In The

Supreme Court of Virginia

RECORD NO. 082280

DEBRA KEENER,

***Appellant*,**

v.

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

Appellees.

BRIEF OF APPELLEES

Shelly R. Collette (VSB No. 74779)
PIRSCH & ASSOCIATES, PLLC
1307 Duke Street
Alexandria, Virginia 22314
(703) 548-5182 (Telephone)
(703) 548-5659 (Facsimile)
shelly@pirsch-law.net

Counsel for Appellees

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

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STATEMENT OF THE CASE

This appeal presents issues as to the deliberate and intentional actions by a beneficiary of a trust that thwarted the testamentary plan of a testator and the resulting consequence of those actions against the beneficiary pursuant to a forfeiture provision in the testator's testamentary documents.

The testator, Hollis Grant Keener, Sr., (the "Decedent") died on August 7, 2007. On February 1, 2003, the Decedent created a testamentary plan by executing a pour over will (the "Will") and creating and funding the Hollis Grant Keener Revocable Living Trust (the "Trust"). Any assets not titled in the name of or transferred to the Trust prior to the Decedent's death would pass to the Trust pursuant to Article II of the Will. The Decedent made many amendments to the Trust during his lifetime, including the addition of a forfeiture clause which is the basis of this appeal.

After hearing all the evidence concerning the Decedent's addition of the forfeiture clause and the testimony of the Decedent's children and estate planning attorney, the trial court determined that the beneficiary's intentional disregard of the Decedent's testamentary documents and the

resulting legal consequences constituted a forfeiture of that beneficiary's share of the Decedent's Trust.

I. The Parties: The Decedent was survived by seven children, of which, Hollis Grant Keener, Jr. ("Mickey"), Thomas C. Keener ("Tommy") and Brenda Collier ("Brenda") are the appelles herein. Debra Keener, ("Debbie") is the appellant herein. The remaining children of the Decedent were named as Respondents in the pleadings below, however, they did not appear on behalf of Debbie nor join in Debbie's responsive pleadings.

II. The Decedent's Testamentary Plan: The Decedent created a testamentary plan on February 1, 2003, which contained multipleamendments including an amendment executed on March 20, 2007, adding a forfeiture provision. (Appendix at 186 -254). The March 20, 2007, amendment was added to the Decedent's testamentary plan after an altercation at Brenda's house where Debbie reviewed and simultaneously confronted the Decedent about his testamentary documents and demanded to know the location of his property, which was either titled in the name of the Trust or was to pass to the Trust pursuant to the Will. (Appendix at 90, 92, 94, 95).

III. Probate of the Decedent's Estate: Though Debbie had seen the Decedent's original Will and Trust during the aforementioned altercation, had a copy of the Will and the Trust in her possession, knew the last place she saw the Will and Trust, knew the name and telephone number of the executor named in the Will (Mickey) and knew the name and telephone number of the Trustee named in the Trust (Mickey), she nevertheless swore under oath before the Probate Clerk of Prince William County that the Decedent died without. As a result, Debbie was appointed Administrator and proceeded to administer the Decedent's estate as an intestate estate. (Appendix at 15 and 175-180).

IV. Proceedings in the Trial Court: To be cloaked with full authority to initiate legal proceedings against their sibling, Joyce Purks, who owed money to either the Trust or the Decedent's Estate, Hollis, Tommy and Brenda filed a Petition for Admittance of Will to Probate, Removal of Administrator and for Appointment of Personal Representative in the Prince William County Circuit Court on December 4, 2007. (Appendix at 1-5, 89).

To support the request to have Debbie removed as Administrator, the Petition alleged several counts against Debbie of the wrongful actions she took to be appointed Administrator (Appendix at 2-4). The Petition did not include a request for the Court to determine whether Debbie had forfeited her share as a beneficiary under the Trust. (Appendix at 5). Debbie insisted, over objection, that the Court determine whether she had forfeited her share of the Trust. (Appendix at 4 and 55).

