In The

Supreme Court of Virginia

RECORD NO. 082023

STEVEN HARBOUR, *et al.*,

Appellants,

v.

SUNTRUST BANK, *et al.*,

Appellees.

BRIEF OF APPELLANTS

Phillip V. Anderson (VSB No. 23758)
panderson@faplawfirm.com
Carolyn N. Dietz (VSB No. 75254)
cdietz@faplawfirm.com
FRITH ANDERSON & PEAKE, P.C.
29 Franklin Road S.W.
Post Office Box 1240
Roanoke, Virginia 24006
(540) 725-3370 (Telephone)
(540) 772-9167 (Facsimile)

Counsel for Appellants

Martin F. Clark (VSB No. 7608)
martinfclarkpc@gmail.com
MARTIN F. CLARK, P.C.
Post Office Box 407
Stuart, Virginia 24171
(276) 694-7144 (Telephone)
(276) 694-2131 (Facsimile)

Counsel for Appellants

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE CASE 1

III. QUESTIONS PRESENTED 3

IV. STATEMENT OF FACTS 3

V. ARGUMENT AND AUTHORITIES 8

A. The language in the trust agreement clearly and unambiguously vests the remainder interests at the time of Johnson's death 8

B. The rule favoring the early vesting of estates applies 21

C. The arguments made on appeal were properly preserved in the trial court 28

VI. CONCLUSION 34

CERTIFICATE 36

TABLE OF AUTHORITIES

Page(s)

CASES

Allison v. Allison,
101 Va. 537, 44 S.E. 904 (1903) 16

Appalachian Power Co. v.
Greater Lynchburg Transit Co.,
236 Va. 292, 374 S.E.2d 10 (1988) 11

Boyd v. Fanelli,
199 Va. 357, 99 S.E.2d 619 (1957) ..... passim

Chapman v. Chapman,
90 Va. 409, 18 S.E. 913 (1894) 21

Clark v. Strother,
238 Va. 533, 385 S.E.2d 578 (1989) 27

Conrad v. Conrad's Ex'r,
123 Va. 711, 97 S.E. 336 (1919) 21

Crews' Administrator v. Hatcher, et al.,
91 Va. 378, 21 S.E. 811 (1895) 21

Disney v. Wilson,
190 Va. 445, 57 S.E.2d 144 (1950) 15, 16, 17

Eure v. Norfolk Shipbuilding & Drydock Corp.,
263 Va. 624, 561 S.E.2d 663 (2002) 30

Fisher v. Commonwealth,
236 Va. 403, 374 S.E.2d 46 (1988), cert. denied,
490 U.S. 1028, 104 L. Ed. 2d 201,
109 S. Ct. 1766 (1989) 30

French v. Logan's Administrator, et al.,
108 Va. 67, 60 S.E. 622 (1908) 21

James v. Peoples National Bank,
178 Va. 398, 17 S.E.2d 387 (1941) 21

Lantz v. Massie,
99 Va. 709, 40 S.E. 50 (1901) 16

McKinsey v. Cullingsworth,
175 Va. 411, 9 S.E.2d 315 (1940) 8, 19, 33

Palmer & Palmer Co., LLC v.
Waterfront Marine Constr., Inc.,
276 Va. 285, 662 S.E.2d 77 (2008) 12

Rady v. Staiars,
160 Va. 373, 168 S.E. 452 (1933) 10, 11

Schmidt v. Wachovia Bank,
271 Va. 20, 624 S.E.2d 34 (2006) 25, 26, 27

Selby v. Morgan's Ex'rs,
20 Va. 156 (1818) 31

Virginian Ry. Co. v. Avis,
124 Va. 711, 98 S.E. 638 (1919) 11

W.F. Magann Corp. v.
Virginia-Carolina Elec. Works, Inc.,
203 Va. 259, 123 S.E.2d 377 (1962) 12

STATUTE

Va. Code § 55-542.01 ..... 1, 3

RULE

Va. Sup. Ct. R. 5:25 20

I. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that the remainder interests of Hazel B. Harbour and James C. Boaz did not vest at the time of Mollie Boaz Johnson's death.

2. 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.

II. STATEMENT OF THE CASE

On December 3, 2007, SunTrust Bank, as trustee for Mollie Boaz Johnson ("Johnson"), deceased, filed a Complaint Seeking Aid and Guidance of the Court pursuant to Virginia Code § 55-542.01 in the Circuit Court of Henry County. SunTrust sought the court's guidance in distributing the remaining corpus of the trust in the amount of approximately $600,000 pursuant to the terms of the trust agreement executed by Johnson on September 30, 1991. The Complaint was served on Stuart Baptist Church, Steve M. Harbour, and James Aubrey Boaz a/k/a James C. Boaz, Jr. (hereinafter

“Jimmy Boaz”), known potential beneficiaries of the trust.

