In The

Supreme Court of Virginia

RECORD NO. 091023

CHRISTINE DOLBY,

***Appellant*,**

v.

CATHERINE DOLBY, *et al.*,

Appellees.

BRIEF OF APPELLEES KIRKMON DOLBY, CHRISTINE DOLBY AND KENT DOLBY

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IN THE SUPREME COURT OF VIRGINIA
RECORD NUMBER: 091023

BRIEF OF APPELLEES

COME NOW, **KIRKMON DOLBY, CHRISTINE DOLBY AND KENT DOLBY, AS BOTH CO-EXECUTORS OF THE ESTATE OF CORNELIUS A. DOLBY, DECEASED AND AS CO-TRUSTEES OF THE CORNELIUS A. DOLBY LIVING TRUST**, Appellees, by counsel, and file this Brief of the Appellee, and respectfully request that the decision of the lower court be affirmed, and further, that Appellees' costs be taxed against Appellant in this behalf expended, pursuant to Rule 5:37 of the Rules of the Supreme Court of Virginia.

QUESTIONS PRESENTED

From Brief of Appellant with Concise Responses and References to Appellee's Argument

1. WAS THE TRIAL COURT'S RULING THAT DECEDENT'S MORTGAGE DEBT, FOR WHICH HE WAS THE SOLE MAKER AND OBLIGOR, WHERE THE PROPERTY WHICH SECURED THE DEBT PASSED OUTSIDE DECEDENT'S WILL BY SURVIVORSHIP, WAS NOT AN OBLIGATION OF HIS PERSONAL ESTATE THAT WOULD EXONERATE THE SECURED PROPERTY OF THE DEBT, BUT INSTEAD THAT THE PROPERTY WHICH SECURED THE DEBT PASSED SUBJECT TO THE DEBT, ERRONEOUS AS A MATTER OF LAW?

Short Answer: No, the trial court's decision was not erroneous. The obligation was one that passed, as a matter of law, to Christine, as she took the property subject to the mortgage at issue, and further, it was the decedent's intent that such obligation run with the land. (See II (A) of Argument section.)

2. WAS THE TRIAL COURT'S RULING THAT A TESTATOR HAS THE ENFORCEABLE POWER, SOLELY BY THE TERMS OF HIS WILL, TO ABSOLVE HIS ESTATE OF ANY LIABILITY FOR SATISFACTION OF HIS PERSONAL MORTGAGE DEBT AND TO SHIFT THE BURDEN OF THAT DEBT TO ANOTHER PERSON OR PROPERTY PASSING OUTSIDE THE WILL, ERRONEOUS AS A MATTER OF LAW?

Short Answer: No, the trial court's decision was not erroneous. It was not the intent to "absolve" the personal estate of liability. Rather, Appellant blurs the lines between the common law right of exoneration and the decedent's right to convey property subject to an encumbrance. (See I (B) and II (B) of Argument section.)

3. WAS THE TRIAL COURT'S INTERPRETATION OF THE DECEDENT'S WILL THAT THE DECEDENT INTENDED THAT HIS PERSONAL MORTGAGE DEBT WAS NOT AN OBLIGATION OF AND SHALL NOT BE PAID FROM HIS PERSONAL ESTATE AND THAT THE PROPERTY WHICH SECURED THE DEBT AND PASSED TO HIS

WIDOW AS SURVIVING TENANT BY THE ENTIRETY SHALL NOT BE EXONERATED FROM THE DEBT BUT SHALL PASS SUBJECT TO THE MORTGAGE DEBT, AND ITS DETERMINATION THAT SUCH INTENT WAS ENFORCEABLE UNDER VIRGINIA LAW, ERRONEOUS AS A MATTER OF LAW OR NOT SUPPORTED BY THE EVIDENCE?

<u>Short Answer</u>: No, the trial court's decision was not erroneous. It was not the intent to "absolve" the personal estate of liability. Rather, Appellant blurs the lines between the common law right of exoneration and the decedent's right to convey property subject to an encumbrance. Allowing exoneration, under the facts and circumstances of this case, would confer a windfall upon the surviving spouse and render the decedent's estate plan meaningless. (See I (B) and II (B) of Argument section.)

4. DID THE TRIAL COURT ERR IN ADMITTING AND GIVING ANY WEIGHT TO EXTRINSIC EVIDENCE AS TO THE DECEDENT'S INTENT IN THE TERMS OF HIS WILL REGARDING PAYMENT OF HIS DEBT OBLIGATIONS IN THE ABSENCE OF ANY FINDING OF ANY AMBIGUITY IN THE WILL?

<u>Short Answer</u>: No, the trial court did not err. The appropriately termed "factors and circumstances" evidence is allowed to determine the meaning behind the words used by the testator. In this case, given the wording contained in the documents, parol evidence was properly taken. Further, since this objection was not succinctly or correctly made at the time the evidence was allowed, the objection to the use and reliance by the trial court is not proper. (See I (A) and (B) of Argument section.)

5. WAS THE TRIAL COURT'S FINDING THAT "[T]HERE IS NO EVIDENCE THAT MR. DOLBY INTENDED FOR MRS. DOLBY TO HAVE THE HOUSE AND THEN TO HAVE [HIS ESTATE] PAY THE MORTGAGE ON THAT HOUSE THEREBY LEAVING [HIS CHILDREN] VERY LITTLE FROM HIS SUBSTANTIAL ESTATE" SUPPORTED BY THE EVIDENCE OR CLEARLY WRONG?

<u>Short Answer</u>: Yes, the trial court's decision was supported by the evidence. The appropriately termed "factors and circumstances" evidence is allowed to determine the meaning

behind the words used by the testator. In this case, given the wording contained in the documents, parol evidence was properly taken. Further, since this objection was not succinctly or correctly made at the time the evidence was allowed, the objection to the use and reliance by the trial court is not proper. (See I (A) and (B) of Argument section.)

