IN THE

Supreme Court of Virginia

RECORD NO. 082023

STEVEN HARBOUR
and
JAMES "JIMMY" AUBREY BOAZ,

Appellants,

v.

SUNTRUST BANK,
STUART BAPTIST CHURCH,
UNKNOWN HEIRS OF HAZEL HARBOUR, deceased,
and
UNKNOWN HEIRS OF JAMES CLAYTON BOAZ, deceased,

Appellees.

BRIEF OF APPELLEE STUART BAPTIST CHURCH

Monica Taylor Monday (VSB No. 33461)
James J. O'Keeffe (VSB No. 48620)
GENTRY LOCKE RAKES & MOORE, LLP
800 Suntrust Plaza
Post Office Box 40013
Roanoke, Virginia 24022-0013
Tel: (540) 983-9300
Fax: (540) 983-9400
monica_monday@gentrylocke.com

Robert W. Mann (VSB No. 07622)
YOUNG, HASKINS, MANN, GREGORY, McGARRY & WALL, PC
400 Starling Avenue
Post Office Box 72
Martinsville, Virginia 24114-0072
Tel: (276) 638-2367
Fax: (276) 638-1214

Counsel for Appellee Stuart Baptist Church

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
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IN THE SUPREME COURT OF VIRGINIA

STEVEN HARBOUR and JAMES "JIMMY" AUBREY BOAZ Appellants, v. SUNTRUST BANK, STUART BAPTIST CHURCH, UNKNOWN HEIRS OF HAZEL HARBOUR, deceased, and UNKNOWN HEIRS OF JAMES CLAYTON BOAZ, deceased Appellees.	)	Case No. 082023

BRIEF OF APPELLEE STUART BAPTIST CHURCH

Stuart Baptist Church ("the Church") responds to the Brief filed on behalf of Steven Harbour and James "Jimmy" Aubrey Boaz, the nephews of Mollie Boaz Johnson ("the Nephews").

This appeal concerns the interpretation of a Revocable Intervivos Trust ("the Trust Agreement") made by Mollie Boaz Johnson ("Mollie") on September 30, 1991. The trust was designed

to: provide for Mollie during her lifetime; provide for Harry Johnson ("Harry"), Mollie's husband, during his lifetime; give the remainder to three named siblings and the Church; and give the lapsed share of any sibling to the Church. The question before the Court is whether the Nephews, who were not even named in the Trust or Mollie's will, are entitled to the remainder interests of the siblings who died before Harry's death, but after Mollie's death. Resolution of this issue, as the trial court correctly found, turned on an examination of the Trust Agreement as a whole, which evidenced Mollie's intent that the siblings' shares vest at Harry's death.

On appeal, the Nephews rely upon arguments, cases and theories they failed to first present to the trial court. They urge this Court to apply the early vesting rule, even though they never brought this rule to the attention of the trial court. They also maintain that their parents had an "indefeasible vested remainder" interest at the time Mollie died. This argument, too, was not preserved below. And, the Nephews' second assignment of error, which they do not even brief, attacks the trial court for reading the Trust Agreement as a whole, even though they actually invited the trial court to do just that.

However, even if these issues were properly preserved below, the trial court's decision should be affirmed because it gives effect to Mollie's dominant intent, in accordance with this Court's precedence.

STATEMENT OF THE CASE

The Nephews' Statement of the Case is supplemented to properly frame the preservation of error issues that govern disposition of this case.

On appeal, the Court is limited to the record before it. Bryant v. Commonwealth, 189 Va. 310, 320, 53 S.E.2d 54, 59 (1949). This record contains no transcript of the June 23, 2008 hearing before the trial court on the questions presented in this case. (JA 61).[1] The Written Statement of Facts merely recites that the arguments presented to the trial court at that hearing are consistent with the legal memoranda filed by the parties. (JA 61). Further, the trial court decided the case on "the facts stipulated by the parties, the arguments of counsel and the excellent memoranda of counsel." (JA 50). And, the Nephews did not raise any new objection when they endorsed the final Order. (JA 54). Thus, the Nephews may only present to this Court the arguments and theories they raised in their

[1] References to the Joint Appendix will be denoted "(JA __)."

legal memoranda, as reflected in the record before the Court. Rule 5:25.

