v. United Med. Labs. Inc.*, 456 F.2d 1248 (9th Cir. 1972) (personal administrator appointed in Nebraska lacked standing to sue on behalf of estate in Oregon).

As long as Mr. Fredeking and Mr. Wolfe were properly appointed by the Cabell County Commission as personal representatives of Lincoln Polan's estate, they are, with certain exceptions not relevant here, the only parties who may sue or be sued in the state of West Virginia as representatives of Lincoln Polan's estate. As noted above, the parties do not dispute that Lincoln Polan owned a residence in Cabell County, West Virginia at the time of his death. Thus, the Cabell County Commission clearly had jurisdiction to appoint personal representatives to the estate.

William and Charles Polan make much of the fact that they are named as executors of the estate in Lincoln Polan's will. However, if the named executor "refuses to qualify by taking the oath and giving bond as required he will be held to have renounced. His refusal relates back to the death of the testator." *Harrison on Wills and Administration* § 193(4). Here, William and Charles Polan refused to produce the will or appear in person when ordered to do so by the Cabell County Commission. By this failure, William and Charles Polan effectively refused to qualify as executors, and the Cabell County Commission was empowered to appoint administrators in their place. *See* W. Va. Code § 44-1-9. Moreover, "[a] person appointed by a will executor thereof shall not have the powers of executor until he qualify as such by taking an oath and giving bond before the county court." *Id.* § 44-1-1. Thus, even apart from their acts constituting a refusal to qualify, William and Charles Polan had no power to sue or be sued in West Virginia as representatives of the estate until

they were qualified in West Virginia as executors, regardless of the fact that the will named them as executors.

As noted above, this court need not evaluate the validity of the Florida appointment in order to determine that William and Charles Polan are not proper parties to this suit. Nonetheless, the court notes its doubts about the continuing validity of that appointment. First, the Florida court's appointment appears to be in the nature of a domiciliary appointment, not an ancillary appointment. As explained above, the Polans are bound by any determination by the Cabell County Commission that Lincoln Polan was domiciled in West Virginia.<sup>8</sup> Second, the Polans obtained the Florida appointment by way of a material misrepresentation, namely that to the best of their knowledge domiciliary appointment proceedings were not pending in any other court. By the time the Florida petition was filed on May 23, 2001, the Polans were of course aware of the Cabell County domiciliary appointment proceedings pending that very day, to which they were parties. This casts further doubt on the continued validity of the Florida appointment.

In sum, the Polans are not proper parties to this proceeding, regardless of the validity of the Florida court appointment. The fundamental principal governing this case is that when a party to a pending lawsuit in the state of West Virginia dies, the only parties with standing to represent the estate of the decedent in a West Virginia court (a category that effectively includes this court sitting in diversity) are personal representatives of the estate who were duly appointed in West Virginia.<sup>9</sup> The record demonstrates unequivocally that Mr. Fredeking and Mr. Wolfe are the only duly-appointed personal representatives of Lincoln Polan's estate in the state of West Virginia. Thus, the

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<sup>8</sup> *See supra* note 6.

<sup>9</sup> The exception to this rule is when the state, by statute, provides that an out-of-state executor may sue or be sued in state, an exception not applicable here. *See infra* p. 14 & note 7.

Polans lack standing to represent the estate in this court. Accordingly, Mr. Fredeking and Mr. Wolfe's motion to intervene is **GRANTED**, as they are the true parties in interest in this case.

### **B. Motion for Relief from Judgment**

In addition to the motion to intervene, Mr. Fredeking and Mr. Wolfe have filed a motion for relief from judgment under Rule 60. While the plaintiffs, the Glucksbergs, do not object to the motion to intervene or to substitute parties, they do object to the motion for relief from judgment. Under Rule 60, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . fraud . . . , misrepresentation, or other misconduct of an adverse party." *Fed. R. Civ. P.* 60(b) (West 2002). The Glucksbergs argue that Rule 60 is inapplicable, because the motion filed by the intervenors does not allege fraud by *an adverse party*. The issue of the proper party in this case is a dispute between two possible defendants – the Polans and intervenors – not between the plaintiffs and the defendants. The plaintiffs' argument has some force. The intervenors seek to relieve the estate from final judgment based on the fraud of the Polans. The Polans are not the adverse party to the estate, however, and the plaintiffs have not committed fraud.<sup>10</sup> Accordingly, Rule 60 does not seem to provide a basis for the motion to set aside the judgment.