STATEMENT OF THE CASE

This case arises out of a Complaint for Aid and Direction filed by Kirkmon Dolby, Christine Dolby and Kent Dolby, as both Co-Executors of the Estate of Cornelius A. Dolby, Deceased and as Co-Trustees of the Cornelius A. Dolby Living Trust.[1] There is no need for amplification or correction to the Appellant's Statement of the Case, with the exception of one item. In a footnote, Christine has renewed her objection to the standing of the Co-Executors in this appeal. Co-Executors renew their opposition to Christine's objection, although her objection was not briefed before this Court in her Opening Brief. Further, the Motion to Dismiss Co-Executors as parties to this appeal was denied by this Court in its Certificate of Appeal. Co-Executors stand ready to submit points and authorities, if this Court considers it appropriate to do so, but will not argue this issue in this Brief, since it is not before the Court at this time.

[1] For ease in reviewing this brief, the fiduciaries (as both Co-Executors and Co-Trustees) will simply be referred to collectively as the "Co-Executors", and the Trust will be referred to as the "CAD Trust". The Estate of Cornelius A. Dolby shall simply be referred to as "the Estate". Christine Dolby shall be referred to as "Christine".

STATEMENT OF FACTS

Christine's Statement of Facts does not contain facts in dispute. It is the interpretation and use of the facts that is in dispute. The Co-Executors adopt the facts as found by the trial court, and Christine's Statement of Facts, with the following additions.

Cornelius A. Dolby ("Al") died testate on December 25, 2006, being a resident of Fairfax County, with his last resident address being 8404 Brookewood Court, McLean, VA 22102 ("Brookewood Property"). (*See* App. at 455 ¶ 1 & App. at 267.) Al was survived by his wife, Christine Dolby ("Christine"), and three children from a prior marriage with his first spouse who preceded him in death: Catherine J. Dolby, Kimberly D. Lauth and Heather E. D. Kho (the "Dolby Children"). (*See* App. at 457at ¶¶11 & 12.) Christine, who married Al on January 11, 2006, also has three children by a prior marriage: Stacey C. Coppola, Erin A. Benz and Galen W. Greenlaw (the "Greenlaw Children"). (*See* App. at 457 at ¶¶ 11 & 13.)

The disposition of Al's assets were governed by both a will and living trust. Al's Last Will and Testament was executed on September 19, 2006 (the "Will"). The Will provided for all tangible personal property to go to Christine and the residuary to "pour over" into the Cornelius A. Dolby Living Trust. (*See* App. at 466.) The Cornelius A. Dolby Living Trust (the "CAD

Trust") was created pursuant to a Revocable Inter Vivos Trust agreement dated January 31, 2002. (*See* App. at 456 at ¶¶ 5, 8 & 10 & App at. 477 & 19) The CAD Trust was completely amended and restated by Amended and Restated Revocable Living Trust dated September 19, 2006, which was further amended by a First Amendment dated October 11, 2006. (*See* App. at 456 at ¶¶ 6, 7 & 8 & App. at 45.[2]) Christine, the Dolby Children and the Greenlaw Children are all named beneficiaries of the CAD Trust under the terms of the Trust Agreement. (*See* App. at 457 ¶ 14.)

Article 1.3 of the Will states, "**My Executor shall not be required to pay prior to maturity any debt secured by mortgage**, lien or pledge of real or personal property owned by me at my death, **and such property shall pass subject to such mortgage, lien or pledge**." (App. at 466) (emphasis added.) Article 8.2 of the Trust Agreement states, "My Trustee may (but shall have no obligation to) pay: Debts, charitable pledges or other proper charges of any kind against my probate estate, but only insofar as their payment out of the residue of my estate is authorized by the personal representative of my estate." (App. at 45.)

The bulk of the assets currently held by or anticipated to be held in the future by the CAD Trust are or will be comprised of assets passing from

[2] 1st amendment omitted because it did not substantially alter the Amended and Restated Revocable Living Trust

the Estate to the CAD Trust, as the sole residuary beneficiary under the Will. (*See* App. at 8 & 19.) The Washington Mutual Obligation has the potential of "wiping out" the property left to fund the CAD Trust, the result of which would be detrimental to the Dolby children and quite possibly contrary to what Al intended with his estate plan. The Co-Executors submitted a demonstrative exhibit showing the impact upon the Estate in the event the Washington Mutual loan obligation was found to be an obligation of the Estate. (*See* App. at 451.)

The dates and sequence of events are of significance and importance to the decision of this case:

- On June 20, 2002, Al acquired title, in his sole name, to the Brookewood Property by deed recorded in Deed Book 13043, Page 764, in and among the Fairfax County Land Records. *(See* App. at 457 at ¶¶ 15 & 16 & App at 513.)
- In connection with the acquisition of the Brookwood Property, Al executed a Deed of Trust ("Chevy Chase DOT") on June 20, 2002, securing the Brookewood Property in favor of Chevy Chase Bank, the lender. (*See* App. at 457 at ¶¶ 17 & 18 & App. at 516.)

- On December 20, 2005, Al took a loan from Washington Mutual Bank in the amount of $1,750,000.00 (the "Washington Mutual Obligaton") as part of an effort to refinance the Chevy Chase DOT. (*See* App. at 458 at ¶ 22.)[3] Al executed the Deed of Trust with Washington Mutual Bank (the "Washington Mutual DOT") as the sole obligor. (*See* App. at 458 at ¶¶ 19 & 20 & App. at 541.)
- On January 11, 2006, Al married Christine.
- On August 28, 2006, Al executed a Deed re-titling the Brookewood Property from his sole name into the names of Al and Christine, husband and wife, as tenants by the entireties, with common law right of survivorship (hereinafter the "Brookewood TBE Deed"). (*See* App. at 459 at ¶ 28 & App. at 601.)