On December 18, 2007 Stuart Baptist Church filed its Answer to SunTrust’s Complaint. On December 21, 2007 Harbour and Boaz filed a motion to transfer the case to the Circuit Court for Patrick County, which the court granted by order dated January 8, 2008. Steve M. Harbour and Jimmy Boaz, as sole heirs of Hazel B. Harbour and James C. Boaz, respectively, filed their Answers to the Complaint on January 15, 2008. An ore tenus hearing was held before the Circuit Court of Patrick County on June 23, 2008. The circuit court issued its letter opinion that same day and a final order was entered July 25, 2008. (App. 50-52). The appellants timely filed their Notice of Appeal on August 12, 2008. (App. 55). A Statement of Facts and Incidents of Trial was timely entered on September 18, 2008. (App. 58). This Court awarded a Certificate of Appeal on April 7, 2009.

III. QUESTIONS PRESENTED

I. Did the trial court err in holding that the remainder interests of Hazel B. Harbour and James C. Boaz did not vest at the time of Johnson's death and thus did not descend to the Petitioners, Steve Harbour and Jimmy Boaz? (Assignment of Error No. 1).

II. Did the trial court err by reading the trust agreement in its entirety to divine Johnson's intent when her intent was evident from the plain language of the trust agreement? (Assignment of Error No. 2).

IV. STATEMENT OF FACTS

Suntrust Bank filed a "Complaint Seeking Aid and Guidance of the Court" pursuant to Virginia Code § 55-542.01 in the Circuit Court for the City of Martinsville on December 3, 2007. (App. 1). The Complaint sought the Court's guidance in the interpretation of a revocable *inter vivos* trust established by a trust agreement executed by Johnson on September 30, 1991 naming Suntrust's predecessor in interest, Crestar Bank, as Trustee. (App. 5). The Complaint also sought the Court's guidance as to how the trust proceeds should be distributed. (App. 1).

Suntrust served the Complaint on Steve M. Harbour, Jimmy Boaz, and the Stuart Baptist Church.

The trust agreement provides for use of the income and principal of the trust for Johnson's benefit, as grantor, during her lifetime. After her death, the trust assets were to be used for the benefit of her spouse, Harry B. Johnson, if he was still living. (App. 58 ¶ 5).

Section 7 of the trust agreement pertains to disposition of the trust. The specific section of the trust agreement at issue, Section 7(C), provides as follows:

> Payment of Estate Tax at Spouse's Death. 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 Harbour.
>
> 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.
>
> 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.

(App. 59 ¶ 6) (emphasis added).

Section Two, paragraph (b) of Johnson's Last Will and Testament states in pertinent part that

> (b) In the event that my spouse shall fail to survive me, I direct my Executor to divide my entire estate consisting of all property, real and personal, tangible and intangible, however held and wherever situate, 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 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.

Subsequent paragraphs of section (b) set forth the framework for the scholarships and how the scholarship

recipients are to be selected. (App. 59 ¶ 8). Section Three of Johnson's Will dictates that in the event her husband survived her the remainder of her estate was to be added to the trust property. Id.

Johnson died in 1999, survived by her husband, Harry B. Johnson ("Harry Johnson"). (App. 60 ¶ 12). Johnson was predeceased by one of her brothers, Herbert A. Boaz, who died on June 14, 1998. (App. 60 ¶ 11). Johnson's sister, Hazel B. Harbour, died on January 21, 2000 and her remaining brother, James C. Boaz, died on December 27, 2005. (App. 60-61 ¶¶ 13-14). Hazel and James predeceased Harry, who died on March 19, 2007. (App. 60-61 ¶¶ 13-15). Petitioner Steve M. Harbour is the only child of Hazel B. Harbour, while Jimmy Boaz is the only child of James C. Boaz. (App. 61 ¶¶ 16-17).

To determine whether Steve Harbour and Jimmy Boaz ("the nephews") were entitled to shares of the remaining trust estate, a hearing on the matter was held in the Circuit Court of Patrick County on June 23, 2008. (App. 61 ¶ 18). At that hearing the parties

stipulated that interpretation of the trust agreement and the proper distribution of the trust property was an issue of law for the court's consideration. (App. 61 ¶ 19). The parties argued their positions consistent with their memoranda of law and agreed to submit the issue to the trial court upon the pleadings, trust agreement, memoranda of law, and arguments of counsel. (App. 61 ¶ 20).

