In The

Supreme Court of Virginia

RECORD NO. 091023

CHRISTINE DOLBY,

Appellant,

v.

CATHERINE DOLBY, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The trial court reached its conclusion that the mortgage debt in issue was not payable from the decedent Cornelius Dolby's personal estate assets but instead that the family home which secured payment of the debt would pass by survivorship to Mrs. Dolby subject to the debt by its interpretation that Article 1.3 of Mr. Dolby's last Will applied to debts secured by property which did not pass under his Will. App. 608-609. The Dolby daughters acting together ("Dolby daughters") and the Executors of the Estate of Cornelius A. Dolby and the Trustees of the Cornelius A. Dolby Trust acting together (the Executors and Trustees together the "Fiduciaries"[1]) each have filed a brief in opposition to Mrs. Dolby's appeal brief. Mrs. Dolby submits her Reply to elements of the arguments made by the Dolby daughters and the Fiduciaries.

Summary of Argument

Both appellee briefs in one form or another acknowledge the general proposition that intent of the testator is the key to the administration of the decedent's estate, but neither has offered any analysis of the applicable

[1] The standing of the Fiduciaries on appeal remains an issue for this Court to consider. The Fiduciaries have taken a position in support of one side of an issue that impacts the beneficiaries as the only aggrieved parties, and in doing so are consuming valuable estate assets to the detriment of Mrs. Dolby. Standing is a legal issue that this Court may raise sua sponte at any time.

portions of Mr. Dolby's Will from where the relevant intent of the testator is to be determined and upon which the trial court premised its rulings, and neither has offered any analysis of whether the intent they allege, even if they are correct, is enforceable under Virginia law. As Mrs. Dolby pointed out in her opening brief, an intent to exonerate the personal estate of Mr. Dolby from payment of the mortgage debt and to de facto shift it to Mrs. Dolby as a charge against property not passing under the will has no basis in law and would not be enforceable.

Moreover, however, neither has even articulated any alleged ambiguity in Mr. Dolby's Will and neither has even contested Mrs. Dolby's analysis and interpretation of the debt payment provisions in Article 1.3 of the Will presented in her appellant's brief filed herein.[2] The Dolby daughters seem to think that contrary arguments about the meaning of a will constitute an ambiguity or even an equivocation. The Fiduciaries do

[2] Article 1.3 of the Will states Mr. Dolby's primary direction that all his enforceable debts (which includes the mortgage debt in dispute) be paid from his personal estate. It then provides a limited exception (not applicable to the mortgage debt) for debts secured by property that he owned at his death and that pass under his will (i.e., an estate of inheritance), and in such latter event those property interests are to pass subject to the debt and be satisfied from his real estate passing under his Will. That latter provision does not even apply to the mortgage debt since the marital home was not an estate of inheritance owned by Mr. Dolby but rather a property jointly owned as tenants by the entirety with survivorship with Mrs. Dolby, and it did not pass under his Will but instead passed by operation of law outside the will.

not even allege any ambiguity in the Will but argue instead, for the first time, that it is the underlying deed under which Mr. Dolby conveyed the secured property to himself and Mrs. Dolby as tenants by the entirety with survivorship that contains an ambiguity in the phrase “subject…to matters visible upon inspection.”

Likewise, both failed to address the fundamental principle of Virginia law that it is the nature of the underlying debt that determines whether the debt is payable by the estate, that if the decedent was personally liable then the debt is payable by the decedent’s estate. Instead, both have cited authorities that do not support the legal principles asserted or are foreign law that is at odds with Virginia law and inapposite to the instant case.

Virginia law simply does not provide what the appellees would like it to be, and that is the real nub of their argument. This Court, however, has consistently deferred to the Legislature for the revision of long standing common law, and the appellees’ concerns remain now for the Legislature to address should it deem proper to do so.

ARGUMENT AND AUTHORITIES

I. APPELLEES POINT TO NO AMBIGUITY IN MR. DOLBY'S WILL AND DO NOT EVEN CHALLENGE MRS. DOLBY'S INTERPRETATION OF THE WILL THAT THE MORTGAGE DEBT IS IN FACT PAYABLE BY MR. DOLBYS' PERSONAL ESTATE TO THE EXONERATION OF THE JOINTLY HELD PROPERTY WHICH PASSED TO MRS. DOLBY BY SURVIVORSHIP.

While the Dolby daughter and the Fiduciaries both acknowledge the importance of the testator's intent in their common citation to Conrad v. Conrad's Executor, 123 Va. 711, 97 S.E. 336 (1918), they then proceed to ignore both what he actually provided in his will regarding payment of "all legally enforceable debts" and the fact that "[t[he primary consideration and rule of interpretation is to determine the intention of the testator *from the language which he has used*." Turner v. Reed, 258 Va. 406, 409, 518 S.E.2d 832, 833 (1999). (Emphasis added). Neither brief makes any attempt to analyze the applicable provisions of Article 1.3 of Mr. Dolby's will, nor does either dispute or even address the analysis provided by Mrs. Dolby of that language. To the contrary, both briefs essentially concede that there is no ambiguity in Mr. Dolby's Will as well as Mrs. Dolby's interpretation of Article 1.3.

