In The

Supreme Court of Virginia

RECORD NO. 091023

CHRISTINE DOLBY,

***Appellant*,**

v.

CATHERINE DOLBY, *et al.*,

Appellees.

BRIEF OF APPELLEES CATHERINE DOLBY, KIMBERLY LAUTH, AND HEATHER DOLBY KHO

Ulka Patel Shriver (VSB No. 70234)
NEALON & ASSOCIATES, P.C.
119 North Henry Street
Alexandria, Virginia 22314
(703) 684-5755 (Telephone)
(703) 684-0153 (Facsimile)
upatel@nealon.com

Counsel for Appellees
Catherine Dolby, Kimberly Lauth, and Heather Dolby Kho

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 CITATIONS iii

STATEMENT OF THE CASE 1

RESPONSE TO QUESTIONS PRESENTED 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 4

PRINCIPLES OF LAW, ARGUMENT, AUTHORITIES 5

I. The appropriate standard of review is to affirm the trial court unless its determinations were made entirely without support from the evidence 5

II. The Trial Court did not err by honoring Mr. Dolby's testamentary directive assigning mortgages to realty, reading such a directive to concern extra-estate property, and allowing such a plan to clear his Estate of obligation for said mortgage 7

A. A Testator lawfully may invoke and execute a directive assigning his debts to his property rights 8

B. The Trial Court properly applied Mr. Dolby's directive to the subject property notwithstanding its passage outside of his estate 9

C. A Decedent's mortgage debt may be adjudicated not the obligation of his personal estate 13

D. Virginia courts are not required to exonerate, and in the case at hand find firm ground not to exonerate, extra-estate realty from encumbering mortgages 16

III. The Trial Court did not err in admitting and considering extrinsic evidence of Mr. Dolby's intent 19

CONCLUSION 21

CERTIFICATE OF SERVICE 23

TABLE OF CITATIONS

Page(s)

CASES

Baker v. Linsly,
237 Va. 581, 379 S.E.2d 327 (1989) 11

Baliles v. Miller,
231 Va. 48, 340 S.E.2d 805 (1986) 20

Board of Missions v. Brotherton,
178 Va. 155, 165 S.E.2d 363 (1941) 11

Brown v. Hargrove,
198 Va. 748, 96 S.E.2d 788 (1957) 14, 15

Collins v. Hartford Acci. & Indem. Co.,
178 Va. 501, 17 S.E.2d 413 (1941) 7, 8, 11

Conrad v. Conrad's Ex'r,
123 Va. 711, 97 S.E. 336 (1918) 7, 8, 14

Elliot v. Carter,
50 Va. 541 (1853) 15

Faison v. Union Camp Corp.,
224 Va. 54, 294 S.E.2d 821 (1982) 17

French v. Vradenburg,
105 Va. 16, 52 S.E. 695 (1906) 9

Gaymon v. Gaymon,
258 Va. 225, 519 S.E.2d 142 (1999) 9

In Re Estate of Vincent,
98 S.W.3d 146 (Tenn. 2003) 16, 17

Johnston Mem'l Hosp. v. Bazemore,
277 Va. 308, 672 S.E.2d 858 (2009) 5

Kellam v. Jacob,
152 Va. 725, 148 S.E. 835 (1929) 7, 13, 14, 15

Marcy v. Graham,
142 Va. 285, 128 S.E. 550 (1925) 7, 13

Miller v. Holland,
84 Va. 652, 5 S.E. 701 (1888) 17

Ott v. L&J Holdings, LLC,
275 Va. 182, 654 S.E.2d 902 (2008) 6

Owen v. Lee,
185 Va. 160, 37 S.E.2d 848 (1946) 17, 19

Simmons v. Gunn,
156 Va. 305, 157 S.E. 573 (1931) 6, 7, 8, 14

Vasilion v. Vasilion,
192 Va. 735, 66 S.E.2d 599 (1951) 18

Whitehurst v. White,
160 Va. 859, 169 S.E. 724 (1933) 11

Wornom v. Hampton, etc.,
144 Va. 533, 132 S.E. 344 (1926) 7, 13

STATUTE

Va. Code Ann. § 64.1-157.1(A) 9

OTHER AUTHORITY

Graves, Real Property, Section 151 18

STATEMENT OF THE CASE

Appellees Catherine Dolby, Kimberly Lauth, and Heather Dolby Kho (hereinafter referred to collectively as the “Dolby daughters”) have reviewed the Statement of Case delivered in Appellant Christine Greenlaw Dolby’s (hereinafter referred to as “Greenlaw”) petition. The exceptions referenced in their opposition to petition for appeal are taken by incorporation.