In a brief letter opinion dated the same day as the hearing, June 23, 2008, the court announced it found "the position of [Stuart Baptist Church] more compelling when [reviewing] the instrument in its entirety." (App. 50). The court held "that the shares of the deceased siblings lapsed and should be added to the share of the Stuart Baptist Church," meaning that Stuart Baptist Church would be the sole beneficiary of the remaining trust property. Id.

V. ARGUMENT AND AUTHORITIES

A. The language in the trust agreement clearly and unambiguously vests the remainder interests at the time of Johnson's death.

The dispute between the parties is, in essence, whether Johnson intended for the remainder interests of Hazel B. Harbour and James C. Boaz, who each died after her but before Harry Johnson, to vest at the time of her death. Johnson's intent is clear from the words she used.

> The intention of the testator must be derived from what [s]he has actually said, and not from what it may be supposed [s]he intended to say. If the words and language of the testator are clear, the will needs no interpretation. It speaks for itself. It is only when the words and provisions of a will are ambiguous in expression that we must undertake to find the intention of the testator.

McKinsey v. Cullingsworth, 175 Va. 411, 414-15, 9 S.E.2d 315, 316 (1940) (citations omitted). The words Johnson used in her trust agreement make clear that the remainders belonging to her siblings were to be measured by her life, not that of her spouse:

> 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.

(App. 59 ¶ 6) (emphasis added). The words she chose could not more clearly express her intent. Indeed, Johnson actually placed her initials – "MBJ" – beside the "fail to survive me" language in the trust agreement; although Johnson initialed the bottom of each page, this is the only instance where she initialed a specific provision in the document.

In its brief to the trial court Stuart Baptist Church asserted that the trust agreement "could have been more precisely drafted". (App. 36). Helpfully, the church even suggests how the trust agreement ought to have been written, so as to avoid confusion. "[I]nstead of writing . . . 'fail to survive me', if the scrivener had simply written . . . 'fail to survive me *and my husband'*, the court's guidance would not have even been necessary." Id. The church, basking in the clarity of hindsight as the sole beneficiary had the instrument been so drafted, is apparently unbothered by

the fact that such a change materially alters the terms of the instrument and ignores a basic tenet of will and trust construction.

> The primary significance of words should ordinarily attach and does attach, unless it is manifest from the will itself that other definitions are intended. Weight and meaning must be given to every word used if they make any sense at all. **None are to be deleted and none added,** for men make their own wills, nor should we search out obscure or recondite possibilities in simple words.

Rady v. Staiars, 160 Va. 373, 376, 168 S.E. 452, 452-53 (1933) (emphasis added).

The church proclaims that it understands Johnson's intent more clearly than her chosen words express; it has no hesitancy advocating the rewriting of the trust agreement to accomplish this understanding of her intent by adding the words "and my husband" to Section 7(C). (App. 36). In contrast, the nephews assert that the best indication of Johnson's intent is the plain meaning of her chosen words in the trust agreement, initialed in the margin. She said what she meant and she meant what she said. Had Johnson intended to

determine the class of remaindermen at her husband's death, she could have done so. Having *not* added the words suggested by the church, we can conclude Johnson meant what she said. As noted above, this Court has ruled that "[w]eight and meaning must be given to every word used if they make any sense at all. None are to be deleted and none added.... for men make their own wills." Rady v. Staiars, 160 Va. at 376, 168 S.E. at 452-53.

These tenets of will and trust construction are consistent with this Court's view regarding the "plain meaning rule" in contract interpretation cases. Longstanding precedent establishes that Virginia is committed to the "plain meaning" rule when interpreting language in contracts. Appalachian Power Co. v. Greater Lynchburg Transit Co., 236 Va. 292, 295, 374 S.E.2d 10, 12 (1988); See also, Virginian Ry. Co. v. Avis, 124 Va. 711, 716, 98 S.E. 638, 639 (1919), ("[T]he language used is to be taken in its ordinary signification . . . . If, when so read, the meaning is

plain, the instrument must be given effect accordingly.”). Recent cases affirm this rule and mandate that the courts construe a contract as it is written.

> The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

Palmer & Palmer Co., LLC v. Waterfront Marine Constr., Inc., 276 Va. 285, 289, 662 S.E.2d 77, 81 (2008), quoting W.F. Magann Corp. v. Virginia-Carolina Elec. Works, Inc., 203 Va. 259, 264, 123 S.E.2d 377, 381 (1962). Obviously, will and trust construction is distinguishable from contract construction; however, both possess a common theme that the words chosen by the drafters should be implemented as written. Courts should be reluctant to add or delete language to accomplish a speculated intent.