Regardless of who is at fault for the continuation of this litigation against the Polans as co-executors of the estate, the fundamental fact is that this court's judgment is not against the Polans *per se*, but rather against the estate of Lincoln Polan. Because the Polans were and are legally incapable of representing the estate in a suit in West Virginia, this court's judgment against the

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<sup>10</sup> It could be argued that because it was the plaintiffs who filed the motion to substitute the Polans as the executors of the estate, it was the plaintiffs' misconduct that resulted in the adverse judgment against the estate. The court need not determine the merits of this argument because, as discussed below, the judgment must be set aside in any case.

estate, which was based upon their representation, cannot stand.<sup>11</sup> “Of particular relevance here, the inherent power [of the court] allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court.” *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). It would be inequitable to permit a judgment to stand against the estate based on the misconduct of the Polans.

The plaintiffs argue that the judgment should not be set aside. The plaintiffs contend that they would be unduly prejudiced by setting aside the judgment and that the estate was competently represented by counsel throughout the litigation. As to undue prejudice, the court notes that the plaintiffs share some of the fault, if only a modest amount, for the course of the proceedings. It was, after all, the plaintiffs who moved to substitute William and Charles Polan as co-executors of the estate of Lincoln Polan. In doing so, the plaintiffs relied solely on Lincoln Polan’s will naming William and Charles Polan as executors, despite clear West Virginia law dictating that an executor named in a will has no authority to act on behalf of the estate until duly qualified, *see* W. Va. Code § 44-1-1, and that an executor who fails to perform the necessary acts to qualify, such as swearing an oath and submitting a bond, may be replaced by another administrator, *see id.* § 44-1-9. The plaintiffs failed to take the relatively simple and prudent measure of attempting to locate the letters of appointment for William and Charles Polan and submitting the same as part of the motion to substitute parties. Had they done so, they quickly would have discovered that the Polans had not been qualified as executors.

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<sup>11</sup> It might even be argued that the court lacked jurisdiction over the estate due to the fact that the proper representatives were never joined as parties. In this case, however, the court is satisfied of its initial and ongoing jurisdiction over the estate. The suit was originally brought against Lincoln Polan during his lifetime, at which time the court unquestionably had diversity jurisdiction based on Lincoln Polan’s admission of West Virginia residency. The court’s initial jurisdiction continued over his estate after his death.

Moreover, any possible injustice to the plaintiffs does not outweigh the interests of the estate. Because the estate of Lincoln Polan was not properly represented in the proceedings before this court, the court's judgment against it cannot stand. The injustice to the plaintiff was caused by the Polans, not by the estate, and the estate should not be forced to bear the burden of their misconduct. Nor is the adequacy (or inadequacy) of William and Charles Polan's legal defense of the estate relevant in any way. The estate is entitled to representation by the duly-appointed administrators, not by purported executors who in fact lack standing to represent the estate before this court.

Accordingly, the intervenors' motion for relief from judgment is **GRANTED**, and the court's January 28, 2002 judgment order [Docket 68] is **VACATED**.

### **III. Litigation Misconduct**

As noted above, the special master found extensive evidence of litigation misconduct in this case, principally by William and Charles Polan. Essentially, the special master found that William and Charles Polan's pattern of misrepresentation and non-disclosure of the ongoing controversy surrounding the appointments of representatives to the estate constituted fraud upon the court. The special master also found that this fraud has thrown into question the legitimacy of all proceedings subsequent to their substitution as representatives of the estate. This court reviews the special master's findings of fact for clear error and any legal conclusions *de novo*. *Fed. R. Civ. P.* 53(e)(2); *Cook v. Niedert*, 142 F.3d 1004, 1010 (7th Cir. 1998). The court agrees with the conclusions of the special master in a number of respects, as will be set out below. In light of the very serious nature of the misconduct in this case, the court will consider imposing sanctions under Rule 11 of the *Federal Rules of Civil Procedure*, and under this court's inherent powers, on those parties found to have committed such misconduct.

