In The

# Supreme Court of Virginia

**RECORD NO. 082023**

## STEVEN HARBOUR, *et al.*,

*Appellants,*

**v.**

## SUNTRUST BANK, *et al.*,

*Appellees.*

## REPLY BRIEF OF APPELLANTS


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## ARGUMENTS AND AUTHORITIES

### I. THE LIMITED ISSUE BEFORE THE TRIAL COURT WAS WHETHER THE TRUST AGREEMENT ADDRESSED THE CIRCUMSTANCE OF A SIBLING SURVIVING MOLLIE JOHNSON, BUT NOT HER SPOUSE HARRY JOHNSON.

The limited issue before the trial court, as set forth in the Trustee's Complaint Seeking Aid and Guidance, was whether the trust agreement addressed the circumstance where the grantor's brother and sister "survive the grantor but predecease the life beneficiary, Harry B. Johnson." (App. 3, ¶ 9). In responding to this inquiry, the nephews focused throughout the trial on the key phrase found in Section 7(C) of the trust agreement:

> <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>

(App. 48 & 59 ¶ 6). The nephews asserted in their Answer and argued throughout trial that the clear and unambiguous meaning of that phrase was that their

parents' shares vested at the time of Johnson's death.[1] (App. 31 & 48).

In its brief, the church asserts that this Court may not now consider whether Johnson's siblings possessed an "indefeasible vested remainder" or apply the early vesting rule because these "sophisticated testamentary arguments" are not found in the nephews' submissions to the trial court. Br. of Appellee at 4. However, the nephews' position on the correct interpretation of the trust agreement was clear throughout the pendency of trial. The nephews argued, beginning with their Answer in the trial court, that their parents' shares vested at Johnson's death. Contrary to the church's assertion that the nephews later abandoned this argument, the nephews' memorandum submitted to the trial court argues,

> [i]f the Grantor's sibling survives the Grantor, then, upon the death of the Grantor's

[1] The church does not directly rebut the nephews' argument regarding the clear and unambiguous meaning of this phrase, focusing instead on procedural bars.

> Spouse, the sibling's share shall not lapse, but instead shall be paid to the sibling, if living, or the sibling's estate or heirs, if he or she predeceased the Grantor's Spouse.

(App. 48-49). Br. of Appellee at 9.

The trial court had an opportunity to rule intelligently on the issues, as required by Rule 5:25. The trial court considered the application of the rule of early vesting when the church argued that the rule did not apply to Johnson's trust agreement. (App. 41). Thus, the church had an opportunity to present its view of the early vesting rule below and argue against the rule's application. See, Hilton v. Fayen, 196 Va. 860, 86 S.E.2d 40 (1955) (Grounds of objections should be specified in the trial court so opposing party has an opportunity to meet the objection.) Moreover, regardless of whether the nephews presented an exhaustive discussion of the rules of early vesting and indefeasible vested remainders in their written submissions, the trial court had the opportunity to

rule intelligently and apply the law to the circumstances.

This is not a case where the appellant never argued the issue it ultimately appealed, causing the trial court to overlook or fail to fully consider that issue. Eure v. Norfolk Shipbuilding & Drydock Corp., 263 Va. 624, 631-632, 561 S.E.2d 663, 667 (2002)("Purpose of Rule 5:25 to protect trial court from appeals based on undisclosed grounds, prevent setting of traps on appeal and enable trial judge to rule intelligently.") (internal citations omitted). Indeed, there is really only one issue in the entire case at bar: whether the nephews took under the trust agreement, in light of the language in Section 7(C).

> If any of my brothers or sister shall fail to survive **me**, his or her share shall lapse....

(App. 59 ¶ 6). The issues which were before the trial court and that impact the determination of this question include the rule of early vesting and the nephews' contention that their parents' shares vested

at the time of Johnson's death. The nephews unmistakably requested that the trial court find 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).