The 3-page legal memorandum that the Nephews presented to the trial court looks nothing like the 35-page brief they have filed with this Court. That legal memorandum mentioned nothing about vesting, the early vesting rule or the sophisticated testamentary arguments they now present to this Court. Other than citing cases that set forth the guiding principles in the construction of wills,[2] that document offers no authority for the Nephews' position. That submission does include an argument that the language of the Trust Agreement is unambiguous, and that, because Mollie placed her initials beside the lapse language, there was no mistake or error in the wording of that provision. (JA 47-48). Further, the Nephews "prayed" that the trial court read each word in the Trust Agreement. (JA 47-49). Beyond these bare comments, the Brief of Appellants

[2] The Nephews now seek to distance themselves from the only authorities they cited below, arguing that those references were merely a "prelude" that set forth the "cardinal rules of will interpretation from the Virginia Supreme Court case law." (Br. of Appellants at 32). In fact, they now contend that they did not actually cite one case for the proposition actually recited in their legal memoranda. (Id.). As discussed herein, a review of their legal memorandum disproves their position on appeal.

bears little resemblance to the legal position the Nephews took below.

Consequently, the Nephews may only press on appeal those arguments and theories they first presented to the trial court which, as the record reflects, are insufficient to prove any reversible error.

QUESTIONS PRESENTED

I. DID MOLLIE INTEND FOR HER UNNAMED NEPHEWS TO RECEIVE A REMAINDER INTEREST IN HER TRUST WHEN THE TRUST AGREEMENT DETERMINES, DIVIDES AND DISTRIBUTES THE REMAINDER INTEREST ONLY AFTER THE DEATH OF THE LIFE TENANT, HARRY. (Assignments of Error I, II)

II. DOES THE EARLY VESTING RULE, WHICH WAS NOT RAISED BELOW, OVERCOME MOLLIE'S INTENT, AS EXPRESSED IN THE TRUST AGREEMENT, THAT HARRY'S DEATH WOULD DETERMINE WHO WAS QUALIFIED TO ENJOY THE REMAINDER OF THE TRUST. (Assignments of Error I, II)

STATEMENT OF MATERIAL FACTS

On September 30, 1991, Mollie simultaneously executed two documents: a Last Will and Testament and a Revocable Intervivos Trust. (JA 5, 13, 74, 77). Crestar Bank, now SunTrust, was named trustee. (JA 58). Mollie retained the right to terminate, revoke, cancel, "alter, change or modify" the Trust Agreement during her lifetime. (JA 7).

The Trust Agreement generally provides that, during Mollie's lifetime, the trust income (and corpus, if necessary) is to be used for her benefit. (JA 5, 9-10). Upon Mollie's death, the "entire annual net income" of the trust is to be used for the benefit of her spouse, Harry, "so long as he shall live." (JA 9). The Trust Agreement also gives the trustee discretion to use the principal of the trust to support Harry, specifically stating that Mollie's "primary purpose is to provide for the necessities" Harry may have. (JA 10). Mollie expressly acknowledged that the use of the principal of the trust for Harry's benefit "may reduce the amount of principal which will be distributed to other beneficiaries hereunder upon the death of [Harry]." (JA 10). Additionally, the Trust Agreement includes a spendthrift clause. (JA 11).

The Trust does not allow for any other use of trust funds so long as either Mollie or Harry is alive. Nor does it mention either of the Nephews even once by name.

The language at issue in this case appears in Section 7(C), which states:

> C. <u>Payment of Estate Tax at Spouse's Death</u>.