Debbie filed an answer and counterclaim and the counterclaim was later amended without objection (Appendix at 19-21, 25, 28-31). The case was tried before the Prince William County Circuit Court on July 14, 2008, and closing argument was held on July 25, 2008. After considering all the evidence adduced at trial, testimony of the witnesses and arguments of counsel, the trial court held that Debbie attempted to defeat the decedent's Trust entire and that enforcing the intent of the Decedent resulted in a forfeiture of Debbie's share. (Appendix at 289-290).

Debbie moved for reconsideration of the trial court's ruling, and in response, Hollis, Tommy and Brenda filed an opposition to Debbie's reconsideration and memorandum in support of opposition. (Appendix at 303-311). On August 22, 2008, after Debbie admitted that administration

of the estate as intestate would affect the disposition of any assets titled in the Decedent's name at his death that were not in the Trust, the trial court held again that Debbie's actions were an effort to oppose or contest the Trust and therefore Debbie forfeited her share of the Trust. (Appendix at 327- 328). Debbie then filed her notice of appeal in the trial court on September 19, 2008. (Appendix at 338-339).

ASSIGNMENTS OF ERROR

1. The trial court erred when it expanded the language of a Trust provision that states forfeiture will occur if a beneficiary of that Trust objects to or contests any provision of the Trust, to include the beneficiary's act of opening probate as a contest of a Trust provision because as a matter of law probate does not constitute a will contest, let alone the contest of a separate Trust document.

2. The trial court erred when it expanded the language of a Trust provision that states forfeiture will occur if a beneficiary of that Trust objects to or contests any provision of the Trust, to include the beneficiary's act of opening probate as a contest of a Trust provision because the express language of the Trust's forfeiture clause must be

strictly construed and cannot be interpreted to encompass the act complained of.

QUESTIONS PRESENTED

Appellees believe that the appellant's appeal presents the following questions:

1. Whether a beneficiary's act of probating an estate as intestate when the beneficiary knows there is a valid will and trust triggers the trust's forfeiture provision? (See Assignment of Error 1).

2. Whether the plain language of a forfeiture clause stating that forfeiture will occur if a beneficiary objects to or contests any provision of the trust, in part or in whole, encompasses the intentional actions by a beneficiary that thwarts the testator's intent? (See Assignment of Error 2).

STATEMENT OF FACTS

The Decedent executed an intervivos Trust and a pour-over Will on February 1, 2003. (Appendix at 186-219). The Will named Hollis Grant Keener, Jr. as the Executor and gave the Decedent's tangible personal property, real property and residue to the Trust (Appendix at 187-188). Over the next several years, the Decedent added several addendum to his Trust. (Appendix at 220-254). The Third Addendum provided that at the

Decedent's death, his car should be distributed to Mickey. (Appendix at 243). Addendum Four dated October 3, 2005, provided that three of the previously named beneficiaries would not receive any distribution of their shares until certain financial obligations relating to those beneficiaries were satisfied. (Appendix at 248-249). No further addendums were added to the Trust until March 2007.

In early March 2007, Debbie visited the Decedent at Brenda's home where the Decedent lived. (Appendix at 90). There was an altercation between Debbie, Brenda and the Decedent regarding the Decedent's estate planning documents. (Appendix at 90-95). Debbie indicated that she was unhappy with the content of the Will as it did not specifically bequeath the Decedent's personal property to individual children, but rather bequeathed the property to the Trust. (Appendix at 92 and 95). Debbie harshly stated her dismay at the Decedent's testamentary plan in the presence of Brenda, Mickey and the Decedent. (Appendix at 92 and 95). Subsequently, Debbie took the Decedent's estate planning portfolio, which contained all of his original testamentary documents, from Brenda's house and had copies made of all the documents contained in the portfolio. (Appendix at 92 at 95).

On March 30, 2007, following the altercation at Brenda's house, the Decedent executed a final addendum to his Trust which provided that Mickey should receive $6,000.00 before any other distributions were to be made; that Joyce Purks' share should first be used to pay off the loan on her behalf to Hollis Grant Keener; that Robin Peer had thirty days following the Decedent's death to return certain figurines and dolls; and most relevant to this appeal, a forfeiture clause that mandated that "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..." (Appendix at 251-253) (emphasis added).