RESPONSE TO QUESTIONS PRESENTED

The Dolby daughters have reviewed the Assignments of Error and Questions Presented delivered in Greenlaw’s petition. The exceptions referenced in their opposition to petition for appeal are taken by incorporation.

STATEMENT OF FACTS

Mr. Dolby died testate on December 25, 2006 (App. 455). When he died, he owned considerable assets and maintained considerable debts on those assets. In his will, which was re-affirmed by way of execution of a codicil thereto in the months before his passing, Mr.

Dolby declared and directed that his executor shall not be required to pay any debt secured by mortgage or lien against real property, and such property shall pass subject to any encumbrances thereon (App. 466).

The real property at issue herein is 8404 Brookewood Court in McLean, Virginia (hereinafter referred to as the “subject property”). In June 2002, Mr. Dolby purchased this property and encumbered it with a purchase-money mortgage in his name alone (App. 457). Mr. Dolby and Greenlaw were married in January 2006 (App. 457). Thereafter, in August 2006, Mr. Dolby executed a deed granting the subject property from himself as sole owner to himself and Greenlaw as husband and wife and tenants by the entirety (App. 459, 598).

Mr. Dolby purchased one or more policies of insurance on his life to benefit and actually collected by Greenlaw, in the total amount of 3 million dollars (App. 204). Mr. Dolby had anticipated Greenlaw’s cost

of carrying the subject property and desired to fund the same (App. 181-182).

Mr. Dolby cared deeply for his three daughters, born of his first wife of many years, who predeceased him (App. 143, 162). Around their mother’s passing, Mr. Dolby established and maintained a trust for their benefit (App. 143).

In the months before his death, at a time when his estate eventually would be responsible for repaying his daughters’ trust for Mr. Dolby’s lifetime loans (App. 144), Mr. Dolby reduced the outright bequests previously made to his daughters. However, as the Estate has complained, if Mr. Dolby’s estate should be charged with the payment of a mortgage against the subject property inherited by Greenlaw, the estate would become insolvent, practically speaking, and would not be able to repay his loans to his daughters’ trust.

SUMMARY OF ARGUMENT

Greenlaw assigns error to the trial court's acceptance of a will's clause assigning debts to property encumbered (Asst. 4), allowing it to effect assignment of debt to property passing by operation of law (Asst. 3), and thereby ruling that a mortgage was not an obligation of or to be paid from the estate (Asst. 1) and refusing to exonerate the realty from its mortgage (Asst. 2). Virginia law is replete with opinions supporting a court's duty to regard testamentary intent as a trump over standard estate accounting rules, and Mr. Dolby's intent was that the subject property pass together with its mortgage. Also, Virginia law has live liens run with land and refuses exoneration for surviving tenants, so Greenlaw has no right of exoneration. Therefore, the trial court did not err as charged.

Furthermore, Greenlaw assigns error to the trial court's admittance of extrinsic evidence of the testator's intent allegedly without a finding of

ambiguity and finding that said evidence established intent to assign a mortgage to realty. Ambiguity is ever-present in this case, in the applicability and effect of testamentary words and by the need to equivocate between competing readings of the same. Also, Greenlaw is limited by the scope of her trial counsel's objections.

For these reasons, the trial court's ruling should be affirmed.

PRINCIPLES OF LAW, ARGUMENT, AUTHORITIES

I. The appropriate standard of review is to affirm the trial court unless its determinations were made entirely without support from the evidence.

Greenlaw contends that five of her assignments of error present questions of law, and therefore they should be reviewed *de novo*. Under *Johnston Mem'l Hosp. v. Bazemore*, this review is reserved for instances presenting pure questions of law. *Johnston Mem'l Hosp. v. Bazemore*, 277 Va. 308, 311, 672 S.E.2d 858, 859 (2009). However, in this matter there are no determinations amounting to pure issues of law. The

relevant law clearly refers to a testator's intentions, which in turn are determined by findings of fact.