> Upon the death of the Grantor's spouse, the Trustee shall divide the trust res, including any undistributed income and the remaining principal, into four equal shares, to be distributed as follows:
>
> One such share shall be paid and delivered to my brother, James Clayton Boaz; the second such share, shall be paid and delivered to my brother, Herbert Alan Boaz; and the third such share shall be paid and delivered to my sister, Hazel Boaz Harbor.
>
> The fourth such share shall be delivered to the Stuart Baptist Church to be kept in a separate trust account entitled "Mollie Boaz Johnson Educational Fund", to be used for scholarships for deserving students from Patrick County in accordance with Section Two, paragraph (b), of My Last Will and Testament.
>
> <u>If any of my brothers or sister shall fail to survive me, his or her share shall lapse and such share shall be added to the trust fund for Stuart Baptist Church, previously mentioned.</u>

(Emphasis added.) Section Two, paragraph (b), of Mollie's Will provides in part:

> In the event that my spouse shall fail to survive me, I direct my Executor to divide my entire estate...into four equal shares. One such share I give, devise and bequeath to my brother, James Clayton Boaz; the second such share, I give, devise and bequeath to my brother, Herbert Alan Boaz; and the third such share, I give, devise and bequeath to my sister, Hazel Boaz Harbour.
>
> The fourth such share, I give, devise and bequeath to the Stuart Baptist Church to be placed

> in a separate trust account designated as the "Mollie Boaz Johnson Educational Fund" to be used as scholarships for deserving students from Patrick County, with preference to children who attend Stuart Baptist Church, and for no other purpose whatsoever.

Mollie's brother Herbert died in 1998. (JA 60). Mollie died in 1999; Harry survived her. (JA 60). She was also survived by two of her siblings, Hazel B. Harbour and James Clayton Boaz, each of whom died before Harry. (JA 60-61). Their sons are the Nephews. When Harry died on March 19, 2007, none of Mollie's siblings was alive. (JA 61).

As the Trustee's Complaint explains, the Trust Agreement is silent as to what should happen if Mollie's siblings survive her, but predecease Harry. (JA 3).

ARGUMENT

I. UNDER THE TRUST AGREEMENT, THOSE WHO QUALIFY UNDER THE PHRASE "UPON THE DEATH OF THE GRANTOR'S SPOUSE, THE TRUSTEE SHALL DIVIDE THE TRUST RES . . . INTO FOUR EQUAL SHARES, TO BE DISTRIBUTED" ARE TO BE DETERMINED BY THE DEATH OF THE LIFE TENANT, HARRY, NOT BY MOLLIE.

A. <u>This issue has not been preserved for appellate review.</u>

The Nephews maintain on appeal that their parents had "an indefeasible vested remainder" and, therefore, their interests vested on Mollie's death. (Br. of Appellants at 28, 31). They did not present this argument below and, therefore, it cannot be considered on appeal. Rule 5:25.

Contrary to their suggestion, the Nephews cannot rely upon their Answer as a vehicle to posit this new argument. (Br. of Appellants at 30). In their Answer, they maintained that the siblings' shares vested at Mollie's death because the Trust Agreement provided for the distribution of these shares at Mollie's death. (JA 31). This argument is an obvious misreading of the Trust Agreement, which clearly directs the Trustee to distribute the four shares at Harry's death. (JA 10). Indeed, the Nephews did not pursue this argument when they filed their legal memorandum, acknowledging that Harry's death (not Mollie's) triggered distribution of the remainder and arguing, instead, that their siblings' shares did not lapse. (JA 48). In fact, the legal memorandum fails to mention vesting at all, (JA 47-49), indicating that they had abandoned this erroneous argument.

Therefore, this new argument and the case law supporting it, which likewise was not brought to the trial court's attention, cannot

provide a basis for this Court's consideration of the questions on appeal.

B. Determining Mollie's intent, as reflected in the Trust Agreement as a whole, is the fundamental objective of the court, as the Nephews agreed below.