The brief of the Fiduciaries (at 15) acknowledges that lack of ambiguity, and thus the concurrent correctness of Mrs. Dolby's analysis of the Will terms, with its statement that "*[b]ecause the Brentewood Property*

became Christine's immediately upon Al's death, it follows that the language in the Will does not necessarily control." The language in the Will being referred to was Article 1.3 upon which the trial court premised its rulings. Instead, however, the brief of the Fiduciaries asserts that while there is no ambiguity in the Will there is nonetheless a "slight ambiguity" in Mr. Dolby's deed in which he conveys the family home to himself and Mrs. Dolby as tenants by the entirety, to be found in the language that the conveyance is "subject to…matters visible upon inspection." See Fiduciary Brief at 15 ("slight ambiguities" and "the ambiguity in question lies in the Brookewood TBE deed"). The Fiduciaries, however, then offer no interpretation of that phrase at all and suggest no actual ambiguity, but they simply posit of the questions "[w]hat does the phrase…mean?" and "how does that document operate with the Will and Trust?"[3] See Fiduciary Brief at 18.

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[3] It is not clear what the Fiduciaries infer in this alleged ambiguity. Matters "visible to inspection" normally refer to matters which a buyer or other transferee may determine from a visual inspection of the property. If, however, the fiduciaries mean to suggest that a visual inspection of the land records of Fairfax County would lead to Mrs. Dolby discovering the deed of trust, then while that may be true it is also a fact that Mrs. Dolby would have discovered in the deed of trust that Mr. Dolby personally and solely committed to payment of the mortgage debt, and she thus would have had no notice that upon Mr. Dolby's death she would be expected to take the property by survivorship with no obligation of his estate to satisfy any part of the debt. See Washington Mutual deed of trust, App. 541-563, at 541, and at 544, ¶ 1.

No such argument, however, was raised at trial or in any brief by he Fiduciaries prior to this appeal brief, and the trial court, moreover, gave no indication whatsoever that it found or considered as relevant any such argument. However, the Fiduciaries then argue that it was this "ambiguity" for which the trial court accepted extrinsic evidence and was the basis for its conclusion as to Mr. Dolby's intent regarding the mortgage debt. Brief at 12 ("*such [extrinsic] evidence was not admitted in aid of interpreting the Will…[but] was relied upon by the trial judge in ascertaining whether to exonerate the [mortgage debt] with Al's personal estate*.") Despite the total absence of any indication that any such review was made by the trial court, an even cursory examination of the deed language, however, demonstrates that the argument has no merit.

As an initial matter, it is relevant that the deed itself does not make the conveyance to be subject to any obligation for the mortgage debt during life or at Mr. Dolby's death. Had Mr. Dolby so intended, as the appellees claim was his clear intention, he could have simply made such a provision in the deed, but he did not. That he did not indicates that he in fact had no such intention. However, the Fiduciaries suggest further that the language in Article 1.3, which they now admit is not ambiguous and "does not necessarily control" the mortgage debt, is somehow "instructive" (Brief at

17) in determining Mr. Dolby's intent in his deed executed prior to his execution of his Will. That assertion itself is pure speculation, particularly so in the context that Mr. Dolby took separate action to convey the family residence directly to Mrs. Dolby for her direct and sole benefit and thereby to keep it from passing to his trust, and there is no reason, other than this speculation, to suggest that he did not equally intend to have the mortgage debt paid by his estate. To the contrary is the language of the Will which provides for payment of the debt.

Moreover, the applicable language of the deed "subject…to matters visible from inspection" can only reasonably refer to an inspection of the property itself that would reveal matters by examination that do not appear in the documents of record, such as an encroachment or a use easement not of record. There is nothing ambiguous about the provision, and certainly nothing in its language to suggest that it in any matter was meant to refer to the mortgage debt.

As to the Dolby daughters, the only "ambiguity" they suggest is that each side asserts a different view of the meaning of the language in the Will, and that those differing views amount to an equivocation that the court is entitled to determine and receive extrinsic evidence to aid in that determination. See Brief at 5 ("*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.") and at 19-20 ("*Ambiguity…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…are admissible to resolve the equivocation*.") Neither constitutes an ambiguity or an equivocation.

There is no basis, therefore, to put the Will in dispute when the language is clear that the mortgage debt does not come within the debt exception language of Article 1.3, and this Court should follow the language of Mr. Dolby as he wrote it to determine his applicable intent that the mortgage debt is a personal debt obligation that is payable by his estate.