In *Simmons v. Gunn*, this Court stated as follows:

> While decided cases are helpful, they are not necessarily controlling because no two wills are alike; the words are different; the surrounding circumstances may be different; so that it may be truly said that each will is a law unto itself." *Simmons v. Gunn*, 156 Va. 305, 308, 157 S.E. 573, 574 (1931).

Therefore, it follows that each determination made by the trial court was with consideration of the law but also with full regard for the will at hand and other relevant facts and circumstances. A careful discernment of questions of law is prerequisite, but Greenlaw has failed to take this measure. Therefore, the appropriate standard of review should be to affirm the trial court unless its determinations were made entirely without support from the evidence. *Ott v. L&J Holdings*, LLC, 275 Va. 182, 187, 654 S.E.2d 902, 905 (2008).

II. The Trial Court did not err by honoring Mr. Dolby's testamentary directive assigning mortgages to realty, reading such a directive to concern extra-estate property, and allowing such a plan to clear his Estate of obligation for said mortgage.

It is widely regarded that the intent of the testator shall serve to guide administration of his estate whenever the letter of the law or his own testamentary documents presents ambiguity or conflict. *Conrad v. Conrad's Ex'r*, 123 Va. 711, 716, 97 S.E. 336, 338 (1918); *Marcy v. Graham*, 142 Va. 285, 128 S.E. 550 (1925); *Wornom v. Hampton, etc.*, 144 Va. 533, 541, 132 S.E. 344, 347 (1926); *Kellam v. Jacob*, 152 Va. 725, 731, 148 S.E. 835, 837 (1929); *Simmons* at 308; *Collins v. Hartford Acci. & Indem. Co*. 178 Va. 501, 511, 17 S.E.2d 413, 417 (1941). In *Conrad*, this Court held "The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills". *Id*. at 716.

Greenlaw assigns error to the trial court's acceptance of a will's clause assigning debts to property encumbered (Asst. 4), allowing it to effect

assignment of debt to property passing by operation of law (Asst. 3), and thereby ruling that a mortgage was not an obligation of or to be paid from the estate (Asst. 1) and refusing to exonerate the realty from its mortgage (Asst. 2). These assignments lack merit.

A. A Testator lawfully may invoke and execute a directive assigning his debts to his property rights (Response to Asst. 4).

The first reference to a testator's intent is made to any express language in his will. *Conrad* at 716; *Simmons* at 308; *Collins* at 511.

Mr. Dolby's will reads "My Executor shall not be required to pay prior to maturity any debt secured by mortgage, lien or pledge on real or personal property owned by me at my death, and such property shall pass subject to such mortgage, lien or pledge" (App. 466). This is the only written testamentary instruction Mr. Dolby made regarding responsibility for his mortgage debt.

The Virginia Code, in Va. Code Ann. § 64.1-157.1(A), provides the following express basis for this clause:

> Unless a contrary intent is clearly set out in the will, a specific devise or bequest of real or personal property passes subject to any mortgage, pledge, security interest, or other lien existing at the date of death of the testator, without the right of exoneration.

This Court has supported a testator's direction as to debts following encumbered property. *Gaymon v. Gaymon*, 258 Va. 225, 234, 519 S.E.2d 142, 146 (1999). Furthermore, this Court has ruled to permit consideration of "the effect of the will of a testator as a whole" and assign a mortgage to realty as it passes *cum onere*. *French v. Vradenburg*, 105 Va. 16, 20-21 (1906).

B. The Trial Court properly applied Mr. Dolby's directive to the subject property notwithstanding its passage outside of his estate (Response to Asst. 3).

Mr. Dolby's will explicitly availed this method of administration, but in doing so did not limit the reference to estate property. May this instruction

stand only for bequests made by will or also for those made in the manner of gift grants that would vest upon the testator’s death? And, may it stand to address property that would have passed by will at the time of the will’s drafting but later came to pass by operation of law absent a change in testamentary intent? In the face of these essential queries, Mr. Dolby’s will does present ambiguity and beg for consideration of testamentary intent.

The terms of Mr. Dolby’s will suggest he intended his Article 1.3 instruction to affect all realty and respective mortgages. This clause comprised his only express instruction regarding mortgages, and following his later conveyance of the subject property to himself and Greenlaw as tenants by the entirety, he never amended this provision.