1. The Nephews may not contest the trial court's ruling on grounds that it was based upon a review of the entire Trust Agreement because they asked the court to do just that.

The Nephews' second assignment of error asserts: "The trial court erred in reading the trust agreement as a whole to divine the testator's intent when the plain language of the trust agreement clearly and unambiguously expressed Johnson's desire that the remainder interests vest at her death and not the death of the life tenant." (JA 81). However, as the record reflects, they never raised this argument below; it cannot be found in their Answer, legal memoranda, endorsement of the final Order, or the Written Statement.[3]

[3] The second assignment of error suffers from another fatal defect. Although the Nephews label it as their second Question Presented, they have no second Question Presented in their brief, and only argue this issue at all in response to the Church's earlier contention that this assignment of error was waived. (Br. of Appellants at 31-34).

To the contrary, in their short legal memoranda, the Nephews asked the trial court to do just the opposite. At that time, they asserted: "An *inter vivos* trust is to be examined as a whole and all parts are given effect, so far a possible, when determining the intent of the grantor." (JA 47-48). And, they went a step further, and "pray[ed] that the Court construe the plain language of the trust by giving meaning to each word...." (JA 49). At no time did they inform the trial court that it could not examine the entire Trust Agreement to ascertain Mollie's intent. Even though the trial court said it reviewed the whole agreement to ascertain Mollie's intent, (JA 50), the Nephews did not object to the final Order on those grounds or file a motion to reconsider. (JA 54).

Having expressly invited the trial court to read the document as a whole, the Nephews cannot now be heard to protest that it did so. E.g., Hansen v. Stanley Martin Cos., 266 Va. 345, 358, 585 S.E.2d 567, 575 (2003) (having invited the trial court to use a certain rule for determining the accrual date of the claim, the party cannot now argue for the application of a different rule on appeal). This Court has repeatedly stated that "'no litigant . . . will be permitted to approbate and reprobate—to invite error . . . and then to take advantage of the

situation created by his own wrong.'" Garlock Sealing Techs., LLC v. Little, 270 Va. 381, 388, 620 S.E.2d 773, 777 (2005) (quoting Cohn v. Knowledge Connections, Inc., 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003)).

2. Even if the Nephews may now argue contrary to their position below, the trial court properly examined the entire Trust Agreement to ascertain Mollie's intent.

The trial court properly examined the words used in the Trust Agreement, and viewed the document as a whole to ascertain Mollie's intent. "In construing the terms of the Trust Agreement, [the court] seek[s] to effectuate the intent of the grantor. In ascertaining that intention, we must examine the document as a whole and give effect, so far as possible, to all its parts." Frazer v. Millington, 252 Va. 195, 199, 475 S.E.2d 811, 814 (1996)[4] (applying these principles in determining if a Trust Agreement is ambiguous); Kling v. Va. Trust Co., 215 Va. 226, 229, 207 S.E.2d 890, 893 (1974) (wills). The difficult "problem" in such cases is to "ascertain" that intent. Huaman v. Aquino, 272 Va. 170, 174, 630 S.E.2d 293, 296 (2006).

[4] The Nephews cited Frazer in their legal memorandum for the very proposition for which the Church offers it here. (JA 47-48).

"This intention must be gathered from the entire will and all of its provisions considered together, rather than from any particular form of words or language employed in a single sentence, clause or phrase." Kling, 215 Va. at 229, 207 S.E.2d at 893; Haag v. Stickley, 239 Va. 298, 302, 389 S.E.2d 691, 694 (1990). Further, if reading the instrument as a whole reveals a general, or dominant, intent on the part of the grantor, "this general scheme will not be defeated by isolated clauses which may be susceptible to more than one interpretation." Kling, 215 Va. at 229, 207 S.E.2d at 893.

Therefore, the trial court did not err in examining the Trust Agreement as a whole to ascertain Mollie's intent, and the Nephews may not now find error in the trial court's decision to do so.