II. APPELLEES IGNORE THE FUNDAMENTAL PRINCIPLE OF VIRGINIA LAW THAT THE PERSONAL DEBT OBLIGATIONS OF A DECEDENT ARE PAYABLE FROM THE DECEDENT'S ASSETS PASSING UNDER HIS WILL, PRIMARILY AND IN THE FIRST INSTANCE FROM HIS PERSONAL ESTATE OR OTHERWISE AS THE DECEDENT MAY DIRECT.

The appellees simply do not address the fundamental principle that it is the nature of the debt which controls whether or not the estate is obligated in regard to a debt of a decedent or that is a lien charge against his property, and that if the decedent is personally obligated then his estate is obligated to satisfy the debt. See Brown v. Hargraves, 198 Va. 748, 751-

752, 96 S.E.2d 788, 791 (1957) ("Where the obligation to pay the debt is personal…it is the nature of the obligation which controls).

Instead, the appellees attempt to confuse the issue with mischaracterization of Mrs. Dolby's argument and with inappropriate citations to cases such as Gaymon v. Gaymon, 258 Va. 225, 519 S.E.2d 142 (1999), which properly recognize, as does Mrs. Dolby as clearly set forth in her opening brief, that the decedent can charge specific assets passing under his will with his debts or particular debts, "*cum onere*" as the appellees state it. Mrs. Dolby, for example, never argues that *cum onere*, per se, is against public policy as the Fiduciaries allege (at Brief 33). She does argue that it is not a proper holding in this case to charge the debt against property passing outside his Will since Mr. Dolby did not direct such a result under his will and regardless that had no authority in his will to do so.

The fact is that the appellees have no authority to support their position that the personal estate of Mr. Dolby is to be exonerated from the obligation of the mortgage debt, and much of the law they rely upon for the principles they assert in fact provides the opposite. The most egregious examples follow.

A. French v. Vradenburg is not authority that property subject to a debt passes at death subject to the debt unless the testator directs otherwise.

Both appellee briefs assert various cases as standing for the proposition, as stated by the Fiduciaries at page 17 of their brief, that

"This Court has upheld the following principle:

> "when a testator shall die seized of mortgaged property, and shall not by his will or deed have signified a contrary or other intention, lands devised subject to a mortgage or other equitable charge, including a vendor's lien, are primarily chargeable therewith, and such devisee is not entitled to have the mortgage debt discharged or satisfied out of the personal estate."

French v. Vradenburg, 105 Va. 16, 18, 52 S.E. 695, 695 (1906).

French, however, in fact does not support that claimed "principle" at all. The quoted language is from a portion of the opinion where this Court explained the law of England as opposed to the law of Virginia, and in doing so rejected the quoted claimed "principle" altogether as contrary to the long established principles of Virginia law enunciated in Elliott v. Carter, 50 Va. 541, 9 Gratt. 541 (1853), that Mrs. Dolby discussed at length in her opening brief. This Court in French reaffirmed the rule of Elliott v. Carter that in the absence of an express charge in a will, the personal estate of a decedent constitutes the "natural primary fund for payment of debts." Supra, 105 Va. at 18, 52 S.E. at 695.

The quoted "principle" above was actually the recitation of how a legislative Act in England, the Lock King's Act, changed the common law rule in that country to the "principle" quoted, an act that had not been done in Virginia and was not done until the Virginia legislature made a comparable legislative change a hundred years after French was decided by adoption of Va. Code § 64.1-157.1, effective July 1, 2007, relating to secured property passing under a decedents' will, a provision that has no application to the instant case. This Court stated immediately prior to that quotation as follows:

> "Since the opinion of Judge Lee, in Elliott v. Carter, 50 Va. 541, 9 Gratt., 541, which was delivered more than half a century ago, wills have been written and estates administered on the faith of that decision throughout the Commonwealth; and if it, and the decisions of this court have followed it, are to be overruled, it should be done by act of the Legislature, and not by the courts. That course was pursued in England by Lock King's Act…"

105 Va. at 17-18, 52 S.E. at 695.

In like manner, the Fiduciaries quote French again (Brief at 26) as the rationale for the claimed principle quoted by them above (Brief at 17). That rationale, however, likewise was simply the rationale for the law adopted in England, not the law of Virginia still then in effect. All in all, French

supports the position of Mrs. Dolby, not that of the Dolby daughters or the Fiduciaries.

B. The decision of the Tennessee Supreme Court in In Re Estate of Vincent is not consistent with longstanding Virginia law.