Under Rule 11, “[o]n its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney . . . or party to show cause why it has not violated subdivision (b).” *Fed. R. Civ. P.* 11(c)(1)(B). Subdivision (b), which pertains to representations to the court, provides that “[b]y presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support or . . . are likely to have evidentiary support.” *Fed. R. Civ. P.* 11(b)(3). In addition to this court’s powers under Rule 11, “[i]t has long been understood that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’” *Chambers*, 501 U.S. at 43 (quoting *United States v. Hudson*, 7 Cranch 32, 34, (1812)). “Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” *Id.* at 44-45 (internal citations omitted). The court’s inherent powers include the power to set aside a judgment obtained by fraud and the power to sanction those who perpetrate such a fraud, including the power to shift attorney’s fees onto the party guilty of wrongdoing. *Id.* at 45-46. In light of these principles, the court now turns to examine the conduct of the various parties in this case.

**A. William and Charles Polan**

The facts of the case make it abundantly clear that William and Charles Polan affirmatively misled the court regarding their status as representatives of the estate. They also failed to bring to the court’s attention significant disputes, known to them but not to the plaintiffs or the court, regarding the appropriate representative of the estate. Specifically, William and Charles Polan

affirmatively misled this court by participating in this litigation as purported co-executors of Lincoln Polan's estate without bringing to the court's attention the following facts: (1) prior to May 25, 2001, they had not been qualified and appointed as personal representatives of the estate in *any* jurisdiction; (2) during the course of the litigation, a substantial dispute regarding the proper administrators of Lincoln Polan's estate was heard and resolved against William and Charles Polan by the Cabell County Commission; (3) the Polans had presented the Florida appointment order to the Cabell County Commission and had argued that the appointment be accorded full faith and credit in West Virginia, but the Commission had rejected their position; and (4) the Cabell County Commission had, during the course of the proceedings in this court and prior to trial, appointed Mr. Fredeking and Mr. Wolfe as co-administrators of the estate.

Rule 11 states pleadings and written motions to the court must be signed by an attorney or, if the party is unrepresented, by the party. "By presenting to the court . . . a pleading, . . . an attorney . . . is certifying," among other things, that "the allegations and other factual contentions are warranted by the evidence." *Fed. R. Civ. P.* 11(b)(3). Because William and Charles Polan were represented by counsel, they did not personally sign any pleadings. Nonetheless, the advisory committee notes to Rule 11 explain that "[e]ven though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client." *Fed. R. Civ. P.* 11 advisory committee's note. *See also Byrne v. Nezhad*, 261 F.3d 1075, 1117-18 (11th Cir. 2001) ("A client may be sanctioned under Rule 11 even if the client did not sign the frivolous pleadings."); *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253, 1258 (2d Cir. 1996); *Burda v. M. Ecker Co.*, 2 F.3d 769, 776 (7th Cir. 1993). Accordingly, the court will consider whether, given the particular circumstances of this case, it is appropriate to impose sanctions directly on William and Charles Polan.

The most fundamental factual allegation in every aspect of William and Charles Polan's participation in the case, including in all court filings, was that they were, in fact, the co-executors of Lincoln Polan's estate. The plaintiffs, in their response to the motion to intervene and set aside the judgment, contend that William Polan testified under oath at a deposition on March 16, 2001, that he and his brother were the representatives of Lincoln Polan's estate. This deposition testimony would have preceded the appointment in Florida in May of 2001, and thus would constitute an affirmative misrepresentation by William Polan, under oath, of his and his brother's status as executors of the estate. This deposition testimony has not been presented to the court, however, so the court does not rely on this alleged statement at this time.

In addition, William Polan testified under oath at trial that he was the executor of his father's estate. (Tr. Trans. Vol. I at 215 (January 23, 2002)). While William Polan might argue that by that time he and Charles Polan had in fact been appointed by the Florida court, his failure to clarify either the date of appointment or the jurisdiction of appointment, taken in light of his participation in the Cabell County proceeding and in this lawsuit as purported co-executor long before the Florida appointment, constitutes yet another act of misrepresentation to this court. The Polans failed to oppose the plaintiffs' motion on October 15, 1999, to substitute the Polans as co-executors of Lincoln Polan's estate, despite their knowledge that no court or commission anywhere had ever appointed them as executors of the estate. In papers filed thereafter, the Polans consistently identified themselves as co-executors of Lincoln Polan's estate, without ever notifying the court of the significant ongoing dispute regarding the proper administrators of the estate. Had the Polans at least notified the court of the dispute prior to the trial and final judgment in this case, the court would have had the opportunity to stay further proceedings until the proper party was determined.