**II. THE ARGUMENTS AND AUTHORITIES PRESENTED TO THE TRIAL COURT PERMITTED A THOUGHTFUL AND INTELLIGENT CONSIDERATION OF THE ISSUES IN ACCORDANCE WITH RULE 5:25 OF THE RULES OF THE SUPREME COURT OF VIRGINIA.**

Curiously absent from the church's brief is a theme from their earlier filings acknowledging the trust "could have been more precisely drafted." (App. 36). The church argued below that the addition of three extra words to the trust agreement, "fail to survive me <u>and my husband</u>," would allow Johnson's true intent to prevail. <u>Id</u>. Instead, the church now grasps a theme of procedural default. The church argues that the nephews first trapped an unsuspecting trial court into error and now spring "sophisticated testamentary arguments" at the appellant stage. Br. of Appellee at 2. The church declares that this Court's own rules

prohibit it from considering the nephews' arguments. However, the Rules of Court were not intended to preclude this Court from correcting error when the ends of justice so require. This is especially true in the case at bar, where the trial court had sufficient understanding of both the parties' positions and the law to permit intelligent consideration of the legal issues.

In Shocket v. Silberman, this Court granted the residuary legatees under a will an appeal after a default judgment had been entered against them in the trial court. 209 Va. 490, 165 S.E.2d 414 (1969). The appellants had filed an Answer and a Motion for leave to file a late Answer, 17 days after the trial court entered its final judgment. The appellees objected to the appeal on the grounds that the appellants had filed no objections to the lower court's decision. However, this Court ruled that the requirements of that rule

"are not inflexible" and may be relaxed to obtain the ends of justice. The Shocket Court wrote:

> For the purposes of determining whether we should hear their appeal to "attain the ends of justice," the tendering of their answer, the motion that it be filed, and the denial of the motion by the lower court ... were sufficient to set forth in the record, for the attention of the lower court and this court, the position upon which these appellants rely in claiming that the lower court erred as a matter of law in the interpretation of the will....

Id. at 494-495, 165 S.E.2d at 418. Similarly, in the case at bar, the nephew's answer, arguments and memorandum left no doubt as to their position regarding the correct interpretation of Johnson's trust agreement and how the lower court erred in its interpretation. In ruling, the Shocket court went directly to the language of the will, which it found to be "clear and unambiguous" and found that the lower court's interpretation was "not in accord with the plain intent of the testator." Id. at 496-497, 165 S.E.2d at 419-420. Likewise, Johnson's trust agreement has

been made a part of the record and the nephews below argued throughout trial that the document unambiguously directed that their parents' shares vested at the time of Johnson's death. (App. 31 & 48). The nephews wrote in their memorandum to the trial court:

> The Plaintiff postulates that there is an ambiguity in the terms of the trust simply because the timing of the division of the trust into separate shares and the distribution of those shares is incongruent. The incongruity of the language does not prove that the language is ambiguous.

(App. 47). The trial court knew the nephews' and the church's position. Most importantly, it had the language chosen by the testator, as set forth in the trust agreement, to consider. The ends of justice require that the trust agreement be enforced as written.

**III. THE TRUST AGREEMENT DOES NOT REVEAL AN INTENTION BY THE TESTATOR EITHER TO DELAY VESTING OR EXCLUDE HER NEPHEWS.**

As drafted, the nephews, Johnson's blood relatives, take under the trust agreement. The church

oversteps its bounds when it construes intent by Johnson to expressly exclude her nephews. Br. of Appellee at 15. The church offers Jarrett v. McReynolds in support of its contention that Johnson did not intend that the nephews take under the trust agreement. Br. of Appellee at 14, 19. The church emphasizes the trust agreement's provision permitting invasion into the corpus to meet Harry Johnson's needs. Br. of Appellee at 14. However, this Court has subsequently commented on its decision in Jarrett, indicating:

> In Jarrett we were concerned solely with the question of the testator's intention in providing for his children. In the opinion we neither discussed nor viewed as relevant the provisions for invasion of corpus except with respect to this question. There the will was ambiguous and we were called upon to infer an intention to provide for someone (the deceased son's widow) who was not a direct descendant of the testator where express language evidencing such intention was lacking.

Elliot v. Griffin, 218 Va. 250, 252, 237 S.E.2d 396, 397 (1977), citing Jarrett v. McReynolds, 212 Va. 241,

183 S.E.2d 343(1971). This Court explained that it had found the will in Jarrett ambiguous and held that two conditions precedent must occur before a child of the testator would have a vested interest, reaching age 25 and surviving the life tenant. Id. The Court discusses in detail each provision of the trust which might control the ultimate distribution. This analysis reveals that the trust agreement in Jarrett must be distinguished from the trust agreement executed by Johnson.[2] The Court focuses on one clause which it finds ambiguous, "probably because of faulty drafting." Jarrett v. McReynolds, 212 Va. at 245, 183 S.E.2d at 346. This clause provides:

> Should any of my said children die before attaining the age of twenty-five years leaving no children surviving, then such deceased child's part of the principal of said trust

[2] This is not surprising, given that every trust and will case has limited precedential value and "cases construing remainder created by wills are almost as countless as grains of sand on the seashore." Clark v. Strother, 238 Va. 533, 540, 385 S.E.2d 578, 582 (1989).