Both briefs cite In Re Estate of Vincent, 98 S.W.3d 146 (Tenn. 2003) as persuasive authority for this Court to follow, and in fact the Fiduciaries urge the Court to adopt the rationale of that case, stating that "The law of Virginia is on a par with the law used and relied upon by the Tennessee Supreme Court." See Fiduciary Brief at 29. The Dolby daughters make a similar assertion in their brief at 17. Those assertions are not correct.

The Virginia cases cited by the appelless as consistent with the result in Vincent, including Daniel v. Leitch, 54 Va. (13 Gratt.) 195 (1856), and Miller v. Holland, 84 Va. 652, 5 S.E. 701 (1888), do not support Vincent in any manner. As to the matters cited in the Fiduciaries' Brief (at 20), Daniel deals with a different issue in the portions cited than does the instant case. Mr. Daniel had purchased a parcel of real property encumbered by a deed of trust to secure a debt existing at the time of purchase but for which he had no personal liability to the lender. Mr. Daniel died. The issue was whether his personal estate was liable to pay the debt. This Court determined that it was not, that the land itself which secured the debt "was

the primary fund for the payment of the debt." 54 Va. at 206. This case follows and supports the primary Virginia rule that personal liability determines the obligation to pay a debt, the rule that the appellees wish this Court to ignore.

Likewise, Miller provides no support for the Vincent case. In Miller, a decedent's widow sold a part of decedent's real property that was encumbered by a mortgage debt, and later another portion of the land, in both cases with the mortgage yet unpaid. The second purchaser paid the debt and sought reimbursement from the estate. This Court rightfully ruled that such a purchaser for value took subject to the debt. Miller is totally inapposite to the issue at hand.

Another case cited by the Dolby daughters, Owen v. Lee, 185 Va. 160, 37 S.E.2d 848 (1937), for support of Vincent, is equally inapposite for that purpose. To the contrary, this Court in Owen held that an existing deed of trust debt upon purchase of a property by the decedent was payable by the decedent's personal estate and did not pass with the real estate because the decedent had become personally liable to the lender for the debt.

The latter principle has been the premier guiding principle in Virginia in all recorded cases. It applies to property passing under a will and to

property passing outside the will, and in either case if the decedent was personally obligated on the debt his estate was charged with payment of the debt to the exoneration of the property which secured payment of the debt. Perhaps the most dramatic example is the case of Pickett v. Spain, 254 Va. 107, 487 S.E. 233 (1997), in which the decedent directed that his estate not pay any part of a joint mortgage debt secured by the husband and wife's personal residence that passed to the wife by survivorship. On the basis that the decedent was personally obligated on the debt, this Court held that his estate was obligated to pay his share of the debt.

These principles were dealt with extensively in Mrs. Dolby's opening brief and need not be restated in any additional detail. Clearly, however, Tennessee has no such comparable historic jurisprudence, and the reasoning in Vincent should not be adopted.

Both the rulings of the trial court and the brief of the Fiduciaries claim to know Mr. Dolby's estate plan, but both ignore that clear fact that the estate plan he adopted, not just the one he may have been considering, was directed to providing for his wife as his priority beneficiary. There is nothing inconsistent in his providing that the mortgage debt would be paid from his estate, and there is nothing unfair about it since he had no obligation under the law to anyone other than Mrs. Dolby to provide any

benefit. "It is the duty of the court to construe the will which the testator has made and not to speculate as to his intentions, or to make a will for him." Jackson v. Fidelity and Deposit Insurance Company, 269 Va. 303, 310, 608 S.E.2d 901, 904 (2005). The trial court set aside the plain, clear intent of Mr. Dolby in Article 1.3 of his Will and effectively re-wrote those terms. The trial court's rulings are erroneous and should be set aside.

CONCLUSION

For the reasons stated in her opening appellant's brief and for the additional reasons stated hereinabove, Christine Dolby prays that the order of the trial court be reversed and that this Court enter final judgment directing that the decedent's mortgage debt at issue is a proper debt of and payable by his estate and that the real property which secured the debt and passed outside his last will to Christine Dolby as his surviving spouse does not pass subject to the debt as a matter of law but rather is entitled to be exonerated from the lien of the debt by payment of the debt by Mr. Dolby's estate.

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RULE 5:26(d) CERTIFICATE

The undersigned hereby certifies, in accordance with Rule 5:26(d), that on the 17th day of November, 2009, the required number of bound copies, and one electronic copy on CD, of this Reply Brief of Appellant have been hand-filed with the Clerk of the Supreme Court of Virginia and that the required copies of the Reply Brief of Appellant have been mailed, first class, postage prepaid, to all opposing counsel and parties of record as follows:

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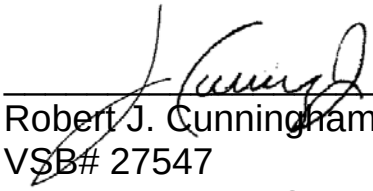

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