Furthermore, circumstances surrounding Mr. Dolby at the time his will was drafted and estate plan was formed clearly indicate his intent was that the mortgage would pass with the subject property.

In *Baker v. Linsly*, this Court held as follows:

> [A] court construing a will must, if it can, determine the testator's intent from the language of the will itself. If in doubt, the court must place itself in the position of the testator at the time the will was drafted, and must consider the surrounding facts and circumstances as they then appeared to the testator. Such a consideration is aided by the presumption that a testator, when drafting his will, knows what he owns and what he owes.
>
> *Baker v. Linsly*, 237 Va. 581, 585, 379 S.E.2d 327, 329 (1989). See also *Whitehurst v. White*, 160 Va. 859, 866, 169 S.E. 724, 726 (1933); *Collins* at 511; *Board of Missions v. Brotherton*, 178 Va. 155, 162, 165 S.E.2d 363 (1941).

When Mr. Dolby executed his will, the subject property was to pass by his estate and therefore clearly subject to Article 1.3. (App. 182). Furthermore, his estate planning counsel testified Mr. Dolby anticipated Greenlaw would bear costs of carrying the subject property, and desired to provide for the same through bequest or insurance (App. 181-182). The record goes on to bear Greenlaw's admission that Mr. Dolby did maintain and she did collect said life insurance in the aggregate amount of the last appraised value of the subject property Mr. Dolby obtained before

his death, each policy being in the amount of the original mortgage principal (App. 204-205). Therefore, a reading of Article 1.3 to direct assignment of the subject property's mortgage to its realty is supported not only by the plan Mr. Dolby established with the execution of his will and larger estate plan but also by the elements of title passage and insurance payouts have transpired.

Addressing the balance of Mr. Dolby's concerns, the record includes Mr. Dolby's daughter Kimberly's testimony that she had no reason to believe her father ever intended to disinherit her and her sisters, stymie repayments to the trust he created in fond memory of his first wife and their mother, or otherwise render his estate insolvent (App. 143-146). Therefore, a reading of Article 1.3 to preserve his personal estate is supported not only by his planning under the counsel of his estate attorney but also by his relationship with his daughters and regard for their trust.

In considering these and other facts and circumstances as Mr. Dolby mapped his estate plan and ratified his will, trusting his knowledge of assets and debts, the only logical conclusion is that Mr. Dolby intended for his second wife to take the property and its mortgage.

C. A Decedent's mortgage debt may be adjudicated not the obligation of his personal estate (Response to Asst. 1).

Greenlaw cries that to permit Mr. Dolby such discretion runs contrary to law. The Dolby daughters disagree. First, a testator's will and intent are vested with great authority that trumps general law. In *Marcy*, this Court held as follows:

> All of the refinements of the law must yield to the power of the testator to dispose of his property as he desires. When this intention, which is the guiding star, is ascertained and can be made effective, the quest is ended and all other rules become immaterial.

See also *Wornom* at 541; *Kellam* at 731.

Second, while it is established that a beneficiary designation or joint titling with right of survivorship passes property in a manner that trumps contrary

instructions in a will, it is not established that a will is prohibited from controlling the association of a mortgage debt with extra-estate property. Testamentary intent should guide whenever no explicit rule of law presents an obstacle. *Conrad* at 716; *Kellam* at 731; *Simmons* at 308.

Third, the testamentary intent captured by a will may be taken in the broader sense and be given effect in the larger planning and administration of a decedent's estate. In *Conrad*, this Court held that a will is to be examined "so as to ascertain the general plan and purpose of the testator." *Id*. at 716.

Greenlaw offers citations from case law prioritizing classes of estate obligations and assigns error to the trial court's willingness to "shift" debt from the personal estate of a decedent to extra-estate realty. The Dolby daughters offer two grounds of support for the trial court's ruling in this regard.

In *Brown v. Hargrove*, this Court recognized as established principle that the general rule providing a

decedent's should be paid from his estate applies only "in the absence of a contrary testamentary direction." *Brown v. Hargrove*, 198 Va. 748, 750, 96 S.E.2d 788, 790 (1957). This Court clearly orders testamentary intent over general law in this context.

