In The

Supreme Court of Virginia

RECORD NO. 082280

DEBRA KEENER,

Appellant,

v.

HOLLIS GRANT KEENER, JR., *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF

Comes now, Appellant Debra Keener ("Ms. Keener"), by counsel, and pursuant to Rule 5:29 of the Rules of the Supreme Court of Virginia, replies to the Brief of Appellees Hollis Grant Keener, Jr., *et al.* ("Controlling Children" or "Children") as follows.

REPLY TO STATEMENT OF FACTS

Controlling Children put significant factual emphasis on their claim that Ms. Keener's actions were an attempt to contest or defeat an alleged "testamentary plan" of the Decedent which in turn constituted a contest of the terms of the Decedent's Trust. (Appellees' Brief at 1). However, the facts establish the existence of two independent documents; a Will, that did not "speak" or otherwise have substance prior to death and that was subject to probate; and a non-testamentary, intervivos trust, created and funded during the Decedent's lifetime, that was not subject to probate. This is significant because the Trust was in no way dependent on the Will for its creation; it existed and was funded long before the Will spoke at death and regardless of the status of the Will, the Trust operated independent therefrom.

Children do not dispute that they were in control of the Decedent's testamentary papers in the months prior to and following his death and that

they advised Ms. Keener that the Decedent did not have a will. (Appendix at 116, 172). Therefore, although Ms. Keener may have seen a will several months prior to the Decedent's death, she had no reason to believe the will had not been revoked given the representations of her siblings and the fact that no will was produced for probate. Controlling Children fault Ms. Keener for having believed their representations to be truthful.

Children likewise concede that Ms. Keener was unaware of the existence of the Addendum that added the forfeiture provision to the Decedent's Trust. (Appellees' Brief at 7-8). They affirm in their Brief that the Addendum was prepared by Decedent after Ms. Keener received a copy of the Decedent's testamentary papers and was not included in the copies Ms. Keener had received. Children do not dispute that they failed to make the beneficiaries aware of the existence of the forfeiture provision in the Trust or that they were in possession of an original Will and had not probated it. Essentially, Controlling Children concede to having provided beneficiaries with inaccurate information related to the status and location of the Will and were silent on material terms of the Trust until they filed suit, 5 months after the Decedent's death, finally producing the Will for probate and claiming that Ms. Keener had forfeited her share.

Controlling Children's representation that Ms. Keener opposed probate of the Decedent's will is not supported anywhere in the record and is plainly wrong. (Appellees' Brief at 10). The record clearly establishes Ms. Keener's consistent position that she would not oppose the probate of Decedent's will if a will in fact existed. (See Keener's Answer to Petition, Appendix at 18). Ms. Keener reaffirmed at trial that she did not contest the probate of the Will once the original was produced. (Appendix at 57-58). It is undisputed that Ms. Keener never filed suit to impeach the Will nor did she take any action to appeal its probate. As a matter of fact and law, Ms. Keener never contested the Decedent's Will.

Children concede that the forfeiture provision in the Trust is unambiguous and that the Decedent's Will does not contain a forfeiture clause or preclude a contest by anyone. Children can point to no language in either the Will or the Trust that identifies, defines or even mentions a "testamentary plan." Lastly, Children fail to identify any provision of the Trust that was actually contested by Ms. Keener's probate act.

REPLY TO STANDARD OF REVIEW

Controlling Children incorrectly characterize the trial court's ruling as having turned on a factual determination giving rise to a "clear error" standard of review. However, the questions before this Court are only two-

fold: 1) what is the legal effect of probate on a will that has not yet been probated and/or on an intervivos trust that is not even subject to probate; and 2) did the trial court err in construing unambiguous language in a Trust by expanding it beyond its clear and plain meaning? Both issues raised by this appeal present questions of pure law and the standard of review is therefore *de novo*.

The act that the trial court determined triggered the language of the Trust's forfeiture provision was Ms. Keener's probate of her father's estate as intestate. The trial court held the probate act constituted a contest of the Trust provisions because it attempted to defeat the Decedent's Will which had not yet been probated. Ms. Keener claims error, as a matter of law, in this decision on the basis of precedent holding that the simple act of probate does not equate to a contest of any will previously submitted or later submitted to probate. In re: Will of Susan Bentley, 175 Va. 456, 9 S.E.2d 308 (1940). Ms. Keener further claims that if the act of probate, as a matter of law, cannot be construed to contest a will subject to probate, it certainly can not legally constitute the contest of a separate, intervivos trust that is not subject to probate. The legal effect of an act of probate on other testamentary documents is clearly a question of law.