C. Mollie's intent, as expressed in the Trust Agreement, was to determine those who qualify as remainderman at the time of Harry's death.

Reviewing the Trust Agreement in light of these principles, Mollie's dominant intent is clear. First and foremost, she meant to provide for herself and her husband for so long as they lived, even if that meant exhausting the principal and leaving nothing for her siblings or the Church. (JA 10). Second, upon Harry's death, she intended to grant her assets to her surviving siblings – who were

actually named in the document – and to use her remaining assets to set up a scholarship fund for deserving students at the Church. (JA 10). Finally, she intended that the Church, rather than the unnamed heirs of her siblings, receive any share from a sibling who died early. (JA 11).

The trial court's ruling gives effect to Mollie's dominant intent and her general scheme. It determines who is qualified to receive the remainder of the trust funds at the time of Harry's death, which is when the trust has accomplished its principal purpose of providing for Mollie and Harry during their lifetimes. This reading of the Trust Agreement is consistent with Mollie's desire that Harry's needs take precedence over anyone else's, even if that meant invading the corpus of the trust and leaving nothing for her siblings or the Church. See Jarrett v. McReynolds, 212 Va. 241, 183 S.E.2d 343 (1971) (a deceased son was not entitled to a share of the trust where he failed to survive the life beneficiary or leave surviving issue, as required under the trust, particularly where there was a provision authorizing the trustee to invade the principal for the beneficiaries' interest during their lifetime). It also ensures that those actually mentioned in the Trust Agreement, who are the people Mollie intended to benefit, enjoy

the remainder of the trust funds, if any, when Harry no longer needed them. Finally, it provides that lapsed shares benefit the Church, rather than unknown people.

The Nephews rely heavily on Disney v. Wilson, 190 Va. 445, 57 S.E.2d 144 (1950), for the argument that Mollie did not intend to delay vesting. (Br. of Appellants at 15-18). However, they did not ask the trial court to consider this case and, nevertheless, it is a case where the Court found the trust language "somewhat ambiguous" and relied upon parol evidence to ascertain the testator's intent. 190 Va. at 453, 57 S.E.2d at 148. Thus, Disney is distinguishable.

D. Mollie did not intend for the Nephews to participate in her trust.

Mollie plainly did not mean for her assets to go to the Nephews, who are never named in the Trust Agreement. To the contrary, she took care to exclude them. Mollie affirmatively excluded the nephews from the Trust Agreement in the very language upon which they now base their claim. The operative language of Section 7(C)—"[i]f any of my brothers or sister shall fail to survive me, his or her share shall lapse and such share shall be added to the trust fund for Stuart Baptist Church"—positively disinherits them. This language plainly

demonstrates Mollie's intent that none of her siblings' offspring should share in the trust.

That Mollie did not intend for the Nephews to share in the remainder is further evidenced by Mollie's intent to limit the remainder to named siblings and the Church. In fact, rather than give her assets to the heirs of a sibling who predeceases her, Mollie gave those assets to the Church. Although Mollie certainly could have provided that, in the event of the death of one of her siblings, the siblings' heirs would receive that share, she did not do so. Thus, the Trust Agreement demonstrates her intent to give the trust funds to a scholarship fund for deserving students whom she didn't even know rather than her own family.

Mollie's intent that the Nephews be excluded from her trust is clear from a reading of the words she used in the Trust Agreement.

E. Alternatively, even if the Trust Agreement is ambiguous or unclear, Mollie's intent that the remainder interests be measured by Harry's death controls.

The trial court does not indicate whether it found the Trust Agreement ambiguous. Whether the Trust Agreement is ambiguous is a question of law. Therefore, if this Court should find the Trust

Agreement ambiguous, it should give effect to Mollie's intent that vesting occurs at Harry's death.