The Decedent died on August 7, 2007. (Appendix at 2). As Trustee of the Trust, Mickey subsequently paid the majority of the Decedent's debts, collected assets owed to the Trust and employed counsel to collect a debt owed to the Trust by a beneficiary. (Appendix at 100, 102 and 105). Mickey then sent a letter to the beneficiaries of the Trust on October 18, 2007, informing them of the status of the Decedent's estate, the value of the Trust, the specific amount of each beneficiary's share and the date that each beneficiary would receive his or her distribution of the Trust. (Appendix at 255). Prior to the date of Mickey's letter, no beneficiaries

requested copies of the Decedent's testamentary documents or requested any information relating to the Decedent's estate. (Appendix at 110-111).

Unbeknownst to Mickey, Debbie qualified as Administrator and probated the Decedent's estate as intestate on October 15, 2007, despite having a copy of the Decedent's Will and Trust. (Appendix at 15 and 177). After speaking with the Decedent's estate attorney, Stephen Kaufmann, concerning Debbie's appointment, Mickey stopped payment on Debbie's distribution from the Trust (Appendix at 97-98). Thereafter, Mickey, Tommy and Brenda filed a Petition on December 4, 2007, to admit the original Will to probate, have Debbie removed as Administrator and for appointment of Mickey as the personal representative of the Decedent's estate. (Appendix at 41, 97, 98 and 1).

Debbie filed an Answer and Counterclaim to the Petition denying the existence of the Decedent's Will, denying she had ever seen the Will, denying any awareness of the Will's existence and admitting that in early March 2007 she had copies of the Decedent's testamentary documents. (Appendix at 16 and 18). Subsequently, an Answer to Debbie's Counterclaim, an Amended Counterclaim and an Answer to Amended Counterclaim were filed before trial commenced on July 14, 2008.

(Appendix at 22-34). At trial, Debbie changed her position regarding the Will and did not object to the Decedent's Will being admitted to probate as long as it was authenticated. (Appendix at 43).

Trial was held on July 14, 2008 and July 25, 2008 (Appendix at 35 and 256). As of the date of trial, Mickey had made distributions to all the beneficiaries except Debbie and Joyce, who was not to receive any distribution until her loan was repaid. (Appendix at 108). The trial court, after considering the facts, circumstances and law in this matter, held that Debbie's administration of the Decedent's estate as intestate triggered the forfeiture provision in the Trust. (Appendix at 289-291). As a result of her actions, the Trust would not have been funded with any assets owned by the Decedent at his date of death. (Appendix at 289-290). Therefore, the trial court held that to act in a manner that defeats the entire Trust is an action to contest a provision of the Trust. (Appendix at 290). Further, the trial court held that the court will enforce the intent of the testator whenever it can be clearly ascertained, and in this case, enforcement of the decedent's intent resulted in Debbie's forfeiture of her share. (Appendix at 290).

Debbie sought reconsideration of the trial court's ruling and Mickey, Tommy and Brenda opposed. (Appendix at 294-306). Both parties filed memoranda in support of their respective positions and the matter was heard before the trial court on August 22, 2008. (Appendix at 294-311). At the hearing, Debbie admitted that probate of the Decedent's estate as intestate would have affected assets still titled in the Decedent's name individually, and that the central question in this case is what effect is to be given to the Trust language within the context of the evidence presented during trial. (Appendix at 325).

The trial court again held that had Debbie been successful in her efforts to probate the Decedent's estate as intestate, the Trust would have been defeated. (Appendix at 327). The Order denying reconsideration and Final Order in the matter were entered by the trial court on August 22, 2008. (See Appendix at 334-337). It is from the Final Order that Debbie appeals this case. Mickey, Tommy and Brenda claim no error in the trial court's ruling forfeiting Debbie's share of the Decedent's Trust.

STANDARD OF REVIEW

An appellate court considers "the evidence and all reasonable inferences therefrom in the light most favorable...to the prevailing party in the circuit court." Moorman v. Blackstock, 276 Va. 64, 661 S.E.2d 404 (2008). Furthermore, the Court gives deference "to the trial court's findings of fact and views those findings in the light most favorable to the prevailing party below." Zelnick v. Adams, 269 Va. 117, 606 S.E.2d 843 (2005); Bottoms v. Bottoms, 249 Va. 410, 457 S.E.2d 102 (1995).

