In The

Supreme Court of Virginia

RECORD NO. 091023

CHRISTINE DOLBY,

Appellant,

v.

CATHERINE DOLBY, *et al.*,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Executors of the Estate of Cornelius A. Dolby ("Mr. Dolby") and the Trustees of the Cornelius A. Dolby Trust (the "Trust") filed a Complaint for Aid and Direction in the Circuit Court of Fairfax County in civil Case No. CL-2007-0014850, and in the related probate administration file in Case No. FI-2007-0000134, to obtain the determination from the court as to whether or not a personal mortgage debt of Mr. Dolby was payable by the Executors from his personal estate assets and/or by the Trustees of the Trust from the assets of the Trust. Both the decedent's will and his trust provide for payment of Mr. Dolby's debts. The Complaint also asked the court to determine whether Mrs. Dolby, as surviving tenant by the entirety of the residential property which secured payment of the mortgage debt, had any obligation to contribute to the debt.

Mr. Dolby's will gifted his tangible personal property to Mrs. Dolby, and otherwise the will poured over the entire residue of the estate to Mr. Dolby's Trust.

The party defendants to the proceedings, all the beneficiaries of Mr. Dolby's estate and of his Trust, were his widow, Christine Dolby ("Mrs. Dolby"), Mr. Dolby's three children from his first marriage (Catherine Dolby, Kimberly Lauth, and Heather Kho (the "Dolby Children"), and

Mrs. Dolby's three children from her first marriage (Stacey C. Cappola, Erin A. Benz, and Galen W. Greenlaw).

The debt at issue was obtained by Mr. Dolby from Washington Mutual Bank in a 2005 refinance of a mortgage debt he had also incurred personally in 2002 when he purchased real property located at 8404 Brookewood Court, McLean, Virginia (the "Brookewood Property") in his sole name, with the property as security for the debt, prior to his marriage to Mrs. Dolby. Following their marriage, Mr. Dolby transferred title to the Brookewood Property from himself to himself and Mrs. Dolby as tenants by the entirety with right of survivorship in August, 2006. He executed his will and his restated trust agreement in September, 2006.

Following Mr. Dolby's death in December 2006 from a stroke, the Dolby Children asserted to the Executors/Trustees that the Washington Mutual mortgage debt was not payable by the estate/trust, but instead that the mortgage debt "ran with the land" and became the sole responsibility of Mrs. Dolby, or in the alternative that if the estate was liable for the debt that Mrs. Dolby should nonetheless be responsible for half the debt. Mrs. Dolby, however, had no personal obligation on the debt and asserted that the estate was obligated under Virginia law to pay the debt in full. The Executors and Trustees thereupon filed their action for aid and direction.

Mrs. Dolby and the Dolby Children filed responsive pleadings to the Complaint and appeared at trial. The children of Mrs. Dolby did not file responsive pleadings and did not appear at the trial. The Executors and Trustees appeared at the trial but remained neutral in the dispute.[1]

In a one-day trial was held before the Hon. Robert J. Smith on August 13, 2008, the court accepted oral extrinsic evidence about Mr. Dolby's intentions, over objection by counsel for Mrs. Dolby, without any finding of any ambiguity in Mr. Dolby's will, and at the close of the hearing took the matter under advisement.

By letter opinion dated December 8, 2008 (the "Ltr. Op."), the trial court ruled that the mortgage debt was not a debt and obligation of the Estate, and commented that "Mr. Dolby's estate plan has been given its proper effect." The trial court incorporated its Letter Opinion into an Order dated December 16, 2008 ("Order") and, on that same date, entered a further order to suspend and stay the Order until February 21, 2009. Mrs.

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[1] The Co-Executors and Co-Trustees received aid and direction in the court below, but nonetheless filed a brief in opposition to the granting of Mrs. Dolby's petition for appeal. Thereupon Mrs. Dolby filed a motion to dismiss them as appellees as not being parties aggrieved by the rulings below. The motion was denied when Mrs. Dolby's petition for appeal was granted. Mrs. Dolby renews her position that the fiduciaries have no standing on appeal under Shocket v. Silberman, 209 Va. 490, 492, n.1, 165 S.E.2d 414, 417 (1969); Schmidt v. Wachovia Bank, N.A., 271 Va. 20, 24, 624 S.E.2d 34, 37 (2006).