[3] The majority of the Washington Mutual Obligation was used to pay off the balance due and owing on the Chevy Chase DOT, which was $1,387,238.78. (*See* App. at 458.)

- On September 19, 2006, Al executed his Will, and he signed an Amended and Restated Revocable Living Trust dated September 19, 2006, which was further amended by a First Amendment dated October 11, 2006. (*See* App. at 456 at ¶¶ 6, 7 & 8 & App. at 45.[4])

The Washington Mutual DOT contained a provision that the loan was an adjustable rate mortgage. (*See* App. at 458 at ¶ 21.) The current balance on the Washington Mutual Obligation is believed to be in excess of the original loan amount because of its characterization as a "negative amortization loan."

The evidence at trial brought forth the following facts:

- Al was on good terms with his daughters at the time of his death. (*See* App. at 605.)
- Christine received the Brookewood Property in fee simple by operation of law. (*See* App. at 606.)
- Christine also received approximately $3 million in life insurance proceeds, as well as "various continuing distributions from the Amended Living Trust." (App. at 606.)

[4] 1st amendment omitted because it did not substantially alter the Amended and Restated Revocable Living Trust

- The Dolby children have received no distributions from the Estate or CAD Trust, "because their share is largely dependent upon the amount of residuary estate." (App. at 606.)
- "The parties do not dispute that the Estate could be rendered insolvent if required to pay the Washington Mutual mortgage and that, as a result, the Dolby children would likely receive, at the Estate's best estimate, approximately $670,000 to share between them – a difference of about $2 million." (App. at 606.)[5]

In light of these facts, as well as the evidence relied upon by the trial court, the trial court's decision should be affirmed.

[5] Given the impact on the Estate and the CAD Trust of the assignment of liability of the Washington Mutual Obligation, Co-Executors do have standing to file this Brief in Opposition and participate in the appellate proceedings. *See Right of Executor or Administrator to Appeal from Order Granting or Denying Distribution*, 16 A.L.R.3d 1274 (2008).

ARGUMENT

I. PAROL EVIDENCE OBJECTIONS WERE NOT RAISED AT TRIAL, AND THEREFORE, WERE WAIVED; HOWEVER, PAROL EVIDENCE WAS NOT ADMITTED AND RELIED UPON BY THE TRIAL COURT IN ITS OPINION TO THE SAME EXTENT ARGUED BY CHRISTINE.

Christine raised parol evidence rule objections in both her Motion for Reconsideration at the trial level, and in this appeal. Nevertheless, Rule 5:25 requires that "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Christine objected on the ground of relevancy initially at trial, but never raised the parol evidence rule until after the trial court issued its opinion. Thus, the issue was not properly raised or stated with reasonable certainty at the time the evidence was introduced.

Further, even assuming that extrinsic (or parol) evidence was admitted, such evidence was not admitted in aid of interpreting the Will. Rather, such evidence was relied upon by the trial judge in ascertaining whether to exonerate the whole of the Washington Mutual Obligation with Al's personal estate. Such factors and circumstances are permitted when a right to payment of an obligation is claimed, and the decedent's intent must

be ascertained. Therefore, the trial court committed no error, and its decision must be affirmed.

A. CHRISTINE FAILED TO OBJECT TO THE ADMISSION OF PAROL EVIDENCE AT THE TIME SUCH TESTIMONY WAS ELICITED, AND THUS, FAILED TO PROPERLY PRESERVE THE ISSUES FOR APPEAL.

Of the many grounds articulated by Christine in her Opening Brief of Appellant, the ones concerning the admissibility and consideration by the trial court of certain "extrinsic evidence" of Al's intent should be disregarded by this Court. This Court has articulated the following rule regarding waiver of certain objections:

> Without referring to other grounds upon which the testimony of the witness Rice might properly have been admitted, we will add that if the objection thereto had been good in the first instance, it was subsequently waived. When Mr. Meredith was on the stand he testified in effect that Mrs. Durphy was one and the same person as Bessie Brown and that she was a woman of bad reputation in Washington. There was no objection to this testimony by him, and if it had been error to admit it in the first place, subsequent introduction of the same evidence without objection constituted a waiver of the previous objection.
>
> *Portner v. Portner's Ex'rs*, 133 Va. 251, 263, 112 S.E. 762, 766 (1922) (citations omitted).

While too voluminous to enumerate, counsel for Christine made a "general objection" during his opening that extrinsic evidence was not relevant, but then proceeded to allow testimony of Al's intent to come in without objection as to the parol evidence rule. (*See*, *e.g.*, App. at 145, ll. 17-22;

App. at 146, ll. 18-19; App. at 159, ll. 21-23; App. at 160, l. 1; App. at 169, ll. 22-23; App. at 170, ll. 1-3; App. at 181, ll. 5-11, 15-17, 19-21; App. at 183, ll. 1-6.)

In cases dealing with the parol evidence rule, the objection as to the admissibility of parol evidence was made, even on a continuing basis, and consequently, the issue was preserved for appeal. *See*, *e.g.*, *Langman v. Alumni Ass'n of the Univ. of Va.*, 247 Va. 491, 498, 442 S.E.2d 669, 674 (1994). Therefore, this Court should find that these issues were not properly preserved for appeal, and as such, cannot be considered pursuant to Rule 5:25 and *Portner*, 133 Va. at 263, 112 S.E. at 766.