This appeal concerns the factual determination by the trial court that Debbie's actions triggered an unambiguous forfeiture clause contained in a testator's testamentary documents that resulted in the forfeiture of her share under the testator's testamentary plan. This Court, in its ruling in Womble v. Gunter, clearly stated that "[w]hat activity or participation constitutes a contest or attempt to defeat a will depends upon the wording of the 'no contest' provision and the *facts and circumstances of each particular case*." 198 Va. 522, 529, 95 S.E.2d 213, 219 (1956) (emphasis added).

Pursuant to the holding in Womble, the trial court evaluated the witnesses' testimony and credibility, considered the facts and circumstances of this case and made a factual determination that Debbie's actions triggered the forfeiture provision contained in the Decedent's Trust and as a result she forfeited her share. As made clear by this Court's holding in Moorman, the Court will not disturb the judgment of the trial court "unless it is plainly wrong or without evidence to support it." Moorman, 276 Va. 64, 661 S.E.2d 404 (2008). Therefore, the appropriate standard of review for this appeal is clear error.

Debbie's brief cites several cases for her position that a de novo standard of review applies in this case, however, her reliance is misplaced in each. This Court, in Jones v. Brandt, found that where the *sole* issue on appeal concerns the legal effect of a written document, the Court applies a de novo review standard of review. 274 Va. 131, 145, 635 S.E.2d 312, 314 (2007) (emphasis added). As evidenced by Debbie's questions presented to the Court, this appeal concerns factual interpretations regarding the act of probate as contesting a trust and triggering a forfeiture clause, as well as to the interpretation of a forfeiture clause of a written document.

(Appt.'s Brief 6). Where the forfeiture clause is not the only issue, the reasoning of this Court in Jones does not apply.

Additionally, Debbie misstates the application of rules of construction in the context of this case. Under her reasoning, the logic of Frazer v. Millington binds this Court to construing the terms of a trust. (Appt's. Brief 12); see also Frazer v. Millington, 252 Va. 195, 198-99, 475 S.E.2d 811, 813-14 (1996). However, in Frazer, this Court had to determine whether terms of a trust were ambiguous, according to the arguments posed by both parties. 252 Va. at 198-200. Neither party nor claims that the terms of the trust in this case are ambiguous, therefore, this Court is not bound to a standard of review based solely on construction of terms.

Lastly, this Court's holding in In re: Will of Susan Bentley is not applicable to the matters at issue in this appeal. As stated by Debbie, In re: Bentley concerned the submission of a later-discovered original will and this Court determined that such an act was not a contest of a previously opened estate. (Appt.'s Brief 12); see also In re: Will of Susan Bentley, 175 Va. 456, 9 S.E.2d 308 (1940). Nowhere in either Debbie's factual recitation, or in the record before the Court, is there any issue regarding the submission to probate of a later-discovered original will as an act of

contest. The facts in this case are *exactly opposite* of the premise for which Debbie relies upon in In re: Bentley, and it therefore has no bearing on the proceedings of this appeal.

In light of the above, it is evident that the appropriate standard under which to review this appeal is clear error by the trial court. However, even if this Court should find that the issues presented warrant de novo review, Mickey, Tommy and Brenda maintain that the facts as presented below and the law as it stands in the Commonwealth support the trial court's finding that Debbie forfeited her share of the Decedent's Trust, and as such, this appeal should be dismissed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT DEBBIE'S INTENTIONAL DISREGARD OF THE DECEDENT'S INTENT TRIGGERED THE TRUST'S FORFEITURE PROVISION.

If a testator's "intention is ascertainable, his intention will prevail." Thomas v. Copenhaver, 235 Va. 124, 128, 365 S.E.2d 760, 763 (1988). When a person executes testamentary documents and establishes an estate plan, a strong presumption exists that "he intends to dispose of his entire estate." Id. at 129. Thus, the only reason to establish an estate plan is to "change the devolution of property from that prescribed by the statutes

of descent and distribution." Board of Missions v. Brotherton, 178 Va. 155, 158, 16 S.E.2d 363, 365 (1941).