Dolby filed a Motion for Reconsideration which was denied by further order February 25, 2009. Mrs. Dolby timely filed her notice of appeal and thereafter presented her petition for appeal, which petition was granted by this Court's order of September 1, 2009.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in ruling that decedent's personal mortgage debt, of which he was the sole maker/obligor, secured by residential real property which passed to decedent's wife at his death as surviving tenant by the entirety, was "not an obligation of and therefore shall not be paid from the decedent's personal estate."

2. The trial court erred as a matter of law in ruling that the property which secured the mortgage debt that passed to decedent's widow by survivorship outside decedent's last will "shall not be exonerated" from the lien of the mortgage debt of which the decedent was the sole maker/obligor, but instead that the property "shall pass to its surviving tenant…subject to the…mortgage."

3. The trial court erred as a matter of law in interpreting the decedent's will to find that the last sentence of Article 1.3 applied to the decedent's mortgage debt and to the property which secured the debt and that his estate had no obligation to pay his personal mortgage debt or to exonerate the secured property from the debt.

4. The trial court erred as a matter of law in interpreting the decedent's last will in ruling that a decedent, solely by the terms of his last will, had the power and authority to, and in this case intended to and did, absolve his personal estate from any liability for satisfaction of an undisputed personal debt of the decedent and shift the burden for satisfaction of the debt from the assets of his personal estate to the real property owned by the decedent and his wife as tenants by the entirety which secured payment of the debt and which passed outside his will to her at his death.

5. The trial court erred in finding that where real property passes to a testator's widow by operation of law outside of the testator's estate, the testator's estate is not obligated to pay or exonerate the decedent's personal obligation mortgage debt secured by that real property and the testator's widow as surviving tenant of the property must become subject to the mortgage debt by the lien of the debt on the secured property despite the facts that (i) the mortgage debt was solely that of the testator, (ii) the widow was never obligated under the mortgage debt, and (iii) the real property did not pass to the widow through the decedent's will/estate.

6. The trial court erred in admitting extrinsic evidence of testator's testamentary intent in regard to payment of his personal mortgage debt where the trial court made no finding of any ambiguity in the will and where there is no ambiguity in the relevant language of the will, and in finding that the evidence established that the testator intended to absolve his estate from any liability for his personal mortgage debt.

QUESTIONS PRESENTED

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? (Assignments of Error 1, 2 and 5)

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? (Assignment of Error 4)

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? (Assignments of Error 1, 2, 3, 4, 5 and 6)

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? (Assignment of Error 6)

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? (Assignment of Error 6)

STATEMENT OF FACTS

Mr. Dolby's first wife died in 1994. Transcript ("Tr.") 50: 4-7, App. 166. Christine Dolby (then Christine Greenlaw) began working for Mr. Dolby in his business in 1978, and worked for him for thirty years. Tr. 70: 7-12; 71:1-13, App. 186, 187. In 2001, Mr. Dolby suffered a stroke that required extensive therapy for him to learn to walk and speak again. Tr. 70:23-71:15; 72:14-22, App. 186-187, 188. Mrs. Dolby assisted in his recovery over a lengthy period. Tr. 71:9-15; 72:14-22, App. 187, 188. Mr. Dolby and Mrs. Dolby married on January 11, 2006 (Tr. 70:1-3, App. 186), but had a close personal relationship dating to 2001. Tr. 55:3-4; 73:7-75:22, App. 171,189-191.