The second issue presented is also a question of law as it involves the interpretation of language in a trust that is conceded to be unambiguous. This case falls squarely within the standard of review found to be applicable in Jones v. Brandt, 274 Va. 131, 135, 635 S.E.2d 312, 314 (2007). Because the sole issue on appeal in Jones was the legal effect of unambiguous language contained in a written document, the standard of review was held to be *de novo*. *Id.* Likewise, in the current case, the sole question on appeal with respect to this second issue is the legal effect of the language contained in the forfeiture provision of the Trust.

Despite Controlling Children's contention otherwise, Frazer v. Millington, 252 Va. 195, 475 S.E.2d 811 (1996), is also directly on point in support of a *de novo* standard of review. In Frazer, the Court acknowledged the issue was the construction of an unambiguous provision in a trust document and therefore proceeded to construe that provision as a matter of law without resort to the parole evidence the trial court had erroneously considered. *Id.* at 252 Va. 199-200, 475 S.E.2d 814-15.

Clearly, both issues raised by this appeal are issues of law and therefore the matter before the Court herein is subject to a *de novo* standard of review.

I. It is error to interpret the unambiguous term "Trust" used in a forfeiture clause as encompassing an undefined testamentary plan.

Controlling Children do not dispute that forfeiture clauses are disfavored under the law and as such, must be strictly construed. Trailsend Land Holding Co. v. Virginia Holding Corp., 228 Va. 319, 323-24, 321 S.E.2d 667, 669 (1984). Nor do they dispute that the clause at issue herein is unambiguous and states plainly:

> Any person that objects to or contests any provision of this Trust, in whole or in part, shall forfeit his or her entire distribution otherwise payable under this Trust…

Despite the law, Children essentially argue that the Decedent did not mean "Trust" when he used the word "Trust" in the sentence, "(a)ny person that objects to or contests any provision of this **Trust** …"; what the Decedent really meant when he used the word "Trust" in the forfeiture clause was for that word to refer to his whole "estate plan" whatever that plan might encompass. Children argue that Decedent said "Trust" but intended that term to include all other testamentary or non-testamentary documents he may have prepared as part of his alleged plan as well as all acts that attempt to thwart that plan.

The terms "will" and "trust" are both clearly defined by statute and when used by a testator or reviewed by a court, have recognized, universal

understanding. See Va. Code § 64.1-45 (definition of "will") and Va. Code § 55-541.03 (trust definitions). Nowhere within the Code or case law is there authority for Children's contention that the term "Trust" includes additional documents that may be part of a testamentary plan. The term "testamentary plan" is not a term of art with any clear definition or universal understanding; it is in fact an undefined and unrecognized term under the law.

Nevertheless, Children contend there is authority for their claim that the plain and unambiguous term "Trust" as used by the testator in his Trust document, was intended by him to refer to an otherwise undefined testamentary plan. Children claim that Thomas v. Copenhaver, 235 Va. 124, 365 S.E.2d 760 (1988), stands for the proposition that "(w)hen a person executes testamentary documents and establishes an estate plan, a strong presumption exists that he intends to dispose of his entire estate." (Appellees' Brief at 15). However, Thomas is a simple case of determining testamentary intent in a holographic will and does not stand for the legal recognition of a testamentary plan.

Likewise, Children's reliance on Board of Missions v. Brotherton, 178 Va. 155, 16 S.E.2d 363 (1941) as recognition that an "estate plan" can be enforced under the law, is misplaced. In Brotherton the court interpreted a

single will which was composed of three writings submitted to probate together. Brotherton does not stand for a rule of law that separate testamentary and non-testamentary documents should be viewed as an "estate plan" for the purposes of interpreting a testator's intent under a forfeiture clause.[1]

What Brotherton ***does*** stand for, is the long established rule that conjecture cannot be used by a court to supply what the testator has failed to sufficiently state on the face of the document itself. *Id.* at 163, 366. It is ironic that Children cite Brotherton in their attempt to persuade this Court that it is acceptable to write into the unambiguous language of both a will and a trust a reference to an "estate plan" that is not found anywhere within either document. Since no such language exists in the documents at issue herein, it would require pure conjecture and would be contrary to the rule in Brotherton, to add those terms to fabricate an intent that does not appear on the face of either of the writings.[2]

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[1] If this were the law, then arguable the alleged "estate plan" could include the creation of a family LLC, the designation of beneficiaries on life insurance policies, joint titles with survivorship on personalty and realty, and any other documents the testator might have put in place during his lifetime with a "plan" to pass title at death outside of probate.