Furthermore, in *Kellam*, this Court held that a testator may direct deviation from default rules for funding debts. *Id*. at 731. After considering the general priority of funding established in *Elliot v. Carter*, 50 Va. 541 (1853), this Court then stated as follows:

> While it is a general rule of law that personalty is not only the primary but the only fund for the payment of debts and legacies, unless they are charged upon the realty by express direction or by necessary implication, the general rule is not to be applied in the construction of a will when to do so will defeat the manifest intention of the testator.
>
> *Kellam* at 731.

As stated above, testamentary intent shall stand unless explicit rule of law presents an obstacle. Virginia law does not prohibit a will from controlling the charge of a mortgage debt upon a beneficiary

inheriting or assuming full ownership of extra-estate property, and therefore a testamentary instruction of this type should be given effect through an estate's authority to honor directives prioritizing debt payment.

D. Virginia courts are not required to exonerate, and in the case at hand find firm ground not to exonerate, extra-estate realty from encumbering mortgages (Response to Asst. 2).

In jurisdictions such as Virginia that provide the legal mechanism of exoneration, when cases similar to this have been considered, the court's standing to refuse exoneration has been emphasized.

In *In Re Est. of Vincent*, 98 S.W.3d 146 (Tenn. 2003), the Tennessee Supreme Court considered a testamentary directive to pass realty together with encumbrances and its applicability to a piece of realty that had been conveyed by the testator as sole owner to himself and his nephew as joint tenants with the right of survivorship. The Tennessee court found that the directive did apply to that realty notwithstanding its passage to a surviving tenant because the common law

right of exoneration shall not operate to free property when a will directs all property to pass as encumbered. *Id.* at 148. Furthermore, the court found that the common law right of exoneration does not apply to realty passing by right of survivorship. *Id.* at 149.

This jurisprudence is supported by Virginia's established principle that a lien running with land remains an encumbrance even absent a basis for personal liability of the grantee, and a grantee to encumbered property takes with knowledge of and responsibility for the same. *Miller v. Holland*, 84 Va. 652, 654, 5 S.E. 701 (1888); *Owen v. Lee*, 185 Va. 160, 166, 37 S.E.2d 848, 851 (1946); *Faison v. Union Camp Corp.*, 224 Va. 54, 60-61 294 S.E.2d 821 (1982).

In the case at hand, the subject property passed from Mr. Dolby the sole owner, bearing a mortgage undertaken by himself as sole owner and borrower, to Mr. Dolby and Greenlaw *as husband and wife and tenants by the entirety*.

As a matter of law, “tenants by the entirety” indicates not two distinct individuals owning but rather one union owing, and courts have held that this union is a third entity unto itself. In the *Vasilion* case, this Court held as follows:

> [A]t common law when land was conveyed to a man and wife the seisin of each was an entirety or in one person because from the unity of their person by marriage they have land entirely as one individual. *Vasilion v. Vasilion*, 192 Va. 735, 739, 66 S.E.2d 599, 601 (1951), referencing Graves, Real Property, Section 151, page 180.

The passage continued to say that “on the death of either husband or wife survivorship takes place between tenants by entireties.” *Id*.

Neither did Mr. Dolby re-affirm the existing mortgage debt as his own as husband and joint owner of the property, nor did Greenlaw assume obligations as a co-borrower. Therefore, when Mr. Dolby, a married man, died and the subject property passed by operation of law to Greenlaw, the encumbrance then existing against the subject property was a pre-existing debt never

assumed by the current owners, and under *Owen* reasoning, ran with the subject property.

III. The Trial Court did not err in admitting and considering extrinsic evidence of Mr. Dolby's intent (Response to Asst. 6).

As set forth above, Virginia law provides that extrinsic evidence may be engaged to more fully consider that which a testator sets onto the parchment of his testamentary documents. Greenlaw assigns error to the trial court's admittance and consideration of extrinsic evidence of Mr. Dolby's testamentary intent when, Greenlaw alleges, the trial court made no finding of ambiguity in relevant language of his will.

Ambiguity within the text of a will itself is not a necessary predicate for consideration of extrinsic evidence. In addition, in a case requiring equivocation, when two competing concepts are articulated equally well, extrinsic evidence of the testator's statements of testamentary intent, whether regarding what he intends for the disposition of his estate or regarding the meaning of the words he

selected for his will, are admissible to resolve the equivocation. *Baliles v. Miller*, 231 Va. 48, 57, 340 S.E.2d 805, 810 (1986).