Here, whether or not Mr. Andrews was aware of the facts surrounding the dispute in Cabell County or the timing and nature of the Florida appointment, William and Charles Polan were directly involved in those matters. William and Charles Polan had firsthand knowledge of the events as they unfolded. Because the facts surrounding William and Charles Polan's status as representatives of the estate were first and foremost in their own hands, it is appropriate in this case to consider sanctions directly against them.

It is worth noting that the propriety of sanctions against William and Charles Polan is not dependent on this court's earlier conclusion that they are not the proper parties to this litigation. The court's consideration of sanctions is based on William and Charles Polan's failure to disclose to the court the multiple facts that drew their status as co-executors *into question*. It is the court's job, not that of William and Charles Polan, to determine whether they are the proper parties to this case. The court does not intend to hold them liable for coming to incorrect legal conclusions about their status as representatives of the estate. William Polan stated in the proceedings before the special master that he believed that he and his brother were in fact the executors of the estate simply because they were named in the will, regardless of whether they had been appointed as such by any court. Even if this court were to credit William Polan's dubious belief in his status as executor, the fact remains that William and Charles Polan were aware of many facts that seriously brought that belief into question. Their awareness of these facts, combined with their continued representations to this court that they were the executors of the estate, constitutes a knowing and intentional scheme to deceive this court. Accordingly, even if this court had determined that the Polans were the proper parties to this lawsuit, the court would still consider sanctions. Putting aside this court's ultimate resolution of the proper party question, the Polans' actions seriously jeopardized the soundness and legitimacy of the trial and judgment in this case.

In addition to this court's powers under Rule 11, the court also grounds its consideration of sanctions in its inherent powers. In particular, the court will consider awarding the plaintiffs their costs and attorney's fees incurred in pursuing this now-vacated judgment. Rule 11 permits the shifting of attorneys' fees only when a party has moved for sanctions. *See Fed. R. Civ. P. 11(c)(1)(A)*. No such motion has yet been filed in this case. Nonetheless, "in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel, even though the so-called 'American Rule' prohibits fee shifting in most cases." *Chambers*, 501 U.S. at 45 (quotations and citations omitted). In particular, "a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. In this regard, if a court finds that fraud has been practiced upon it, or that the very temple of justice has been defiled, it may assess attorney's fees against the responsible party." *Id.* at 45-46 (quotations and citations omitted). Accordingly, the court may consider shifting attorney's fees to the Polans in this case.

Before imposing Rule 11 sanctions *sua sponte*, a court must issue an order to show cause describing the specific conduct subjecting the party to sanction. *Fed. R. Civ. P. 11(c)(1)(B)*. The court considers its order of March 7, 2002, referring this issue to a special master, as sufficient to satisfy this requirement. That order does not, however, specifically mention Rule 11 or the possible imposition of sanctions. Thus, out of an abundance of caution, the court **ORDERS** William and Charles Polan to show cause why they should not, for reasons explained in this memorandum opinion and order, be sanctioned. After William and Charles Polan have had an opportunity to respond to the court's order, the court will decide whether sanctions should be imposed, and if so, in what amount.

**B. Scott Andrews**

The special master also found that Mr. Andrews, initially counsel for Lincoln Polan and then counsel for William and Charles Polan in their purported capacity as executors of the estate, violated his duties to this court by: (1) failing to disclose to this court that Lincoln Polan had died and by filing numerous documents with the court on behalf of Lincoln Polan for months after his death; and (2) failing to inform the court that William and Charles Polan were not qualified as executors of the estate of Lincoln Polan.

The record amply bears out the first finding. Clearly, Mr. Andrews continued to file documents in this court on behalf of Lincoln Polan long after his death.<sup>12</sup> The record does not disclose when Mr. Andrews became aware of his client's death. If he was aware of Lincoln Polan's death soon after it occurred, Mr. Andrews' continued filings constitute misrepresentations and violate his duty of candor to the court. If Mr. Andrews was unaware of his client's death, his continued filing of documents on behalf of Lincoln Polan for months on end, without ever consulting with his client, amounts at the very least to a dereliction of his duties vis-a-vis his client. Mr. Andrews certainly was aware of Lincoln Polan's death by the time he notified plaintiffs' counsel of that fact. His failure to also notify the court constitutes a violation of his duty of candor.