> estate shall belong to...the survivor or survivors thereof....

Id. Significantly, this Court writes,

> We may interpret [this clause] as impliedly vesting a share of the trust principal in a child like James Jr. who dies without issue after reaching age 25 but before his mother's death. But [this clause] purports *not to vest shares in the Testator's children when they attain age 25, but rather purports to vest shares of the testator's deceased children in his living children and grandchildren.*

Id. (emphasis added).

In the case at bar, only one condition precedent to vesting exists in Johnson's trust agreement, surviving Johnson herself. (App. 47)("If any of my brothers or sister shall fail to survive **me**, his or her share shall lapse.") The words used by Johnson mandate that if any of her siblings predecease her, their shares shall lapse. The most direct reading of this clause likewise concludes that if any of her siblings *do not* fail to survive her, his or her share *does not lapse*. See, Rady v. Staiars, 160 Va. 373, 376, 168 S.E. 452, 452-53 (1933)("The primary

significance of words should ordinarily attach.... Nor should we search out obscure or recondite possibilities in simple words.") The rules that favor early vesting in the absence of a *clear intention* to delay vesting only strengthen this conclusion. Schmidt v. Wachovia Bank, N.A., 271 Va. 20, 26 (2006) ("...we have imposed delayed vesting only when the will contained some actual language directing or supporting deferral.")

Further, in Jarrett, this Court was called to infer an intention, under an ambiguous will, to provide for an individual not a direct descendant of the testator. Elliot v. Griffin, 218 Va. at 252, 237 S.E.2d at 397, citing, Jarrett, 212 Va. at 245, 183 S.E.2d at 346. In contrast, in the instant case, the nephews, while not direct descendants of the testator, are her blood relatives. Unlike in Jarrett, it is not the testator's direct descendants who will subsume the nephews' share, but rather, in the church's own words,

"students whom [Johnson] didn't even know." Br. of Appellee at 16.

Turning to the church's divination of the true intention of Johnson, the church is convinced that Johnson intended it receive the shares of all siblings who did not survive *both* her *and* her husband. Br. of Appellee at 13 ("Upon *Harry's death*, [Johnson] intended to grant her assets to her surviving siblings.") (emphasis added). Of course, this is not what Johnson wrote. The church further speculates that Johnson granted shares to her siblings, at all, only, "presumably, [because] Mollie did not want any of her surviving siblings to think poorly of her." Appellee's Br. in Opp. at 11-12. However, the church remains dumbfounded by the "poor drafting" which vested shares in Johnson's siblings at her death, instead of her husband's death. The church writes:

> 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.*

Br. of Appellee at 18. (emphasis added). Still, possible explanations do exist for the way Johnson worded her trust agreement. Perhaps she thought that, at *her death*, the will and trust agreement would be read and known by her siblings and she wanted them to see she had thought of and provided for them, though they would not collect until her husband died. The point is no one can now know Johnson's true intentions and motivations and we need not guess if we simply follow the clear language set forth in the trust agreement.

RESPECTFULLY SUBMITTED

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**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., 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, Roanoke, Virginia 24022, (540) 983-9300 and Robert W. Mann, Esquire, and Scott C. Wall, Esquire, Young, Haskins, Mann, Gregory, McGarry, & Wall, P.C., 400 Starling Avenue, P.O. Box 72 Martinsville, Virginia 24114-0072, (276) 638-2367.

3. In compliance with Rule 5:26(d), fifteen (15) true and accurate paper copies and one electronic copy on CD of the foregoing Reply Brief of Appellants have been hand-filed with the Clerk of this court and three (3) paper copies were sent 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, Roanoke, Virginia 24022, Philip G. Gardner, Esquire, Gardner, Gardner, Barrow & Sharpe, P.C., 231 E. Church Street, 4th Floor, Martinsville, Virginia 24112, and Robert W. Mann, Esquire, Young, Haskins, Mann, Gregory, McGarry, & Wall, P.C., 400 Starling Avenue, P.O. Box 72 Martinsville, Virginia 24114-0072, counsel for the Appellees this 26th day of June, 2009.

Phillip V. Anderson