The language of the trust unambiguously provides that upon the death of Johnson’s spouse, Harry Johnson, the trust res, if any remain, shall be divided into

four equal shares and distributed to those who survived *Johnson*, including Hazel B. Harbour and James C. Boaz, Johnson's siblings who survived her (and thus to their heirs, Steve Harbour and Jimmy Boaz). While the church finds it perplexing, "unreasonable," and "irrational" that Johnson would exclude the heirs of those siblings who predeceased her but include those whose parents survived her but not her husband, such second-guessing is unnecessary when the words are simply accepted to mean what they say. (App. 38). Remarkably, as if to anticipate the very argument now being offered by the church, as stated, Johnson placed her initials – "MBJ" - beside the "fail to survive me" language in the trust agreement. One is at a loss to imagine any way she could have been more clear, precise and emphatic. This also contradicts the church's contention that Johnson *inadvertently* omitted the words "... and my husband" from this paragraph. (App. 36).

In addition to suggesting to the trial court how Johnson's trust agreement ought to have been written,

the church further opined below that Johnson's "general plan and purpose is easily ascertainable by reading the entire trust." (App. 38). According to the church, her "dominant intent is clear." Br. in Opp. to Pet. for Appeal at 14. She meant to (1) provide for herself and her husband for as long as they lived and (2) upon Harry's death, grant her assets to her surviving siblings and use her remaining assets to set up a scholarship fund at the church. Id. Of course, even assuming that the church has correctly guessed Johnson's "dominant intent" this purpose is actually upheld by enforcing the trust agreement *as written.*[1] Johnson's husband was provided for during his life and the church receives half of the remaining trust assets after his death. Under the trust, if all Johnson's siblings had predeceased Johnson, the church would have received all the remaining trust assets; if all Johnson's siblings had survived her the church would have received one-quarter of the trust assets. Whether

[1] Of course, this also requires an assumption that an "overall purpose" exists.

this scenario "defies logic" or is "irrational," as asserted by the church, is immaterial. (App. 38). Johnson is free to distribute her assets as she sees fit.

Moreover, the church proffers just one particular provision of the trust agreement as evidence of Johnson's "general scheme". Section 7(C) of the trust states that "[u]pon the death of the Grantor's spouse, the Trustee shall divide the trust res . . . ." (App. 39). (emphasis added). Law from this Court makes clear that this language has no relevance whatsoever to the issue of vesting.

In Disney v. Wilson, 190 Va. 445, 57 S.E.2d 144 (1950), this Court was asked to determine whether a beneficiary of a will received a vested or contingent remainder. Id. at 455, 57 S.E.2d at 148. The Court began its analysis by focusing on the characteristics of a vested remainder. Id.

> 'A vested remainder is a remainder limited to a certain person and on a certain event, so as to possess a *present capacity to take effect in*

> *possession*, should the possession become vacant. * * *
>
> The *present capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. Fearne's Remainders 215.'

Id. (citing Lantz v. Massie, 99 Va. 709, 711, 40 S.E. 50, 50-51 (1901)) (emphasis in original). It is "[t]he existence of the present right, as distinguished from its future enjoyment, [that] is an inherent, essential quality of all vested remainders." Id. (quoting Allison v. Allison, 101 Va. 537, 569, 44 S.E. 904, 915 (1903)).

The Court then addressed the specific words used by the testator:

> Upon the death of both my wife and my mother, or the survivor of them, or should neither of them survive me, then I direct that all of my said estate shall be divided between my brother Wins F. Wilson, and my sister Lily Wilson Hamberlin, and should either my said sister, or my brother not survive me, my wife and my mother, then all of my said estate shall go to such surviving brother (Wins F. Wilson) or sister (Lily Wilson Hamberlin) to be held in fee simple.

190 Va. at 448, 57 S.E.2d at 145 (emphasis added). The Court then explained that this language

> denoting futurity of time refers to the *period of possession rather than to the time of vesting.* The testator's use of the words 'upon' and 'then' simply refers to the time when [the testator's] brother was to come into possession and enjoyment rather than the time of vesting of the right of enjoyment.

Id. at 456, 57 S.E.2d at 149 (citations omitted) (emphasis added).

This analysis in Disney directly refutes the church's assertion that this language evidences Johnson's intent to delay vesting. When Johnson died, the "fail to survive me" language created an indefeasible vested remainder in Hazel B. Harbour and James C. Boaz, the siblings who survived her. It was limited to certain persons (siblings who survived Johnson) upon the occurrence of a certain event (Johnson's death). At the time of Johnson's death both had the "present capacity to take effect in possession" should Harry Johnson have then died. The language in Section 7(C) fixing the life tenant's death as the time

for dividing and distributing the shares merely denoted when the vested remaindermen were to have possession and enjoyment of their shares.[2]

The church offers its own supposition that Johnson surely did not intend for one sibling's share to go to the church on her death but descend to her other siblings' heirs upon her husband's death, regardless of what language she chose.