"Even though the language of the will may be obscure or uncertain, the testator's intention will prevail, if it can be ascertained." Haag, 239 Va. at 302, 389 S.E.2d at 694. Accordingly, "when the words of the will are capable of two different constructions, 'that should be adopted which is most consistent with the intention of the testator as ascertained by other provisions in the will; and when the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words.'" Id. (quoting Waters v. Trefouret, 117 Va. 186, 190, 83 S.E. 1078, 1079 (1915)).

As the Trustee noted in seeking the guidance of the court, the Trust Agreement states that if any of Mollie's siblings fail to survive her, his or her share will lapse and be added to the Church's share. (JA 2). However, the Trust Agreement "does not address the circumstances wherein" Mollie's siblings would survive her, but

predecease Harry. (JA 3). This poor drafting[5] left unanswered the very situation presented here. Although Mollie included the lapse language to make the Church the failsafe beneficiary in the event of the early death of a sibling, she did not accomplish that purpose through the language that was used.

Applying the lapse provision as the Nephews urge means that they would share in the trust only if their parents outlived Mollie, but that they would be completely excluded from enjoying anything that remained in the trust if their parents died before Mollie. Stated another way, this reading means that the share of any sibling who died before Mollie would be added to the funds committed for her scholarship, but if that sibling died before Harry, the share would go to the sibling's unnamed heirs who are mentioned nowhere in her general scheme. Such a result defies logic and undermines Mollie's

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[5] The Court need look no further than the Trust Agreement itself for additional evidence of poor drafting. For example, the very part of the Trust Agreement at issue in this case – Section 7(C) – is titled "Payment of Estate Tax at Spouse's Death," but does not concern that issue at all. Further, as Mollie acknowledged, there is no Section 8 of the Trust Agreement, skipping from Section 7 to Section 9. (JA 12). Finally, the Trust Agreement includes a section providing a "Definition of Descendents," even though the word "descendents" appears nowhere in the document. (JA 11).

stated intent.[6] Mollie's intent, in this regard, was that the amount of the scholarship be increased by the share of any sibling who died early. Under these circumstances, the Court could conclude that the Nephews' reading not only frustrates Mollie's intent, but also underscores an ambiguity in the Trust Agreement.

Although every trust and will case has limited precedential value, see Clark v. Strother, 238 Va. 533, 540, 385 S.E.2d 578, 582 (1989) ("'Cases construing remainders created by wills are almost as countless as grains of sand on the seashore'") (citation omitted), some guidance can be drawn from Jarrett v. McReynolds. There, the testator created a trust for the benefit of his wife for life, but gave the trustees power to invade the corpus of his estate to provide for his childrens' education and medical needs. After his wife died, the share of each child was to be distributed when each reached the age 25. The shares of children not surviving to that age passed to their surviving children or, in their absence, to their surviving brothers and sisters. One son died at the age of 32 while married, but without children, while his mother was still alive. The will did not dispose of

[6] The Nephews contend that the Court should not be perplexed with this anomaly, but offer no explanation for how such a reading is consistent with Mollie's stated intent or achieves her stated objectives in disposing of the trust assets. (Br. of Appellants at 13).

the share of a child of the testator who attained the age of 25, but predeceased the life tenant and left no children.

This Court found that the Jarrett will was ambiguous and was the product of "faulty drafting." 212 Va. 245, 183 S.E.2d at 364. Further, the Court concluded that the son's interest did not vest when he reached age 25 during the lifetime of his mother. Id. The testator's intent, as gleaned from an examination of the will as a whole, was to pass his estate to his children living at the time of distribution, and the deceased son's widow (who was not even mentioned in the will) would not share in the estate. Id. at 246, 183 S.E.2d at 364.

Like Jarrett, the Trust Agreement here does not provide for the circumstance where a sibling survives Mollie, but predeceases Harry. Viewing the Trust Agreement as a whole, as the trial court did, it is evident that Mollie intended that the Church receive any share of a sibling who died before distribution of the trust corpus. This conclusion is consistent with Mollie's desire that (1) Harry's needs take precedence over the remaindermen, even if it meant using all of the principal; (2) that the Church receive the lapsed share of a deceased sibling; (3) and that the shares be divided at Harry's death.