B. THE EVIDENCE ADMITTED AS TO AL'S "INTENT" DID NOT GO BEYOND WHAT WAS PERMISSIBLE, AND WHILE NO SPECIFIC RULING AS TO AMBIGUITY WAS MADE BY THE TRIAL COURT, ARGUMENTS RAISED BY CHRISTINE THAT THE LANGUAGE IN THE WILL CONSTITUTED "BOILERPLATE" AND FURTHER, THAT THE BROOKEWOOD PROPERTY PASSED OUTSIDE THE OPERATION OF THE WILL, MAKE IT CLEAR THAT EVIDENCE OF INTENT WAS ACCEPTABLE.

Assuming *arguendo*, that this Court finds that it must consider Christine's objections to the admissibility of parol evidence, this matter is complicated by the fact that no one document controls Christine's claimed right of exoneration. Contrary to Christine's simplistic view of the right of exoneration, the documents controlling the determination of the right

invoked by Christine do contain slight ambiguities. This Court reviews whether there exists ambiguity in documents in question *de novo*. *See Eure v. Norfolk Shipbuilding & Drydock Corp*., 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002). Further, the ambiguity in question lies in the Brookewood TBE Deed, not when such deed is read against the Will and Trust. This Court has clearly articulated the following rule:

> It is apparent that the trial court relied on parol evidence of the parties' intentions and the circumstances surrounding the transaction, because the court's letter opinion speaks of the transaction as being "contrary to the intentions of the parties as revealed in their discussions preceding the transfer." In considering parol evidence, the court apparently accepted the argument advanced by the Alumni Association that the deed was rendered ambiguous by an "internal inconsistency" in that it conveyed a gift yet provided for the assumption of indebtedness. The parol evidence rule applies to written instruments, including deeds, that express the terms of the parties' agreement. "'Parol evidence of prior or contemporaneous oral negotiations or stipulations is inadmissible to vary, contradict, add to, or explain the terms of a complete, unambiguous, unconditional, written instrument.'"
>
> The question whether a writing is ambiguous is not one of fact but of law. Thus, the trial court's conclusions in this regard are not binding on this Court, and we are provided with the same opportunity as the trial court to consider the written provisions of the deed in question.
>
> *Langman v. Alumni Ass'n of the Univ. of Va*., 247 Va. 491, 498, 442 S.E.2d 669, 674 (1994) (quoting *Amos v. Coffey*, 228 Va. 88, 92, 320 S.E.2d 335, 337 (1984) (quoting *Godwin v. Kerns*, 178 Va. 447, 451, 17 S.E.2d 410, 412 (1941)) (citing *Wilson v. Holyfield*, 227 Va. 184, 187-88, 313 S.E.2d 396, 398 (1984);

Christopher Assocs. v. Sessoms, 245 Va. 18, 22, 425 S.E.2d 795, 797 (1993)).

The right of exoneration is limited by the decedent. This Court has held that: "we have long followed the common law rule that in the absence of a contrary testamentary direction, the personal estate of a decedent is the primary fund for the payment of his debts, even though they may be secured by deed of trust given by the decedent in his lifetime on real state." *Brown v. Hargraves*, 198 Va. 748, 750, 96 S.E.2d 788, 790 (1957). There are three operative portions of three documents that must be reviewed in deciding this matter:

> **From Article 1.3 of the Will:**
>
> **My Executor shall not be required to pay prior to maturity any debt secured by mortgage**, lien or pledge of real or personal property owned by me at my death, **and such property shall pass subject to such mortgage, lien or pledge**.
>
> (App. at 466) (emphasis added.)
>
> **From Article 8.2 of the Trust Agreement:**
>
> My Trustee may (but shall have no obligation to) pay: Debts, charitable pledges or other proper charges of any kind against my probate estate, but only insofar as their payment out of the residue of my estate is authorized by the personal representative of my estate.
>
> (App. at 45.)

From the Brookewood TBE Deed:

> . . . Grantor does hereby grant, bargain, sell and convey, in fee simple, with Special Warranty of Title, unto the Grantees, as tenants by the entirety with the common law right of survivorship . . . . **This conveyance is made expressly subject** to easements, conditions, restrictions, and rights-of-way of record contained in the instruments forming the chain of title to the property conveyed herein and **to matters visible upon inspection**.

(App. at 602 & 603) (emphasis added.)

Christine makes it a point to argue repetitively that the trial court "absolved" the Estate of its obligation to pay the underlying note which was the basis of the deed of trust. The problem is that the right of exoneration is predicated on a common law right that is limited by the intent of the testator. 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)

Because the Brookewood Property became Christine's immediately upon Al's death, it follows that the language contained in the Will does not necessarily control. It is, nonetheless, instructive in determining the intent expressed in the Brookewood TBE Deed (i.e., that the conveyance was

subject "to matters visible upon inspection"). (App. at 603.) What does the phrase "to matters visible upon inspection" mean? Further, how does that document operate with the Will and Trust? In order to make such a determination, the trial court rightfully considered so-called "factors and circumstances" evidence, which evidence this Court has allowed in cases of ambiguity:

> Extrinsic evidence of facts and circumstances, such as "the state of [the testator's] family and property; his relations to persons and things; his opinions and beliefs; his hopes and fears; his habits of thought and of language", are "always admissible in aid of the interpretation of the will -- i.e., as explanatory of the meaning of the words as used by the testator"; and "the same doctrines should apply to all ambiguities, whether patent or latent, admitting evidence of the facts and circumstances in all cases.
>
> *Baliles v. Miller*, 231 Va. 48, 58, 340 S.E.2d 805, 810-811 (1986) (quoting C. Graves, "Extrinsic Evidence in Respect to Written Instruments," 14 Va. L. Reg. 913 (1909)).