[2] Children completely ignore the fact that the Decedent did not include a forfeiture provision in his Will although he certainly would have if a contest of the Will was intended by him to amount to "thwarting" his estate plan.

It was conceded by all parties and the trial court that the forfeiture provision in the Trust Addendum is not ambiguous. Therefore, no extrinsic evidence, including the existence or terms of the Will itself, should have be used to interpret the forfeiture clause, let alone expand it to encompass an "estate plan" that included documents and acts beyond the scope of the Trust. See Frazer v. Millington, 252 Va. 195, 199; 475 S.E.2d 811, 814 (1996). The cardinal rule is that when the words and language of the testator are clear, they need no interpretation by the court as the document speaks for itself. *Id.*

If the Decedent's intent was to establish a "testamentary plan" and preclude any action that might attempt to thwart that plan, he clearly failed to express that intent anywhere on the face of either his Will or his Trust. Likewise, if the Decedent considered the probate of his Will to be an integral part of that estate plan such that interference with probate or a contest of the Will would give rise to a forfeiture, he could easily have expressed that intent as well, but significantly, did not.[3]

[3] Of course at the time Ms. Keener probated her father's estate she had been told no will existed and no will had been presented for probate. It would then appear that the ones who were attempting to thwart the "estate plan" would be those who had possession of the original will yet failed to present it for probate in order to effectuate the alleged plan.

Children contend that Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956) supports their position that the court herein was permitted to look at probate acts unrelated to the Trust provisions in determining whether the forfeiture clause in the Trust applied. The actions at issue in Womble consisted of filing a suit to contest the decedent's will where the will contained a forfeiture clause expressly prohibiting a will contest. Womble is clearly distinguishable on the facts from the case herein.

When interpreting a testamentary document, a court cannot ignore the plain language of the document and has no authority to interpolate words into the document. Jackson, Administrator v. Fidelity and Deposit, 269 Va. 303, 310, 608 S.E.2d 901, 904 (2005). It is the duty of the court to construe the document that the testator has made, not to speculate as to his intent or to re-write that document for him. *Id*.

This Court has long recognized that it needs no argument or authority to show that a court has no right to add language to a testamentary document that the testator did not use. Gasque v. Sitterding, 208 Va. 206, 213, 156 S.E.2d 576, 581(1967). Children's position is contrary to established precedent that provides, where the terms of an instrument are clear, the court's inquiry is to be limited to the four corners of the document in question. Frazer v. Millington, 252 Va. 195, 199-200, 475 S.E.2d 811,

814 (1996); Cohn v. Central Nat'l Bank, 191 Va. 12, 16-17, 60 S.E.2d 30, 32 (1950). It was error for the trial court herein to go beyond the four corners of the Decedent's intervivos Trust in order to find an unexpressed "estate plan", then interpret the plain language of the forfeiture provision as including acts that attempted to thwart that alleged plan, yet had no impact whatsoever on the provisions of the Trust.[4]

Children argue for the acceptance of expanding an unambiguous forfeiture clause far beyond where its clear and plain language would allow it to go. More importantly, however, Children's position that a court is authorized to look beyond the plain meaning of the term "Trust" used by a testator in a forfeiture provision and define that term to include separate, independent documents that the court considers to have been part of an otherwise undefined "estate plan" would be deeply disruptive to the precedents governing interpretation of testamentary documents.