To hold otherwise frustrates her intent, as expressed throughout the Trust Agreement.[7]

Therefore, whether the Trust Agreement is ambiguous or unambiguous, the trial court's ruling gives effect to Mollie's intent.

II. THE EARLY VESTING RULE DOES NOT APPLY AND, NEVERTHELESS, CANNOT OVERCOME MOLLIE'S INTENT, AS EXPRESSED IN THE TRUST AGREEMENT.

A. Because the argument that the early vesting rule applies was not presented to the trial court, that issue is not preserved for appellate review.

The Nephews next argue that, under the early vesting rule, their interests vested on Mollie's death. Although they devote an entire argument section of their appellate brief to the early vesting rule, (Br. of Appellants at 21-28), the Nephews never even mentioned this rule below. They did not argue to the trial court at anytime that the early vesting rule applies. Thus, the trial court never had an opportunity to consider the specific argument that they now ask this Court to entertain.

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[7] There is no point in requiring a sibling's share to lapse before Mollie's death. As she would still be alive at that point, she could have changed the Trust Agreement to account for or dispose of any sibling's lapsed share.

The Nephews may not now present an argument that the early vesting rule applies. It is well-settled that this Court will not hear an argument or theory unless it first has been presented to the trial court. Rule 5:25.

The Nephews argue that their Answer raised the issue of vesting and, therefore, this Court can consider the early vesting rule. (Br. of Appellants at 29). This argument is flawed for two reasons.

First, even though the Nephews mentioned vesting generally in their Answer, they never advised the trial court that the early vesting rule applies. This Court will not consider a new argument that is raised for the first time on appeal, even if it relates to the same general issue. E.g., Commonwealth Transp. Comm'r v. Target Corp., 274 Va. 341, 351-352, 650 S.E.2d 92, 98 (2006) (refusing to consider a new argument in support of a jury instruction); Jackson v. Commonwealth, 266 Va. 423, 436, n.1, 587 S.E.2d 532, 542, n.1 (2003) (refusing to consider an argument "that was not asserted in the trial court" on the same issue); West Alexandria Prop., Inc. v. First Va. Mort. and Real Estate Inv. Trust, 221 Va. 134, 138, 267 S.E.2d 149, 151 (1980) ("though taking the same general position as in the trial court, an appellant may not rely on reasons which could have

been but were not raised for the benefit of the lower court"); Floyd v. Commonwealth, 219 Va. 575, 584, 249 S.E.2d 171, 176 (1978) (an appellate court will not consider a specific argument on appeal even though a related issue was raised in the trial court).

Second, the reference to vesting in the Answer was later abandoned in favor of an argument that the Nephews' shares did not lapse, and the earlier position was never revived. The Answer alleges that the shares of Steve M. Harbour and James A. Boaz vested at the time of Mollie's death because the Trustee was to distribute the shares **at Mollie's death**. (JA 31, ¶4). The Nephews later abandoned that faulty argument because it was based upon an entirely erroneous reading of the Trust Agreement, which actually places the time of distribution **at Harry's death.** (JA 10). Instead, when they filed their only other submission to the trial court – the legal memorandum -- they took the position that distribution occurred at the time of Harry's death, and they never mentioned vesting again. (JA 47-49). And, they did not object to the trial court's letter opinion or the final Order on the basis of vesting or the early vesting rule. (JA 54).

The Nephews also attempt to excuse their failure to present the early vesting rule to the trial court by arguing that they were not required to do so because the Church mentioned the early vesting rule in its legal memorandum. (Br. of Appellants at 29). However, the Church never argued the position that the Nephews now advance. Rather, the Church argued that the rule **did not** apply. (JA 41). The argument that the early vesting rule applies – which is the position the Nephews now press for the first time on appeal – was never before the trial court. Rule 5:25.