First, in looking to the terms of the Trust, Article 6 governs the division of the assets into the two subtrusts (i.e., the Qualified Terminable Interest in Property Trust ("QTIP") and the Credit Shelter Trust ("CST")). Article 3.4 requires that the principal and income of the QTIP be applied for Christine's health, education, support and maintenance. (*See* App. at 482.) The terms "support" and "maintenance" would unavoidably include

payment of the mortgage. It does not, however, include an express exoneration of the Washington Mutual Obligation. (*See id*.)

Then, the language contained in Article 1.3 of the Will basically states that those taking property encumbered by a mortgage, do so subject to said mortgage. Finally, the evidence admitted at trial concerning Al's relationship with his daughters at the time the Will, Trust and Brookewood TBE Deed were executed supports the conclusion the trial judge reached – that Al never intended to exonerate the Brookewood Property by exhausting his entire estate, leaving nothing to his daughters. Such evidence was properly admitted and considered by the trial judge.

While the trial court's decision does not clearly state that there was a finding of "ambiguity", it is appropriate for this Court to infer such a finding in light of the written opinion. Even so, such a failure by the trial court does not constitute reversible error, when there was, indeed, an ambiguity and it was appropriate for the trial court to consider the parol evidence. *See Portner v. Portner's Ex'rs*, 133 Va. 251, 274, 112 S.E. 762, 769 (1922) (holding that "[t]hese questions are all of such a character as that if the court erred in respect to each of them, the errors might have been rendered harmless by facts developed in the evidence at large; and it is incumbent

on the party appealing to affirmatively show reversible error.") Christine has not shown reversible error in her argument.

Based upon the aforementioned limitation on exoneration, it would appear that Al's intent does, indeed, limit the right Christine claims when reviewing all documents operative in this matter. The wording in the Brookewood TBE Deed is sufficiently ambiguous to allow the admission of parol evidence. Therefore, the trial court's decision should be affirmed.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE ESTATE WAS NOT LIABLE FOR THE WASHINGTON MUTUAL NOTE.

A guiding principle in Virginia is the following rule: "In this jurisdiction, we have long followed the common law rule that in the absence of a contrary testamentary direction, the personal estate of a decedent is the primary fund for the payment of his debts, even though they may be secured by deed of trust given by the decedent in his lifetime on real state." *Brown v. Hargraves*, 198 Va. 748, 750, 96 S.E.2d 788, 790 (1957). The facts in *Brown* differ from this matter; however the guiding principles are relevant. *See id.* The trial court did not err in its application of this rule and other rules applied to this case. In fact, the trial court's decision was consistent with rules of construction adopted by this Court. Therefore, the trial court's decision should be affirmed.

A. WHILE THE BROOKEWOOD PROPERTY WAS NOT DEVISED BY AL'S WILL, THE ISSUE OF THE ESTATE'S LIABILITY TURNS ON SEVERAL FACTORS, AND THE TRIAL COURT'S HOLDING IS CONSISTENT WITH THE LAW IN VIRGINIA.

The common law right of contribution is a distinguishable right from the right of exoneration, which rule of law was properly applied by the trial court in this case. There is no disagreement there exists a right of contribution between two co-tenants, jointly obligated on the same instrument. However, while no specific case has been decided by this Court that has addressed what happens when the debt is the sole obligation of one of the spouses, but secured by jointly held property, as is the case in this matter, the rule of law applied by the trial court was correct, and thus, the decision should remain undisturbed on appeal.

1. The right of contribution is not applicable to this case.

In *Brown,* the decedent and Charles Brown jointly owned a house with right of survivorship. *See Brown v. Hargraves*, 198 Va. 748, 750, 96 S.E.2d 788, 790 (1957). They joined together in placing two deeds of trust on the property to secure notes totaling $7,500 at the time of decedent's death. *See id.* The question arose as to whether the personal estate of the decedent should be applied to payment on the outstanding notes or whether it should go to decedent's sole heir. *See id.* The court found that

decedent was personally liable on the notes, jointly and severally with Brown, and that therefore, her estate should be applied to the notes even though the decedent's estate took no interest in the property. *See id.*

This Court held that Brown had a right of contribution to have decedent's estate charged with half of the indebtedness, stating:

> Subject to a common burden to be borne equally, each had the right to look to the other for reimbursement for any amount expended beyond the proportionate amount required to be paid by each of them. Thus each was entitled to the right of contribution, an equity which arises when one of several parties liable on a common debt discharges the obligation for the benefit of all.
>
> *Id.* at 751 (citing *Van Winckel v. Carter*, 198 Va. 550, 555, 95 S.E.2d 148, 152 (1956)).

The reasoning appeared to be based upon the joint obligation of both co-tenants, which seems to be consistent with the underlying note obligations. Building upon this principle, the Court in *Brown* made an affirmative decision not to follow the rule enunciated in other jurisdictions, which allows for an exception in situations where the property passes by right of survivorship and the deceased takes nothing in the property, opting instead to apply the aforementioned common law rule. *See id*. at 750 (holding that

Virginia does not follow the New Jersey rule from *In Re Staiger's Estate*, 144 A. 619 (1929)).[6]

This Court had occasion to further consider the right of contribution in *Caine v. Freier*, and the Court choose to uphold the common law rule in a situation in which husband and wife were jointly obligated on a note secured by real estate acquired as tenants by the entireties, and allowed a right of contribution by the spouse for one-half of the note. *See Caine v. Freier*, 264 Va. 251, 259-260, 564 S.E.2d 122, 126-127 (2002). The *Caine* decision does not speak to the facts present in this matter, but it is clear that where the obligation is joint in nature, there exists a right of contribution for one-half the value of the note. Since this is not a contribution case, the authorities relevant are those dealing with the right of exoneration.