In the years after 2001, Mr. Dolby made increasing provisions for Mrs. Dolby (and her children) in the event of his death, beginning with including her as a beneficiary of his Trust first established on January 31, 2002, in which he referred to her as his spouse even though they were not married. Tr. 54:23-55:4, App. 170-171; Agreed Joint Stipulation of Facts & Evidence ("Jt. Stip."), ¶ 5, App. 456. In 2005, he obtained a substantial life insurance policy insuring his life in which she was named as beneficiary. Tr. 76:12-20, App. 192. After their marriage on January 11, 2006 (Jt. Stip. ¶ 11, App. 457), Mr. Dolby transferred title to the Brookewood Property, their personal residence that he had acquired in 2002 in his sole name (Jt. Stip. ¶ 15, App. 457) to himself and Mrs. Dolby as tenants by the entirety with survivorship by deed dated August 28, 2006. Jt. Stip., ¶¶ 28-29, Ex. 17, App. 459, 600-603.

On December 20, 2005, Mr. Dolby entered into a loan and Deed of Trust with Washington Mutual Bank (the "mortgage debt") in the principal amount of $1,750,000.00, with the Brookewood Property as security. Jt. Stip. at ¶¶ 19, 22, App. 458. Mr. Dolby was the sole signatory and the sole obligor of the mortgage debt. Jt. Stip., at ¶ 20, App. 458. Mr. Dolby never transferred the note or had any co-signer or guarantor of the debt. Tr.

86:11-21, App. 202. Mrs. Dolby never assumed the debt of the mortgage. Tr. 92:14-17, App. 208.

Mr. Dolby signed his Last Will and Testament (the "Will") on September 19, 2006. Jt. Stip. at ¶ 2, App. 455-456. The relevant portions of Article 1.3 of the Will in issue read:

> "*I expressly empower my executor to pay [all legally enforceable debts…without limitation as required by law] and expenses…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*."

Mr. Dolby died on December 25, 2006, after a second stroke in November, 2006. Jt. Stip. ¶ 1, App. 455. The Brookewood Property passed to Mrs. Dolby outside of Mr. Dolby's estate by right of survivorship upon Mr. Dolby's death. Ltr. Op. 3, App. 616. At the time of signing the Will and at Mr. Dolby's death, his children were the beneficiaries of substantial assets in a family trust established by their mother before her death. Tr. 27:10-21; 34:12-37:5, App. 143, 150-153.

The trial court, over Mrs. Dolby's objection, Tr. 14:9-12; 25:9-26:23, App. 130, 141-142, received testimony regarding Mr. Dolby's testamentary intent from Ms. Lauth, Mrs. Dolby, and John Hale, the lawyer who drafted

the Will. None of the testimony received construed, explained, or clarified the specific language employed in Mr. Dolby's Will or trust, nor did the trial court make any finding or determination that the Will or trust was ambiguous prior to receiving the testimony. App. 142-185.

SUMMARY OF ARGUMENT

The trial court's rulings that the mortgage debt is not an obligation of and shall not be paid from Mr. Dolby's personal estate and that the family residence that secured the debt shall not be exonerated from the debt are erroneous as a matter of law, both under long standing Virginia common law as to the obligation of a decedent's estate for payment of a decedent's debts and under the unambiguous terms of Mr. Dolby's Will itself, and this would be so even if Mr. Dolby's Will had so provided since such provision in a will would be contrary to Virginia law. The trial court misinterpreted both the common law and also the debt payment provisions of Article 1.3 of Mr. Dolby's Will to reach its rulings that a testator can, and in the instant case did, solely by the terms of his will, absolve his personal estate of any obligation to pay a mortgage debt for which he is the sole maker and sole obligor, and could and did unilaterally shift the total burden of the debt to

the property which secured payment to the lender but which passed outside his will to his wife as surviving tenant by the entirety.[2]

Under traditional Virginia common law, the answer to the question of whether the estate is responsible for and obligated to satisfy a specific debt of a decedent is resolved by the nature of the underlying legal obligation for the debt, and not by the nature of the title to any property which may be security for payment of the debt. The principle is simple and straightforward. If the decedent was personally liable for the debt, then the assets of his testamentary estate are charged with satisfaction of the debt. That is so even if the debt is secured by a lien on any real or personal property of the decedent, and even if the secured property passes outside the decedent's will by survivorship. In the instant case, Mr. Dolby was the sole maker of and obligor for the mortgage debt. As such, Mr. Dolby's estate is liable, as a matter of law, to satisfy his own just debt, even though