> The presumption is that a testator uses words in their ordinary meaning. They are then to be taken to mean what [s]he says. This is not to be affected by the mere fact that, when so construed, <u>they may seem to others to be unjust and unreasonable. The essential object of a will is to enable a person to dispose of [her] property as [s]he may see fit.</u> If that intention is clearly expressed in the will, we need go no further. We cannot make a will for [her]. We do not know what [her] secret motives are.

[2] Indeed, it would have been nonsensical to divide the trust into shares *before* Harry Johnson's death as he had, as life tenant, exclusive use of the whole trust principal and income as might be needed for his care, subject to disbursement by the Trustee. Had the trust corpus been depleted, which would not be known until after Harry Johnson's death, there would have been no property to divide.

McKinsey, 175 Va. at 415, 9 S.E.2d at 316 (emphasis added). When the church suggests that the document would have been clearer or "more precisely drafted" if the scrivener had written "fail to survive me and my husband" it attempts to posthumously re-write Johnson's Will, an act clearly against the policies outlined by this court. (App. 36).

Moreover, the church unjustifiably characterizes Johnson's trust agreement as the "testamentary equivalent of a slap in the face" to her nephews. (Br. in Opp. to Pet. for Appeal at 12). In support of this gross overstatement, it refers to Section 7(C) as a disinheritance clause. Id. The church baselessly implies that the nephews stand unworthy of an inheritance and that Johnson chose deserving students she did not know over her nephews. Nothing in the record justifies this interpretation of Johnson's will or trust agreement; indeed, if Johnson had desired to expressly disinherit any individual, she could have done so. In fact, assuming the nephews' parents had

survived Johnson’s husband, even under the church’s interpretation the nephews would stand to inherit funds from the trust as beneficiaries of their parents. No one can know exactly what Johnson wanted and courts are left with only the second best option, both in the instant case and other will or trust agreement interpretation cases, of following as precisely as possible her specific written words. This obviously includes a refusal to re-write her words post-humously and a dedication to enforcing the words actually written, as written.

Section 7 of Johnson’s trust agreement clearly and unambiguously provides for the disposition of the trust property. Because the language used by the testator “fail to survive **me**” is clear the testator’s intent should not be divined from the document “as a whole.” Thus, the remainder interests vested at the time of Johnson’s death.

B. The rule favoring the early vesting of estates applies.

Both the clear language of the trust agreement and longstanding Virginia law specify that the remainder interests vested at Johnson's death. It "is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills." Conrad v. Conrad's Ex'r, 123 Va. 711, 715-16, 97 S.E. 336, 338 (1919). However, it is equally true that "[t]he law favors early vesting of estates." Boyd v. Fanelli, 199 Va. 357, 360, 99 S.E.2d 619, 622 (1957) (citing French v. Logan's Administrator, et al., 108 Va. 67, 60 S.E. 622; Chapman v. Chapman, 90 Va. 409, 18 S.E. 913; Crews' Administrator v. Hatcher, et al., 91 Va. 378, 21 S.E. 811; and James v. Peoples National Bank, 178 Va. 398, 17 S.E.2d 387.). "Devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is **clearly indicated** by the will." Id. (citations omitted) (emphasis added).

Having argued in the earlier part of its brief to the trial court that Johnson's trust agreement "could have been more precisely drafted," the church subsequently argued that the "general scheme for the disposition of her property is crystal clear and unambiguous." (App. 36, 38). Regardless of the church's conflicting statements concerning whether the trust agreement is ambiguous, the rule favoring the early vesting of estates applies.

> The law favors early vesting of estates. French v. Logan's Administrator, et al., 108 Va. 67, 60 S.E. 622; Chapman v. Chapman, 90 Va. 409, 18 S.E. 913; Crews' Administrator v. Hatcher, et al., 91 Va. 378, 21 S.E. 811; James v. Peoples National Bank, 178 Va. 398, 17 S.E.2d 387.
>
> 'Devises and bequests are to be construed as vesting at the testator's death, **unless the intention to postpone the vesting is clearly indicated by the will**.' 20 M.J., Wills, § 122, p. 323. However, if it appears from the language of the will that testator intended that the vesting of an estate be deferred to a time or event subsequent to his death, that intent must be given effect. Canons or rules of construction are not to be resorted to when the testator's intent may be readily ascertained from the language of the will.

Boyd v. Fanelli, 199 Va. 357, 360-61, 99 S.E.2d 619, 622 (1957) (citations omitted) (emphasis added).