2. <u>Property can be transferred *cum onere*, and that principle has strong roots in Virginia jurisprudence.</u>

Consider the impact of section 5.2 of Restatement 3d on Property, which states the following:

> When mortgaged real estate is transferred without assumption of liability:

[6] The court basically analyzed the right of exoneration – which is really the right being asserted by Christine in this matter.

> (a) the mortgage remains effective against the real estate in the hands of the transferee; and
>
> (b) the transferor remains personally liable for the covenants in the mortgage and for the obligation secured by the mortgage, to the extent such liability existed prior to the transfer; and
>
> (c) in the event of a default in the performance of the obligation secured by the mortgage, the mortgagee has the right (except as limited by the parties' agreement, by statute, and by §§ 5.3, 8.2, and 8.4):
>
> (1) to proceed against the transferor personally, to the extent of the transferor's liability, and
>
> (2) to enforce the mortgage, and thereafter to proceed against the transferor personally, to the extent of the transferor's liability, for any deficiency.
>
> (d) The transferee does not become personally liable, by virtue of the transfer, for the obligation secured by the mortgage.
>
> (e) If the transfer is a sale and the amount of the mortgage obligation is credited against the price paid, the transferor is regarded as a secondary obligor, and the mortgaged real estate as a principal obligor, under the principles of Restatement Third, Suretyship and Guaranty. If the transferee defaults in performance of the obligation secured by the mortgage, the transferor is entitled to relief against the security of the mortgaged real estate by way of subrogation (Restatement Third, Suretyship and Guaranty §§ 27-31).
>
> Restatement (Third) of Property: Mortgages, § 5.2.

Liability on the note is separate from whether the lien transfers with the property. Christine's arguments that the burden of paying the mortgage has shifted to her negates the potential windfall of having property

transferred to her without any encumbrance, while at the same time, potentially depleting the entire estate. Christine's argument also belies one very important point – she took the Brookewood Property under the Brookewood TBE Deed, which property was already subject to the Washington Mutual Obligation. (*See* App. at 602-603.) Certainly such a scenario was not what Al intended by his actions. It can hardly be said that a court is constrained from looking at the totality of the circumstances, and looking solely to the underlying obligation, without regard to Al's estate plan *in toto*.

As such, there is another rule applicable to this situation. While the personal estate is the primary fund for the discharge of debt secured by property devised in a will, this rule is not without exception. Operation of this rule can be altered by the testator if he directs in his will that the encumbered property be the primary source of his estate for satisfaction of the lien. *See Gaymon v. Gaymon*, 258 Va. 225, 234, 519 S.E.2d 142, 146 (1999)*; see also Brown*, 198 Va. at 751, 96 S.E.2d at 791.

This Court has dealt with the issue of property being devised *cum onere*, or "with the burden; subject to an incumbrance." Black's Law Dictionary 455 (4th ed. 1968). If a testator devises property and states that

said property is to be transferred *cum onere*, then there is little objection to the testator passing such liability on to the devisee:

> The reason for the rule established by Lock King's Act, and cognate authorities, which allows the legatee who has been disappointed of his legacy by the application of the personal property to disencumber real property specifically devised, to stand in the place of the encumbrancer, is to give effect to the will of the testator as a whole, which it is said can only be done by requiring the devisee to take *cum onere*. But it would seem that under the facts of this case, to uphold the contention of the appellees would violate the principle which they invoke to sustain it; for in this instance, as we have seen, there is an express charge upon the personal estate for the payment of debts, subject to which charge the legacies were given.
>
> *French v. Vradenburg*, 105 Va. 16, 20-21, 52 S.E. 695, 696 (1906).

Christine argues that such intent (i.e., stating that property should be transferred subject to a lien) is contrary to public policy. How is it not contrary to public policy that exonerating a debt secured by property jointly held and transferred by operation of law from the decedent's personal estate, to the point of rendering the estate insolvent and defeating the plan of the decedent? Such exoneration would not be contrary to public policy unless contrary intent was articulated by the decedent, which is what was present in this case.

Moreover, the Supreme Court of Tennessee has held, in a case very similar to this one, that a result effectively rendering the decedent's estate

plan meaningless is against public policy. The analysis utilized by the Tennessee Supreme Court is instructive, and this Court is urged to adopt same in this matter:

> Under the common law doctrine of exoneration, an heir or devisee is generally entitled to have encumbrances upon real estate paid by the estate's personalty unless, in the devisee's case, the will directs otherwise. Vincent, despite taking title by deed and not through devise or descent, argues that the doctrine of exoneration should be applied to his situation as well, and that this Court should extend the doctrine to apply to mortgages on property passing outside probate.
>
> . . . .
>
> Furthermore, a number of jurisdictions have abrogated the common law doctrine of exoneration, requiring that wills specifically direct that exoneration is intended for encumbered property.
>
> . . . .
>
> We find that the general language in the decedent's will, directing his personal representative to pay all of his "just debts," is not sufficiently clear to justify the exoneration of a mortgage on property passing by right of survivorship. As stated, the common law doctrine of exoneration did not apply to property passing by right of survivorship. Furthermore, given the trend in other states to limit the common law doctrine by requiring specific language indicating an intent to exonerate devised property, it would be inappropriate to interpret general language such as "just debts" as evincing an intent to exonerate property passing outside probate. In the absence of guidance from the General Assembly, we decline to extend the common law doctrine of exoneration in this manner.
>
> . . . .

In this case, the clearly stated intent of the decedent is to benefit the sole beneficiary of the will. Furthermore, the decedent had two opportunities to direct that Vincent was to receive the Deerfield property free and clear: he could have purchased the property outright, avoiding a mortgage altogether, or else expressly directed in his will that the Deerfield property mortgage be paid from his estate. The brevity of the will, the direction to give all his property, both real and personal, to John Oliver, and the absence of language mentioning either the plaintiff or the Deerfield property in the will require this Court to infer that the decedent intended that his entire estate pass to the stated sole beneficiary. This Court believes that it would be overreaching to find that the language regarding installment payments applies to unnamed, non-probate property.