In the case at hand, an examination of the testator's intent is required to resolve to resolve an equivocation involving a clearly requested and executed statement in his will – that the beneficiary of property be charged with the obligations associated therewith – and the speechless operation of law when family property he came to share with his second wife as tenants by the entirety was inherited by her.

Greenlaw only objected to the trial court's consideration of extrinsic evidence of Mr. Dolby's intent when Kimberly Lauth was asked to testify regarding her family's relationship and her understanding of Mr. Dolby's interest in caring and providing for herself, her sisters, and their children. This objection was limited to an objection on the grounds of soliciting an "opinion" and "speculation" and of relevancy, and did not further cover Kimberly

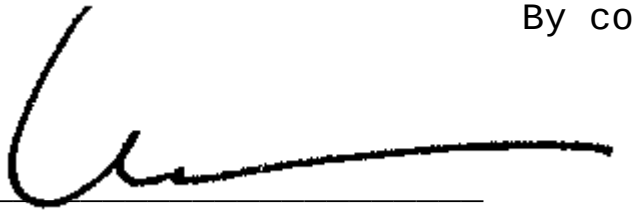
Lauth’s testimony regarding what her father had declared. The trial court overruled both objections and heard Kimberly Lauth’s testimony, ultimately finding that such testimony offered credible support for Mr. Dolby’s testamentary intent as submitted herein.

CONCLUSION

Although this was a novel matter under Virginia case law, both jurisprudence and the relevant facts support the trial court’s carefully considered and equitably rendered opinion. If such a ruling is not affirmed, then the result will be windfalls to surviving tenants, frustration to estates and their beneficiaries, and further collection challenges to mortgagees in this already fragile economy. Furthermore, our regard for testamentary intent and rule of liens will be upheaved.

For the reasons stated herein, The Dolby daughters respectfully petition this Honorable Court to affirm the opinion of Judge Robert Smith and the ruling of the Circuit Court of Fairfax County in this matter.

Respectfully submitted,
Catherine Dolby
Kimberly Lauth
Heather Dolby Kho
By counsel



_____

Ulka Patel Shriver, Esq. (VSB No. 70234)
NEALON & ASSOCIATES, P.C.
119 North Henry Street
Alexandria, Virginia 22314
Telephone: (703) 684-5755
Facsimile: (703) 684-0153
upatel@nealon.com
Counsel for the Appellees of the First Part

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November, 2009, fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Brief of Appellees Catherine Dolby, Kimberly Lauth, and Heather Dolby Kho have been hand-filed with the Clerk of the Supreme Court of Virginia, and that three (3) paper copies of the same have been served, via U.S. mail, postage prepaid, to each among the following, in compliance with Supreme Court of Virginia Rule 5:26(d):

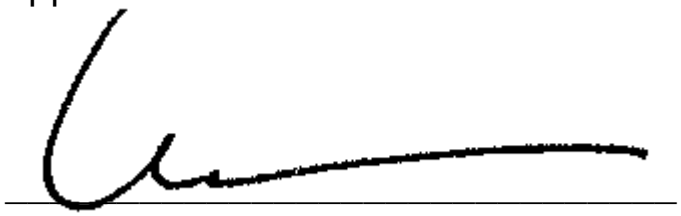
Robert Cunningham, Jr., Esq.
John Boland, Esq.
Stephen Charnoff, Esq.
REES BROOME, P.C.
8133 Leesburg Pike, Ninth Floor
Vienna, Virginia 22182
Counsel for Christine Greenlaw Dolby
Appellant

Kimberley Ann Murphy, Esq.
HALE CARLSON PENN, PLC
10511 Judicial Drive
Fairfax, Virginia 22030
Counsel for the Estate of Cornelius A. Dolby, et al.
Appellee of the Second Part

Stacey Coppola
653 Perimeter Road
Downingtown, Pennsylvania 19335
Pro Se
Appellee

Erin Benz
2102 North Lakeshore Drive
Louisa, Virginia 23903
Pro Se
Appellee

Galen Greenlaw
756 South Lakeshore Drive
Louisa, Virginia 23903
Pro Se
Appellee



Counsel