Citing Boyd, the church asserted to the trial court that the rule favoring early vesting did not apply since language in the instrument clearly expressed an intent to delay vesting. (App. 41). The church then argued that language compelling division of the trust res into four shares "upon the death of the Grantor's spouse" manifested Johnson's clear intent to delay vesting.

The problem with this assertion is that unlike Johnson's trust agreement, the will's language in Boyd directed the remainder of the life estate's trust to her "next of kin". The class of persons qualifying as the testatrix's "next of kin" would thus remain unknown until the life tenant died. As the Court explained:

> The phrase, 'and that at his death the principal of said fund shall pass to my next of kin, per capita', designates a class, the members of which could not be ascertained until the life tenant's death. In plain language it fixes [the life tenant's] death as the time when the corpus of the trust shall pass to the then qualifying members of the class. The phrase used, when considered along with other pertinent parts of the will, makes it quite clear that [the] testatrix *intended to defer*

> *the vesting of what was left of the corpus of the trust fund until the life tenant's death. At his death it vests in testatrix' then next of kin.*

Id. at 362, 99 S.E.2d at 623 (emphasis added). Unlike the testatrix in Boyd, Johnson designated remaindermen by name and explicitly fixed the vesting upon *her* death. It is difficult to imagine a clearer statement of Johnson's intent *not* to delay vesting than the one she drafted.

Contrary to the church's claims to the court below, the division of the trust property into four shares after Harry's death is not indicative of Johnson's intent to delay vesting. This is because Johnson knew at the time she executed the trust agreement how many remaindermen she intended – three siblings and one church. She did not have to "wait" until Harry's death to know the members of the class, though the members of the class of beneficiaries would not be fixed until her death. The church made one additional argument.

According to the church,

> [o]ne of the other 'pertinent parts of the will' in [Boyd] as in [Johnson's] case, was the existence of language authorizing the trustee, in its sole discretion, to use so much of the principal as might be necessary for the support and maintenance of the life tenant. There was also a spendthrift provision pertaining to the life tenant.[3]

(App. 41-42). Again relying on Boyd the church reasoned that allowing the trustee use of the principal for the life tenant's benefit plus the existence of a spendthrift provision further proved Johnson's intent to delay vesting until Harry's death, not hers.[4]

In Schmidt v. Wachovia Bank, 271 Va. 20, 624 S.E.2d 34 (2006), this Court clarified the evidentiary effect

---

[3] Section 7(E) of the trust agreement states that

> The principal and income of the trusts hereunder shall not be liable for the debts of or the alienation by any or all of the beneficiaries thereof, but are made expressly exempt therefrom to the extent authorized by the laws of Virginia.

[4] In its brief the church points out language in Boyd regarding the anomalous situation that would exist if a beneficiary of a life estate were also the owner of a vested remainder. Such is not the case here, however, as Harry was not a vested (or unvested) remainderman.

of spendthrift provisions when evaluating a testator's intent to delay vesting. The issue in Schmidt was whether any language in the testators' wills "indicated a clear intent to delay vesting of remainder interests in the trusts created by the wills." Id. at 22, 624 S.E.2d at 35.

The Schmidt grandchildren argued that provisions in the wills prohibiting their aunt's assignment of the trust principal combined with the spendthrift provisions indicated "a clear intent to delay vesting of the remainder interests until the death of the testators' last surviving child." Id. at 25, 624 S.E.2d at 37. Disagreeing, the Court cautioned against reading Boyd so broadly.

> The Grandchildren also rely on Boyd v. Fanelli, 199 Va. 357, 99 S.E.2d 619 (1957), for the proposition that because a spendthrift trust is inconsistent with early vesting, it is sufficient evidence of an intent to delay vesting. This is an overly broad reading of Boyd.
>
> * * * *
>
> In the instant case, **no phrase such as that in Boyd identifies an event or time at which the remainder interests in question were**

> **to vest.** The only similarity between the two cases is the existence of a spendthrift trust. Neither Boyd nor any other case has held that the existence of a spendthrift trust alone is sufficient to show a clear intent to delay vesting.
>
> While the intent of the testator to defer vesting reflected in the will must be given effect, **we have said that such intent must be clearly indicated by language contained in the will.** First Nat'l Exch. Bank, 200 Va. at 687, 107 S.E.2d at 413. Accordingly, in the past we have imposed delayed vesting **only** when the will contained some actual language directing or supporting deferral.

Id. at 26, 624 S.E.2d at 38 (emphasis added).