In this case, the Decedent's estate plan consisted of a Will, Trust and several addendums to the Trust. (Appendix at 186-254). Pursuant to the Decedent's estate plan, all the Decedent's assets were held by the Trust, titled in the name of the Trust or were to pass to the Trust under a residuary clause. (Appendix at 188 and 240). By executing an estate plan, it is clear the Decedent intended to avoid intestacy and dispose of his entire estate. However, Debbie's act of probating the Decedent's estate as intestate thwarted the Decedent's estate plan. Under an intestate estate, all assets owned by the Decedent at the date of his death that were not in his Trust would not pass to his Trust but rather pursuant to the laws of intestate succession. See Va. Code Ann. § 64.1-1. Thus, the trial court did not err when it held that Debbie's act of probate constituted an objection to or contest to the Trust, as the Decedent's intent was clear and ascertainable and Debbie's actions thwarted the Decedent's intent to devise his property as he so desired.

The proposition that probate does not amount to a contest concerns estates in which a written document has been admitted to probate.

Generally, the act of probating a subsequent will does not amount to a contest of a will already submitted to probate or thereafter submitted because the first will is revoked by the act of the testator in executing a subsequent will. In re: Will of Susan Bentley, 175 Va. 456, 462, S.E.2d 308, 311. Admittance of a later will to probate flows "not from any proceeding attacking the will, but from the law which gives vitality and force to the last testamentary act of the testator." Id.

Additionally, the statutory methods referenced by Debbie in her argument regarding contest of a will under the Code can only be employed if a will has actually been admitted to probate. (Appt's Brief at 14); Va. Code Ann. §§ 64.1-78; 64.1-88. However, there is no precedent stating that a will may *only* be contested via statutory methods. In fact, the statutes themselves do not restrict other methods of contest. As clearly stated in Womble v. Gunter, contests may be determined by the facts and circumstances of each case. 198 Va. 522, 529, 95 S.E.2d 213, 219 (1956). Debbie's argument ignores the clear ruling of Womble, which is applicable to this case.

Therefore, the precedent and statutes relied upon by Debbie are not applicable to this case. The Decedent's Will was not probated, therefore

there could be no appeal filed against the Clerk's order probating the will pursuant to Va. Code Ann. § 64.1-78 or impeachment by filing a bill in equity pursuant to Va. Code Ann. § 64.1-88 . Here, the Decedent did not revoke any previous testamentary document, instead, Debbie intentionally disregarded the Decedent's clearly expressed estate plan and knowingly probated a testate estate as intestate. (Appendix 186-254 and 179). This Court should not allow Debbie to hide behind inapplicable statutory provisions and inapplicable precedent to justify her actions in this case.

Additionally, the trial court did not err when it held that Debbie's act of probate constituted an objection to or contest to the Trust, as the statutory provisions for contesting a testamentary document are not the exclusive means to contest an estate. To contest a will it is not necessary to make a direct assault upon the entire instrument as "*any attack* which would defeat the purpose of the testator in the will comes within the clause working forfeiture." See generally Annotation, <u>What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary</u>, 49 A.L.R.2d 198 § 4 (1956) (emphasis added). Therefore, a forfeiture clause is violated not only by a direct contest or challenge instituted by the beneficiary but also by "voluntary conduct of the beneficiary

that amounts to an *indirect* contest or challenge." RESTATEMENT (THIRD) OF PROPERTY § 8.5 (comment e)(2003) (emphasis added).

Effectively, though Debbie did not employ the statutory methods of contesting the Decedent's estate plan, her action in probating the Decedent's estate as intestate was an attack that defeated the purpose of the Decedent as clearly expressed in his Trust. Thus, the trial court's finding that Debbie's conduct in probating the Decedent's estate as intestate resulted in forfeiture of her share should be upheld, because her conduct at least amounted to an indirect objection or contest to the Trust, and at most was a direct challenge, defeating the purpose of the Decedent's estate plan and Trust. (Appendix at 327).