Application of Rule 5:25 under these circumstances is important to protect the trial court from traps and surprises. Fisher v. Commonwealth, 236 Va. 403, 374 S.E.2d 46 (1988) (stating that the purpose of the rule is to protect the trial court from appeals based upon undisclosed grounds and to prevent the setting of traps on appeal), cert. denied, 490 U.S. 1028 (1989). It is simply unfair to the trial court, to the trustee, and to the Church, for the Nephews to argue for reversal of the trial court's decision on grounds that they never presented below.

B. The early vesting rule is not applicable here because Mollie intended that vesting occur at Harry's death.

The early vesting rule applies only if the Trust Agreement is unclear. Landmark Comm., Inc. v. Sovran Bank, 239 Va. 158, 163, 387 S.E.2d 484, 487 (1990). Further, "[w]hen, as in this case, the intention to postpone the vesting of an estate is clearly indicated by the will, that intent must be given effect." Maiorano v. Virginia Trust Co., 216 Va. 505, 510, 219 S.E.2d 884, 888 (1975); Boyd v. Fanelli, 199 Va. 357, 360-361, 99 S.E.2d 619, 622 (1957).

As previously discussed, the intent to postpone vesting until Harry's death is apparent from the Trust Agreement itself. By its very terms, the Trust Agreement provides that the residual trust funds will not be divided into four equal shares **or** be distributed until Harry's death. Thus, the "shares" of the residual beneficiaries were not even created at Mollie's death.

Further, Molly permitted the principal to be used for Harry's benefit during his lifetime, indicating her intent to delay vesting. See Boyd, 199 Va. at 362, 99 S.E.2d at 623 (where the trustee had similar powers, the Court rejected the early vesting rule, finding that the language "at his death the principal of said fund shall pass to my next of kin, *per capita*" was measured at the death of the life tenant, not the testatrix). Finally, Mollie explicitly acknowledged that permitting

the use of the principal during Harry's lifetime "may reduce the amount of principal which will be distributed **to other beneficiaries hereunder** upon the death of [Mollie's] spouse." (JA 10, emphasis added). This language manifests Mollie's intent that only her named beneficiaries (siblings and Church) will take under the Trust Agreement. She did not intend that unnamed relatives participate in the trust.

In short, the Trust Agreement manifests Mollie's intent to delay vesting, and the trial court properly gave effect to that intent, which overrides the early vesting rule.

CONCLUSION

This Court should affirm the decision and judgment below.

STUART BAPTIST CHURCH

By: Monica Taylor Monday
Of Counsel

Monica T. Monday (VSB No. 33461)
James J. O'Keeffe (VSB No. 48620)
GENTRY LOCKE RAKES & MOORE LLP
800 SunTrust Plaza
P.O. Box 40013
Roanoke, Virginia 24022-0013
(540) 983-9300
Fax: (540) 983-9400
Monica_Monday@gentrylocke.com

Robert W. Mann (VSB No. 07622)
YOUNG, HASKINS, MANN, GREGORY,
MCGARRY & WALL, PC
400 Starling Avenue
P.O. Box 72
Martinsville, Virginia 24114-0072
(276) 638-2367
Fax: (276) 638-1214

Counsel for Stuart Baptist Church

CERTIFICATE OF SERVICE

I hereby certify as follows:

That on this 12th day of June 2009, the correct number of true and accurate copies of this Brief of Appellee has been sent by certified mail to the Supreme Court of Virginia, and three copies have been served by first class mail upon counsel for the appellants:

Phillip V. Anderson
Carolyn N. Dietz
FRITH ANDERSON & PEAKE, P.C.
29 Franklin Road, S.W.
P.O. Box 1240
Roanoke, Virginia 24006-1240
(540) 725-3362
Fax: (540) 772-9167

Martin F. Clark
MARTIN F. CLARK, P.C.
P.O. Box 407
Stuart, Virginia 24171
(276) 694-7144
Fax: (276) 694-2131