[2] The court below also made additional errors in receiving parol evidence as to Mr. Dolby's intent, over objection, without any finding of ambiguity in the Will, then made a factual finding unsupported by any evidence that Mr. Dolby intended his estate to have no obligation for payment of the debt. The ruling to accept parol evidence was erroneous as a matter of law, and there was no evidence which in any manner indicated an intent by Mr. Dolby to charge the family home with the mortgage debt. The factual finding was totally speculative, subjecting the rulings of the court below to reversal on those grounds as well.

the property which secured the debt passed to his wife by survivorship, regardless of the terms of his Will.[3]

The trial court, in fact, fully recognized that Mr. Dolby was personally obligated for the debt (Ltr. Op. 2, App. 615), and moreover that Mrs. Dolby was not.[4] To reach its conclusions, however, the court then made unjustified distinctions between this case and the controlling authorities to set aside this fundamental principle of Virginia law that a decedent's estate is obligated to satisfy his personal obligation debts.

The trial court dismissed a line of joint-party debt "contribution" cases as inapposite on the totally irrelevant distinction that they involved parties who were "jointly liable", and simply ignored the consistent principle in all those cases that the personal debt obligation of a decedent is payable by his estate. Ltr. Op. 5, App. 618. It likewise cited a debt case not involving

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[3] New Va. Code Ann. § 64.1-157.1, effective July 1, 2007, revised the common law default rule that payment of a decedent's just debts is to be made first from his personal estate to the exoneration of any property passing under the will which is subject to a lien as security for payment of the debt. The new statute now provides that secured debt property passing under a decedent's will passes subject to the debt unless the testator directs otherwise. This new statute, however, does not apply to the Dolby estate both by its effective date which occurred after Mr. Dolby's death and because there simply is no property passing under Mr. Dolby's estate which is subject to the lien of any of his debts.

[4] The trial court found as a matter of fact that "*Mrs. Dolby was not added as a joint obligator on the note, nor did she assume the obligation….*" Ltr. Op. 3, App. 616.

contribution, Owen v. Lee, 185 Va. 160, 37 S.E.2d 848 (1946), in reciting the general rule for payment of debts (Ltr. Op. 4, App. 617), but made no mention of the essential holding of the case that was premised upon this same principle that a personal debt obligation of a decedent is payable by his estate. Lastly, the court classified Mrs. Dolby's position as a claim for "exoneration" (Ltr. Op. 5, App. 618) as a basis to set aside the usual rule that just debts are paid by the testamentary assets, thereby improperly elevating exoneration as the basic principle and issue at stake rather than just the legal result from the estate's payment of a decedent's just debt, a meaningless distinction to allow the court to again decline to follow the essential principle at issue, namely that a decedent's personal estate is obligated to pay his just debts.

Instead, the trial court focused upon and then misapplied to the instant case the principles of a related but different question that often arises in the course of the administration of an estate as to which of the testamentary assets of the decedent are to be charged with payment of a proper debt. That question is not an issue at all in the instant case, but the trial court considered those rules, then misapplied them to this case, and then misinterpreted those rules.

Those rules too are simple and straightforward. A just debt is payable from a testator's testamentary assets, first from the personal estate as the default rule, subject to a testator making specific contrary direction in his will as to what assets passing under the will are to bear the burden of debts. The debt is payable by the assets of the testamentary estate even if it is secured by property which passes outside the will. The court below erred when it viewed the clause "*in the absence of a contrary testamentary direction*" in the cases stating the general rule as allowing a testator sweeping powers in death that he would not have had in life, namely, to allow him to relieve his estate altogether from a just debt and thereby to not exonerate secured property from the debt. To the contrary, the correct meaning of the clause is simply and only that a testator has the right to direct in his will whether *personal assets* passing under the will or *real assets* passing under the will, or some specific designated assets passing under the will, shall be used to satisfy estate debts. The primary element of the rule is that it is always the decedent's testamentary assets that bear the burden of the just debt, not assets that pass outside the will or outside the intestate estate. And that is so because it is a fundamental obligation upon a decedent's assets to satisfy his debts before any beneficiary enjoys the benefit of the estate assets and because a testator

under a will has no right or authority to unilaterally impose estate burdens on property owned with another person that passes outside the will.