Although Debbie later admitted at trial that she would consent to the Decedent's Will being probated so long as it was authenticated, her pre-trial actions of bypassing the Decedent's clearly stated intent, and falsely representing the nature of the estate to an officer of the Commonwealth still constitutes forfeiture, and withdrawing her protest at trial has no curative effect on her prior actions.

Even if a contestant to a testamentary document subsequently withdraws her objection and treats the will as valid, a contest has occurred.

Womble v. Gunter, 198 Va. 522, 529, 95 S.E.2d 213, 219 (1956). Further, a forfeiture clause has been violated regardless of "whether the action is subsequently withdrawn immediately after its institution, prior to a hearing, at the trial, or at any time thereafter." RESTATEMENT (THIRD) OF PROPERTY § 8.5 (comment d)(2003). Therefore, though Debbie acquiesced to the probate of the Will at trial, her actions in denying the Will and the Trust as the residuary beneficiary of the Will had already violated the clause and resulted in a forfeiture of her share.

II. THE TRIAL COURT CORRECTLY HELD, AFTER REVIEWING THE FACTS AND CIRCUMSTANCES OF THE CASE, THAT DEBBIE'S ACTIONS FELL WITHIN THE MEANING OF THE FORFEITURE CLAUSE AS WRITTEN.

The forfeiture clause contained in the Decedent's Trust is valid and enforceable and Debbie's actions fell squarely within its meaning. In Virginia, a condition against contesting a will or attempting to set it aside is generally held valid and enforceable. Womble v. Gunter, 198 Va. 522, 525, 95 S.E.2d 213, 216 (1956). Forfeiture clauses are generally enforced to effectuate the testator's legitimate interest in preventing attempts to thwart his intent. Virginia Foundation of Indep. Colleges v. Goodrich, 246 Va. 435, 438, 436 S.E.2d 418, 420 (1993). As will contests may bring "sorrow and suffering to many concerned...a clause of this nature may contribute to the

fair reputation of the dead and to the peace and harmony of the living." Womble, 198 Va. at 527, 95 S.E.2d at 217.

What activity or participation constitutes a forfeiture depends upon the "wording of the no-contest provision and the facts and circumstances of each particular case." Womble, 198 Va. at 529, 95 S.E.2d at 219; Goodrich, 246 Va. at 439, 436 S.E.2d at 420. The facts and circumstances of the case include the document itself, "as well as the pleadings and actions of the beneficiary." Goodrich, 246 at 439, 436 S.E.2d at 420. Therefore, it is for the trial court to determine based on the foregoing, whether or not the actions in each case at hand trigger the forfeiture clause at issue.

The forfeiture clause at issue in this case is contained in the Decedent's Trust addendum and provides "any person that objects to or contests any provision of this Trust, in whole or in part, shall forfeit his or entire distribution otherwise payable under this Trust ..." (Appendix at 251). Therefore, any objection or contest to any provision of the Trust, in whole or in part, constitutes a forfeiture of the contesting beneficiary's share. As the document is unambiguous, "no further evidence is needed to determine the meaning of the provision or the intent of the testator in making the

provision." Id. Therefore, the trial court must consider the facts and circumstances of the case, including the actions of the beneficiary, to determine whether a forfeiture occurred.

In this case, the facts and circumstances adduced at trial establish that Debbie went to Brenda's house and, in the presence of the Decedent, vehemently questioned his estate plan and testamentary documents. (Appendix at 168). Debbie then took the Decedent's original testamentary documents and made copies of the contents of the entire estate planning portfolio (Appendix at 169). After Debbie stated her adamant dismay at provisions of the Will and the beneficiary of the Will (the Trust), the Decedent added an addendum to his testamentary plan to provide for a forfeiture penalty to anyone who contested his testamentary plan. (Appendix at 251-254).

Debbie knew the location of the Will, informed the probate clerk that "Brenda had it," knew the named executor in the Will and the named beneficiary of the Will, however, she made no efforts to contact anyone in an effort to obtain the Will or to request any information as to the status of the Decedent's estate. (Appendix at 173, 175 and 176).