Johnson's trust agreement does not contain language expressing a clear and definite intent to delay vesting.[5] It does, however, contain explicit language identifying an event at which time the remainder interests of Johnson's surviving siblings were to vest

[5] The church also cited Clark v. Strother, 238 Va. 533, 385 S.E.2d 578 (1989), for the proposition that vesting time is irrelevant if the overall intention of the testator is clear. (App. 40). The church overlooks, however, that in Clark the Court actually found the remainder vested at the testator's death, not that of the life tenant. However, the will in that case contained explicit language subjecting the remainder to divestment if the remaindermen died before the life tenant. Neither Johnson's trust agreement nor will contains similar divestment language.

— "if any of my brothers or sister shall fail to survive **me**". Virginia's rule favoring the early vesting of estates, combined with the unambiguous language of the trust, makes clear that Hazel B. Harbour and James C. Boaz were seized of their respective beneficial interests upon Johnson's death in 1999. Petitioners, as sole beneficiaries of their parents' remainder interests, were entitled to their respective one-quarter shares of the trust proceeds.

C. The arguments made on appeal were properly preserved in the trial court.

The appellants properly preserved the arguments now made on appeal in the court below. The Answer submitted by the nephews, Steve Harbour and Jimmy Boaz, avers that under the trust agreement, their shares vested at the time of Johnson's death. (App. 31 ¶ 6). As stated, when Johnson died, the "fail to survive me" language created an indefeasible vested remainder in Steve Harbour and Jimmy Boaz's parents, Hazel B. Harbour and James C. Boaz. The Answer avers that the trust agreement "expressly provides for such occasions

[when two of grantor's siblings survived the grantor, but predeceased the grantor's husband] and directs that the shares vest upon the death of Mollie Boaz Johnson…." (App. 31 ¶ 9). The nephews unmistakably requested that the court below find that their shares "were vested at the time of Mollie Boaz Johnson's death, and that, as her heirs, they are entitled to the distribution thereof...." (App. 31). Moreover, the law on early vesting was before the trial court. The church conceded in its memorandum to the court below, "…it is true that the law generally favors early vesting of estates …." (App. 41). And further, "…the rule favoring early vesting of estates is trumped by the language in the instrument itself clearing indicating an intention to delay vesting." Id. Thus, the trial court had the clear opportunity to consider the law regarding early vesting, choosing to adopt the church's position that early vesting did not apply.

The nephews' position was clear throughout the pendency of trial and the trial court had an

opportunity to rule intelligently as required by Rule 5:25. The purpose of Rule 5:25 is to protect the trial court from appeals based on undisclosed grounds, prevent the setting of traps on appeal, enable the trial judge to rule intelligently, and avoid unnecessary reversals and mistrials. Eure v. Norfolk Shipbuilding & Drydock Corp., 263 Va. 624, 631-632, 561 S.E.2d 663, 667 (2002), citing Fisher v. Commonwealth, 236 Va. 403, 414, 374 S.E.2d 46, 52 (1988), cert. denied, 490 U.S. 1028, 104 L. Ed. 2d 201, 109 S. Ct. 1766 (1989). The nephews asserted in their Answer and argued throughout trial that their shares vested at the time of Johnson's death; this clearly does not present an appeal on undisclosed grounds.

In its Brief in Opposition to the Petition for Appeal, the church attempts to make a distinction between the appellant's first assignment of error and the trial court's ruling. The church asserts that the trial court ruled that the remainder interests of Hazel B. Harbour and James C. Boaz lapsed, never addressing

the issue of vesting. (Br. in Opp. to Pet. for Appeal at 6). However, the church ignores the finding implicit in the court's ruling that the shares had *not* vested. See generally, Selby v. Morgan's Ex'rs, 20 Va. 156, 156-157, (1818)(affirming lower court's ruling that the beneficiaries interest in certain land had vested *and therefore did not lapse by their deaths.*) Simply put, the nephews argue that when Johnson died the trust language created an indefeasible vested remainder in Steve Harbour and Jimmy Boaz's parents, Hazel B. Harbour and James C. Boaz. Precisely because the shares vested at Johnson's death those shares did not lapse, *and could not lapse* as held by the trial court.

The church further suggests that appellants, in their second assignment of error, appeal an error of the trial court they invited the court to commit. (Br. in Opp. to Pet. for Appeal at 7). The church argues that appellants asked the trial court to read the trust agreement as a whole, and may not now complain that it

did so. In developing its argument, the church focuses on a few words from the nephew's memorandum to the trial court, words taken from a quotation on general rules of will interpretation. Id. As a prelude to making their argument regarding the proper reading of the trust agreement, the nephews provided the trial court with cardinal rules of will interpretation from Virginia Supreme Court case law. The nephews directed the trial court to Section 7(C) of the trust agreement. They asserted that the language was clear and unambiguous, mandating that if the grantor's sibling survives the grantor then "upon the death of the grantor's spouse, the sibling's share shall not lapse but instead shall be paid to the … sibling's heirs…." (App. 48-49).