Trial courts hereafter would be called upon to embark on a search for a testator's undisclosed "testamentary plan" that might arise from a review of multiple documents the testator created during his lifetime to provide for

[4] Children's failure to probate the Will following the Decedent's death would appear to fly in the face of their claim that the Will was part of an estate plan that could only be realized by probating it. Following Children's logic then, it was their failure to probate the Will in the first instance that "thwarted" the Decedent's estate plan and rendered him intestate.

the distribution of his property after death. The Court should not open the door to such an analysis as the standard creates uncertainty for all parties, including testators who attempt to draft narrow forfeiture provisions with the understanding that they will only be applied after death as they have been expressly stated to apply.

II. The simple act of probate does not constitute a "contest" of any later probated will or any other documents not subject to probate.

Lastly, the Controlling Children's position that Ms. Keener's act of probating Decedent's estate intestate was a contest of Decedent's Will which in turn was a contest of his "estate plan" which could then be extrapolated to be a contest of the Trust provisions giving rise to a forfeiture, is at its core grounded in legal error. The clear authority refutes Children's claim that an act of probate is tantamount to a contest of any other testamentary documents.

Despite Children's contention otherwise, the Decedent's Will could not be contested by merely opening probate as intestate. Hawkins v. Tampa, 197 Va. 22, 87 S.E.2d 636 (1955). A will can only be contested as provided for by statute in one of two ways; 1) by filing an appeal of the order probating the will under Va. Code § 64.1-78, or 2) by filing a bill in equity to impeach the will pursuant to Va. Code § 64.1-88. First Church of

Christ, Scientist v. Hutchings, 209 Va. 158, 161, 163 S.E.2d 178, 180 (1968).

Children's claim that "… there is no precedent stating that a will may *only* be contested via statutory methods" is plainly wrong. (Appellees' Brief at 17). A will can only be contested by the two methods provided for under the Virginia Code. First Church of Christ, Scientist, *Id.*

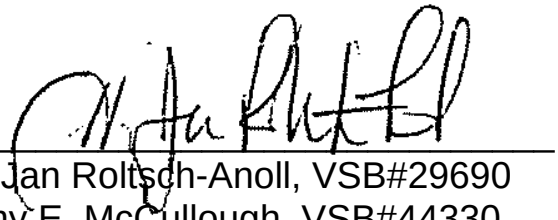
Children again rely on Womble v. Gunter *infra.* as alleged support for their position that a will can be contested by means other than those identified in the statutes. While the action of filing suit to impeach a will in Womble had the unsurprising result of being deemed a will contest by this Court, the Controlling Children's reliance upon Womble for the proposition that the simple act of probating an estate as intestate constitutes a will contest, is unsupported.

This Court has clearly held that acts of probate are not a contest of any will. Hawkins v. Tampa, 197 Va. 22, 87 S.E.2d 636 (1955); In re: Will of Susan Bentley, 175 Va. 456, 9 S.E.2d 308 (1940). Since the act of probate, in and of itself, does not constitute a "contest" of any will which has yet to be probated, it could never rise to the level of a contest of a document that is not even subject to probate at all.

The trial court's determination herein that probate of the estate intestate was an attempt to defeat the Decedent's Will, which equated to interference with his "estate plan" and therefore amounted to a contest of the provisions of a wholly independent intervivos trust, not even subject to probate, is not supported by any authority whatsoever and is error as a matter of law.

CONCLUSION

Wherefore, Appellant Debra Keener respectfully requests that the August 22, 2008 Final Order of the Circuit Court of Prince William County be vacated, that the trial court's finding of forfeiture against Debra Keener be reversed, and that the case be remanded to the trial court for a ruling on the merits of Appellant's Amended Counterclaim and the relief requested by Appellant therein.



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CERTIFICATE

In accordance with Rules 5:26(d) and 5:29 of the Rules of the Supreme Court of Virginia, counsel for Appellants hereby certifies that on this 15th day of May, 2009, fifteen (15) paper copies and one electronic copy of the foregoing Reply Brief of Appellant have been hand filed in the office of the Clerk of the Supreme Court of Virginia, and further that three (3) copies of this reply brief were sent, first-class mail, postage prepaid, to the following:

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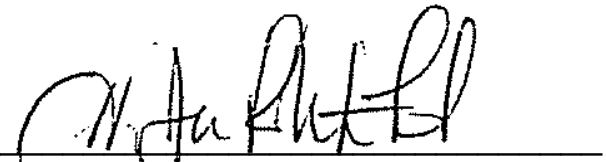

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