Thereafter, Debbie intentionally disregarded the Decedent's testamentary plan by probating his estate as intestate. Debbie was appointed administrator of the Decedent's estate and pursuant to Va. Code Ann. § 64.1-119, swore under oath that "the deceased has left no will, so far as he knows," knowing that the Decedent's will existed. (Appendix at 179). Debbie then began marshaling the Decedent's assets by inquiring as to the balances of the Decedent's accounts at his bank and visiting the Virginia Department of Motor Vehicles to determine ownership and titling of the Decedent's vehicle. (Appendix at 178-180).

In addition to defeating the entire Trust, the facts and circumstances of this case illustrate that Debbie's actions specifically thwarted particular provisions of the Decedent's Trust. The specific provisions that were thwarted by Debbie's actions include:

> (1) Article I: The purpose of this Trust is to reduce or eliminate probate costs to the extent possible while maintaining complete control of my assets. I wish to ultimately distribute my estate to members of my family in a prompt, orderly and private manner (Appendix at 198);
>
> (2) Addendum Four Paragraph 2: Joyce Purks' share shall be used first to pay off the loan on her behalf to Hollis Grant Keener before any distribution is made to her (Appendix at 248);

> (3) Addendum Four Paragraph 3: Hollis Grant Keener, Jr. Shall receive $6,000 before any other distributions are made to cover the cost of the Head Stone for his mother and myself (Appendix at 252); and
>
> (4) Addendum Four dated 10/30/2005 Paragraph 1: The Wachovia Bank Loan account on behalf of Clark Allen Keener shall be paid off from this person's share of the assets payable to him before any distribution is made to him (Appendix at 249).

The Decedent's intent to devise his property in accordance with his wishes is clearly stated in the foregoing Trust provisions. Certain beneficiaries were not to receive distributions from the Decedent's estate until debts or loans were satisfied from their respective shares. Under the laws of intestate succession, had the Decedent's bank account been funded and had the car not been titled in the name of the Trust, the Decedent's estate would have passed pursuant to Va. Code. Ann. § 64.1-1 to all the intestate's children equally. All beneficiaries would have received distributions regardless of the Decedent's clear intent that some beneficiaries not receive distributions until his or her debt or loan was satisfied. The Decedent's instructions were clear: his property was to pass to the Trust as the residuary beneficiary of his Will. (Appendix at 8).

Therefore, after considering the facts and circumstances in this case, the trial court did not err when it concluded that Debbie's act of probating

the Decedent's estate as intestate constituted a forfeiture of her share of the Trust.

CONCLUSION

For the foregoing reasons, the Appellees request that this Court dismiss this appeal and affirm the trial court's ruling.

Respectfully Submitted,

Hollis Grant Keener, Jr., *et al.*

By Counsel

Shelly R. Collette (VSB No. 74779)
PIRSCH & ASSOCIATES, PLLC
1307 Duke Street
Alexandria, Virginia 22314
(703) 548-5182 (Telephone)
(703) 548-5659 (Facsimile)
shelly@pirsch-law.net

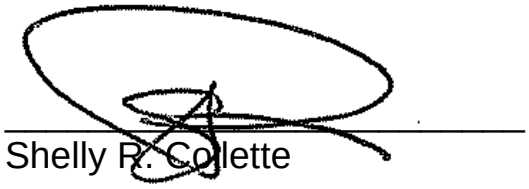
CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d), I hereby certify that:

1. The Appellee is Hollis Grant Keener, Jr., *et al.*, and Counsel for the Appellee is Shelly R. Collette, Pirsch & Associates, PLLC, 1307 Duke Street, Alexandria, Virginia 22314.

2. The Appellant is Debra Keener, and Counsel for the Appellant is Amy E. McCullough, Szabo, Zelnick & Erickson, PC, 12610 Lake Ridge Drive, Woodbridge, Virginia 22192.

3. Fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellees have been hand filed with the Clerk of the Supreme Court of Virginia, and three paper copies of the same have been served, via U.S. Mail, postage prepaid, this 1st day of May, 2009, upon Counsel for the Appellant.



Shelly R. Collette