Having misapplied and misinterpreted these debt payment rules to allow for the possibility that a testator could "exonerate" his estate altogether from any obligation to pay his just debts, the trial court then interpreted Mr. Dolby's Will to find that Mr. Dolby in fact had directed just such a result. In point of fact, the applicable provisions of Mr. Dolby's Will are clear that the debt is an obligation of the estate. The pertinent language in Article 1.3 of Mr. Dolby's Will begins clearly and unambiguously with direction that obligates the executor "to pay all legally enforceable debts", an affirmative obligation for payment of the mortgage debt, and only provides in the last sentence of that section an exception to that direction to pay debts in the situation where a debt is secured by property passing under the Will, and thus the exception simply does not apply to the mortgage debt which is secured by property passing outside the Will.

The judgment of the trial court should be reversed and final judgment entered determining that the Washington Mutual mortgage debt is a proper debt of and is to be paid from the personal estate of Mr. Dolby to the exoneration of the family home which passed to Mrs. Dolby by survivorship.

ARGUMENT AND AUTHORITIES

I. STANDARD FOR REVIEW ON APPEAL.

All assignments of error, save the last, present pure questions of law, including the issues of the interpretation of Mr. Dolby's Will, the application of Virginia law to the undisputed fact that the Washington Mutual mortgage debt in issue was the sole obligation of Mr. Dolby, and the determination whether the circuit court erred in admitting extrinsic parol evidence of Mr. Dolby's intent regarding his mortgage debt, and thus are subject to *de novo* review. Johnston Mem'l Hosp. v. Bazemore, 277 Va. 308, 311, 672 S.E.2d 858, 859-860 (2009); Jones v. Brandt, 274 Va. 131, 135, 645 S.E.2d 312, 314 (2007); Ott v. L&J Holdings, 275 Va. 182, 187, 654 S.E.2d 902, 904-905 (2008).

The sole assignment of error which does not present a question of law is that the trial court erred in finding that the evidence supported the conclusion that it was Mr. Dolby's testamentary intent that his estate not be liable to pay the Washington Mutual mortgage debt or to exonerate the home residence from the debt. On such a question of fact, the trial court's finding will be upheld unless it is apparent from the evidence that the trial court was plainly wrong or without evidence to support its finding, as Mrs. Dolby contends the trial court was in this instance. Id. at 187, 905; Va. Code Ann. § 8.01-680.

II. THE TRIAL COURT ERRED IN RULING THAT THE DECEDENT'S PERSONAL ESTATE WAS NOT OBLIGATED TO PAY HIS PERSONAL OBLIGATION MORTGAGE DEBT AND THAT INSTEAD THE PROPERTY WHICH SECURED THE DEBT WOULD PASS OUTSIDE THE DECEDENT'S WILL BY SURVIVORSHIP SUBJECT TO THE DEBT.

The trial court ruled that the Washington Mutual Bank mortgage debt "*is not an obligation of and shall not be paid from the decedent's personal estate*" and that the residential property which secured payment of the debt during Mr. Dolby's lifetime "*shall pass to its surviving tenant [Mrs. Dolby] under law and outside the decedent's estate, subject to the Washington Mutual mortgage*." App. 611. The court reached this ultimate conclusion by its erroneous interpretation of Section 1.3 of Mr. Dolby's Will and its misreading of Virginia common law. Under Virginia common law, this debt is payable by the estate as a matter of law regardless of what the Will says and the payment acts to exonerate the family home from the lien of the debt even though the property passes outside the will by survivorship. A decedent's just debts are always to be paid from his assets passing under his will, first from his personal estate. Moreover, properly read, Section 1.3 of Mr. Dolby's Will itself directs payment of all legally enforceable debts, including the mortgage debts, and the debt payment exception provision does not apply to the mortgage debt since the property which secures the debt passes outside the Will. Under all circumstances, therefore, the debt

is properly paid by Mr. Dolby's personal estate contrary to the ruling of the trial court.