The nephew's memorandum appropriately provided the trial court with case law from this Court on will interpretation; the memorandum written by the appellants did not "invite error" as alleged by the church. (Br. in Opp. to Pet. for Appeal at 8).

Indeed, the nephew's memorandum argued that under applicable rules of will and trust construction if "the words and language of the testator are clear, the Will needs no interpretation. It speaks for itself." (App. 47)

The second assignment of error asserts that 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. Reading the trust agreement as a whole to discover Johnson's intent was improper because the words and language chosen by Johnson, specifically those set forth in Section 7(C) were clear and required no interpretation. (App. 47). McKinsey v. Cullingsworth, 175 Va. at 414, 9 S.E.2d at 316 ("if the words and language of the testator are clear, the Will needs no interpretation. It speaks for itself.")

Indeed, Section 7 of Johnson's trust agreement, duly executed, clearly and unambiguously provides for the disposition of the trust property. Its terms are not contradictory and the language used in Section 7(c) in particular is clear and concise – "fail to survive **me**". Because the language used by the testator is clear the testator's intent should not be divined from the document "as a whole." This position is only strengthened by the law favoring early vesting. For these reasons, the remainder interests vested at the time of Johnson's death.

VI. CONCLUSION

For the reasons set forth above the petitioners respectfully request that the Court find that the trial court erred in holding that the petitioners, as sole beneficiaries of their parents' remainder interests, were not entitled to their respective one-quarter shares of the trust proceeds and award other such relief as the Court may deem necessary, just and proper.

RESPECTFULLY SUBMITTED

STEVE HARBOUR and
JIMMY AUBREY BOAZ

By: _____
Of Counsel

Phillip V. Anderson (VSB No. 23758)
Carolyn N. Dietz (VSB No. 75254)
FRITH ANDERSON & PEAKE, P.C.
29 Franklin Road S.W.
Post Office Box 1240
Roanoke, Virginia 24006-1240
Phone: 540-725-3370
Facsimile: 540-772-9167
panderson@faplawfirm.com
cdietz@faplawfirm.com

Martin F. Clark (VSB No. 7608)
MARTIN F. CLARK, P.C.
Post Office Box 407
Stuart, Virginia 24171
Phone: 276-694-7144
Facsimile: 276-694-2131
martinfclarkpc@gmail.com

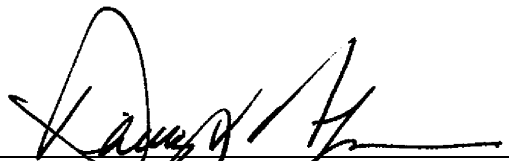
Counsel for Appellants

CERTIFICATE

1. The Appellants are Steven Harbour and James "Jimmy" Aubrey Boaz and they are represented by Phillip V. Anderson, Esquire, and Carolyn N. Dietz, Esquire, Frith Anderson & Peake, P.C., 29 Franklin Road, S.W., Post Office Box 1240, Roanoke, Virginia 24006-1240, (540) 725-3370.

2. The Appellees are Stuart Baptist Church, represented by Monica T. Monday, Esquire and James J. O'Keeffe, Esquire, Gentry, Locke, Rakes & Moore, L.L.P., 10 Franklin Road, S.E., Suite 800, Post Office Box 40013, Roanoke, Virginia 24022-0013, (540) 983-9300 and Robert W. Mann, Esquire, Young, Haskins, Mann, Gregory, McGarry, & Wall, P.C., 400 Starling Avenue, Post Office Box 72, Martinsville, Virginia 24114-0072, (276) 638-2367.

3. In compliance with Rule 5:26(d), fifteen (15) bound copies and one (1) electronic copy of the foregoing Opening Brief of Appellants and the Joint Appendix have been hand-filed with the Clerk of this court and three (3) bound copies were served, via U.S. Mail, postage prepaid, to Monica T. Monday, Esquire and James J. O'Keeffe, Esquire, Gentry, Locke, Rakes & Moore, L.L.P., 10 Franklin Road, S.E., Suite 800, Post Office Box 40013, Roanoke, Virginia 24022-0013, Philip G. Gardner, Esquire, Gardner, Gardner, Barrow & Sharpe, P.C., 231 East Church Street, 4th Floor, Martinsville, Virginia 24112-2840, and Robert W. Mann, Esquire, Young, Haskins, Mann, Gregory, McGarry, & Wall, P.C., 400 Starling Avenue, Post Office Box 72, Martinsville, Virginia 24114-0072, counsel for the Appellees, this 18th day of May, 2009.



Phillip V. Anderson, Esquire