We are in agreement with the defendants that the plaintiff took the Deerfield property subject to the mortgage. In Swope v. Jordan, 107 Tenn. 166, 64 S.W. 52 (Tenn. 1901), we said that "where the mortgagor conveys by deed absolutely silent with respect to the outstanding mortgage, the grantee, of course, takes the land encumbered by the mortgage, if he has actual notice of it, or constructive notice by record or otherwise." Swope, 64 S.W. at 54 (quoting 3 Pomeroy's Equity, § 1205).

The plaintiff argues that his taking subject to the mortgage does not require him to pay the mortgage, but that taking "subject to" only means that he cannot contest the validity of the mortgage. We agree that the plaintiff has no legal obligation to pay the mortgage. However, as a practical matter, the plaintiff must continue to pay the mortgage in order to continue to enjoy the benefits of ownership.

In Hussey v. Ragsdale, 831 S.W.2d 279 (Tenn. 1992), this Court stated that where a mortgage is not assumed by a vendee, that "'vendee is not liable for the mortgage debt, or any deficiency that may result from foreclosure.'" Hussey, 831 S.W.2d at 281 (citing Fuller v. McCallum & Robinson, Inc., 22 Tenn. App. 143, 118 S.W.2d 1028, 1037 (Tenn. 1937)). In Hussey, the vendee, having taken property subject to a

> mortgage, was not required to pay the mortgage debt, but in order to avoid foreclosure, the vendee had to continue making payments. The vendor in Hussey, still responsible for the mortgage, was responsible for the deficiency on foreclosure. Similarly, the estate in this case would be responsible for any deficiency on foreclosure of the Deerfield property.
>
> Were this Court to order the estate to pay the balance on the Deerfield property mortgage, the sole beneficiary of the will would suffer. On the other hand, the plaintiff is not harmed by taking the property subject to the mortgage. The plaintiff has several options. He can continue ownership of the property by paying the mortgage, or he can sell the property and redeem any existing equity, or he can allow the bank to foreclose.
>
> *In re Estate of Vincent*, 98 S.W.3d 146, 149-151 (Tenn. 2003).

The law in Virginia is on par with the law used and relied upon by the Tennessee Supreme Court. This Court has held that land sold (or transferred) subject to a mortgage, remains subject to the mortgage in the hands of the grantee:

> When land is sold subject to a mortgage as part of the consideration money, the grantee, as between himself and the grantor, is bound to pay, and is liable to an action on the part of the grantor for breach of contract in not paying the debt; but the grantee does not become personally liable to the mortgagee without some promise made to him; and even a promise made to him, does not always change the primary liability from the mortgaged land to the personal estate of the grantee. It must be made with intention to have that effect.
>
> *Daniel v. Leitch*, 54 Va. (13 Gratt.) 195, 206-207 (Va. 1856).

Additionally, this Court has ruled that:

> In other words, each grantee, as the phrase is, "sits in the seat of his grantor," and must take the land with all its equitable burdens. It is the same, in effect, as if the grantor had executed a mortgage on the unsold land for the indemnity of his grantee, so that a subsequent purchaser with notice of the first or any prior conveyance, takes the land with this increased burden upon it. And the rule, very justly, is the same, whether the land be conveyed for valuable consideration or not; for if it were otherwise it would enable a purchaser with notice of a prior voluntary conveyance to perpetrate a fraud upon the donee, which equity abhors.

Miller v. Holland, 84 Va. 652, 654-655, 5 S.E. 701, 702 (1888).

Taken together, these cases form the basis for the same conclusion reached by the Tennessee Supreme Court. Christine is not personally liable for the payment of the Washington Mutual Obligation. She could choose to pay, or not, and allow the Brookewood Property to fall into foreclosure. However, if the Estate is forced to exonerate the Washington Mutual Obligation, then the result is paramount to defeating Al's estate plan, which is a consideration that is ignored by Christine's arguments. "Fairness" is relative. Defeating Al's intent to the point of rendering the Estate and Trust insolvent should not be permitted in this case. The right of exoneration has limits, and those limits were properly decided by the trial court. Therefore, the trial court's decision should be affirmed.

B. <u>AL DID NOT INTEND TO RENDER HIS OWN ESTATE INSOLVENT, AND THIS IS CLEAR FROM HIS OVERALL ESTATE PLAN</u>.

It seems reasonable that the trial court chose to review all of Al's documents together, instead of taking the underlying debt obligation in a vacuum. There is case law from other jurisdictions that holds that a trust and will should be read together to determine the testator's estate plan. *See In re Trust of Sudheimer*, 2007 Minn. App. Unpub. LEXIS 221 (Minn. Ct. App. 2007) (holding, "'The primary purpose of construing a will is to discern the testator's intent.' . . .Where an estate plan is formed by a will and a trust, 'they must be construed together.' And where a will and a trust are executed on the same day, and are interdependent as shown by the language of the documents, they 'should be construed as parts of a single, well-considered estate plan.'") While Virginia has not expressly incorporated this particular rule of construction, it appears appropriate when juxtaposed with other rules of construction involving wills. As to interpretation of will, this Court has utilized the following:

> [T]he general rule is that the words of a will are construed with reference to the facts as they exist at the time of its execution . . . . In construing wills the court will give effect to the intentions of the testator, however obscurely expressed, if legal and ascertainable. It is also true that the language of the will must be first considered.