As to the second finding by the special master, that Mr. Andrews violated his duty of candor by failing to inform the court that his clients had not in fact been appointed co-executors of the

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<sup>12</sup> Specifically, on June 25, 1999, a month after Lincoln Polan's death, Mr. Andrews filed an Answer and Counterclaims on behalf of Lincoln Polan. In July of 1999, he filed certificates of service of certain documents on behalf of Lincoln Polan. In September of 1999, he (along with the plaintiffs) submitted a joint report of the Rule 26 meeting held by the parties in August of 1999, again claiming that he was representing Lincoln Polan. On October 13, 2002, he filed his initial disclosures, again in the name of Lincoln Polan. In this submission, Mr. Andrews finally indicated that he represented "Lincoln M. Polan (deceased)," but did not bring the court's attention to that fact or file a motion to substitute parties. This last submission was filed two days before the plaintiffs filed their motion to substitute parties based on Mr. Andrews's informing them of Lincoln Polan's death.

estate, the court **FINDS** that there is not sufficient evidence in the record to support a finding that Mr. Andrews was aware of these facts. Indeed, the only evidence in the record is an affidavit signed by Mr. Andrews stating that William and Charles Polan represented to him that they were the co-executors of the estate, that he was unaware of the proceedings in the Cabell County Commission regarding the proper administrator of the estate, and that he believed that William and Charles Polan were the executors of the estate. At this point in the proceedings, the court will not consider sanctions against Mr. Andrews relating to his alleged knowledge that William and Charles Polan were not actually the executors of the estate. The court may return to this issue in the future if evidence indicating such knowledge on the part of Mr. Andrews is submitted by a party in support of a motion for further sanctions.

Regardless of Mr. Andrews's actual knowledge of the fact that William and Charles Polan had not been appointed co-executors of the estate, he had a duty to reasonably investigate the Polans' representations of their status as executors. *See Fed. R. Civ. P. 11(b)*. Despite the fact that Mr. Andrews was undertaking the representation of a client (the estate) in a serious and complicated legal matter, he failed to take basic measures to ensure that William and Charles Polan were in fact the proper representatives of the estate that Mr. Andrews agreed to represent. Like the plaintiffs, Mr. Andrews easily could have requested that the Polans provide him a copy of their letters of appointment by the appropriate West Virginia authority, or have sought out those documents himself. Accordingly, the court will consider sanctioning Mr. Andrews for his failure to reasonably investigate and confirm William and Charles Polan's purported status as co-executors of the estate. For the reasons discussed above, the court **ORDERS** Mr. Andrews to show cause why he should not be sanctioned. After Mr. Andrews has had an opportunity to respond to the court's order, the court will decide whether sanctions should be imposed, and if so, in what amount.

### **C. The Glucksbergs and their Counsel**

As discussed above, the Glucksbergs, through counsel, were actually the first to identify William and Charles Polan as co-executors of the estate and to move to substitute them as parties. While their failure to make further inquiries has resulted in a trial and judgment in their favor that now must be vacated, this failure was relatively minor. The court will not consider imposing sanctions on the plaintiffs or their counsel, as the loss of the judgment they had hoped to secure is more than adequate punishment.

### **IV. Conclusion**

In sum, the court **GRANTS** the motion to intervene, because Mr. Fredeking and Mr. Wolfe, the only representatives of the estate of Lincoln Polan appointed in West Virginia, are the true parties in interest in this case. The court **VACATES** its earlier judgment against the estate, as the West Virginia representatives of the estate, the only parties with standing to represent the estate in this court, were not parties to the proceedings. The court also **ORDERS** William Polan, Charles Polan, and Scott Andrews to show cause why, for the reasons given in this memorandum opinion and order, they should not be sanctioned. A hearing on the order to show cause will be held in Charleston on January 27, 2003, at 2 p.m.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: December 16, 2002

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JOSEPH R. GOODWIN  
UNITED STATES DISTRICT JUDGE