> In varying phrases, but with a common purpose, courts have, in no uncertain words, undertaken to tell us that we must, when possible, sustain a testator's intention.
>
> "This rule is familiar and elementary and to it all others are subordinate and subservient."
>
> Again, while a will ordinarily speaks as of the date of the death of the testator, yet in its construction we try to see things as he saw them when it was written.
>
> We place ourselves "as nearly as possible in the situation of the testator at the time of the execution of this will."
>
> *Whitehurst v. White*, 160 Va. 859, 866, 169 S.E. 724, 726 (1933).

This Court has also held that "The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy." *Conrad v. Conrad's Ex'r,* 123 Va. 711, 716, 97 S.E. 336, 338 (1918). Where else can Al's intent be gleaned, except from his Will, the CAD Trust and his own actions?

Further, this Court held in *Kellam v. Jacobs*, a case decided prior to *Brown*, that the testator's intent superseded the common law rule:

> While it is true that the first clause of the will deals with the payment of debts and primarily charged the personalty with their payment, this clause, as shown by subsequent events, can not be the polar star if, as said in the opinion of the trial court, "it is inescapably obvious and indisputable that the testator, however short he may have fallen of accomplishing his

intention, designed and endeavored to divide his estate among his five offsprings equitably and equally."

. . .

This language is capable of but one interpretation, that prompted by a father's affection for his children, the testator intended to make an equitable distribution of his estate. While the lands devised to the daughters are not expressly charged with the payment of the liens, the clear implication is that they were so charged. To hold otherwise leads to this result: Mrs. Lillian N. Jacob would receive real estate valued by some of the witnesses at $30,000.00 (by others at $22,500.00); Mrs. Lucy W. Brown would receive real estate valued at $11,500.00; in addition thereto they would receive their pro rata share of the proceeds from the sale of the personalty and the real estate directed to be sold in the event there should be funds remaining after the payment of the testator's debts; Mrs. Helen P. Jackson would get, if the deed of trust liens are satisfied out of payments derived from the residue of the estate, between six and seven thousand dollars; the two sons would have their patrimony reduced by the repayment of $4,677.40, and such other sums as their portion bears to the whole indebtedness. It seems manifest that this result was not intended by the testator.

We are of opinion that, in order to carry out the intention of the testator to distribute his estate as equally as possible among his children, Mrs. Jacob takes the farm "Jeffersonia" *cum onere,* and should be charged with the payment of the deed of trust upon the land devised to her; that Mrs. Brown takes the farm " Barn Field" *cum onere,* and should be charged with the payment of the deed of trust upon the land devised to her; that Mrs. Jacob, Mrs. Jackson and Mrs. Brown take one-fourth interest of testator in the "Grape Valley" farm *cum onere,* and should be charged with the payment of the deed of trust upon it. We are also of opinion that the decree is erroneous in requiring the sons at this time to repay the sum of $4,677.40.

Kellam v. Jacob, 152 Va. 725, 733-735, 148 S.E. 835, 838 (1929).

Article 1, Section 3 of the Will, indicates that Al intended that any real property he owns at death pass subject to any mortgage, lien or pledge. (*See* App. at 466.) (instructing that: "My Executor shall not be required to pay prior to maturity any debt secured by mortgage, lien or pledge of real or personal property owned by me at my death, and such property shall pass subject to such mortgage, lien or pledge.") The CAD Trust places no mandatory requirement that the trustees pay probate expenses. (*See* App. at 45) (providing that "Debts, charitable pledges or other proper charges of any kind against my probate estate, but only insofar as their payment out of the residue of my estate is authorized by the personal representative of my estate.") Further, though enacted after Al's date of death, the Virginia Code Section 64.1-157.1 states that encumbered property should pass subject to any lien: "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. . . or other lien existing at date of death of the testator, without the right of exoneration."

The rule that property can pass *cum onere* is not contrary to or violative of a rule of law or public policy. It can be equally argued that it is contrary to public policy for the exoneration of an asset to be borne completely by the Estate, to the detriment of the heirs and other creditors.

The trial court correctly viewed all documents together and formulated its basis for finding of intent based upon this Court's holding in *Kellam*. Therefore, the trial judge's ruling is a correct statement of the law, and should be affirmed.

CONCLUSION

WHEREFORE, the Respondents, KIRKMON DOLBY, CHRISTINE DOLBY AND KENT DOLBY, AS BOTH CO-EXECUTORS OF THE ESTATE OF CORNELIUS A. DOLBY, DECEASED AND AS CO-TRUSTEES OF THE CORNELIUS A. DOLBY LIVING TRUST, respectfully request that this Court affirm the trial court's decision; they request an award of attorney's fees and costs should they prevail; and for such other and further relief as this Honorable Court deems just and meet.

Respectfully submitted,

KIRKMON DOLBY, CHRISTINE DOLBY AND KENT DOLBY, AS BOTH CO-EXECUTORS OF THE ESTATE OF CORNELIUS A. DOLBY, DECEASED AND AS CO-TRUSTEES OF THE CORNELIUS A. DOLBY LIVING TRUST

By counsel

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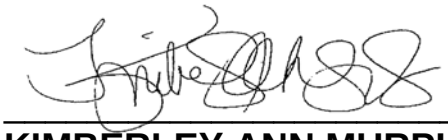

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have complied with the following service requirements as set forth in Rule 5:26(d):

1. Fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Brief of Appellees have been hand-filed with the Clerk of the Supreme Court of Virginia on November 3, 2009, which is within the time limits prescribed under Rule 5:26.

2. Counsel for Appellees has mailed via first class mail, postage prepaid, three copies of the Brief of Appellees to the following on November 3, 2009:

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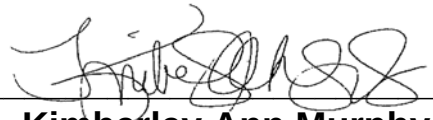

Kimberley Ann Murphy