A. Mr. Dolby's Personal Obligation Mortgage Debt is an Obligation of his Estate to be Satisfied from his Testamentary Assets to the Exoneration of the Family Home as a Matter of Law.

In their pre-trial brief dated July 15, 2008, the Dolby Children themselves conceded that "*under a simplistic view of Virginia law, it would appear that the Brookewood Property would pass to [Mrs. Dolby] as a surviving spouse but that Cornelius Dolby's estate would remain liable for the weighty mortgage thereon*" but nonetheless asserted that "this was not Cornelius Dolby's intent" and suggested instead that "equity" should consider (speculatively it turns out since no evidence was offered in support) that Mr. Dolby would have refinanced the mortgage debt in some way to make Mrs. Dolby jointly obligated on the debt. Brief at 2, App. 104.

Had that occurred, it is undisputed that the estate would be obligated for half the debt as this court has ruled in Pickett v. Spain, 254 Va. 107, 487 S.E.2d 233 (1997) and other cases. The trial court's ruling thus produces the odd result that had Mrs. Dolby in fact been jointly liable on the debt the estate indisputably would be liable for half the debt, but where she has absolutely no personal obligation for the debt she in effect is fully burdened with the entire debt. The established principles of Virginia law

make clear, however, that the personal estate of Mr. Dolby is obligated to satisfy this debt since he was personally obligated to the lender.

It is undisputed that Mr. Dolby was the sole maker of the Washington Mortgage debt and the sole party personally obligated on the debt. He purchased the Brookewood Property personally and entered into the debt prior to his marriage to Mrs. Dolby. After their marriage and prior to the execution of his Will, Mr. Dolby transferred the Brookewood Property to himself and Mrs. Dolby as tenants by the entirety with common law right of survivorship. Mrs. Dolby was not added as an obligor on the debt and she did not assume the debt. Mr. Dolby made no provision in his Will for satisfaction of the debt out of any specific assets that passed under the Will.

Under these circumstances, the mortgage debt is payable by Mr. Dolby's personal estate as a matter of law, and that is so regardless of the terms of his Will. The trial court made unjustified distinctions between this case and the controlling authorities, then misinterpreted those authorities, to find an exception to this fundamental principle of estate administration that would act to relieve Mr. Dolby's estate from all obligation to satisfy his personal debts and allow him to shift the burden to property passing outside his last will.

1. A decedent's just debts are to be paid from the testamentary assets of the decedent's estate.

The initial error in the ruling of the court below that the estate has no obligation for satisfaction of the mortgage debt is that the ruling is contrary to the first principle of estate administration that payment of a decedent's debts is the highest priority and that the beneficiaries of the estate only enjoy the benefit of the estate after debts are satisfied. The court made no mention of this fundamental principle in its decision.

In Lynchburg College v. Central Fidelity Bank, 242 Va. 292, 295-296, 410 S.E.2d 617, 619 (1991), a case determining the assets of an estate to bear the burden of federal estate taxes, this Court stated "[i]*nitially, certain basic principles of law should be reviewed.…In Virginia, all the debts and liabilities of a testator must be paid before any bequests can be effectual; the first mandate of a will is that the testator's just debts should be paid promptly",* citing Edmunds v. Scott, 78 Va. 720, 726 (1884).

Likewise, in Owen v. Lee, 185 Va. 160, 169, 37 S.E.2d 848, 852 (1946), a case determining that the decedent's estate was liable to pay a mortgage debt to the exoneration of the real estate which secured the debt, this Court commented on a direction in the decedent's will to pay debts that "[t]*he first paragraph of the will is: 'I desire all my just debts paid.' This formal declaration, usually found in wills, merely recites the duty which*

every executor has under the law." See also Va. Code Ann. § 64.1-139, providing for the personal representative to "administer… the whole personal estate"; Va. Code Ann. § 64.1-157, regarding payment of debts of an insolvent probate estate; Va. Code Ann. §§ 64.1-171, *et seq.*, regarding determining debts and demands against the estate; and Va. Code Ann. § 64.1-181, regarding charging real estate passing under the will with payment of debts.

The simple fact is that this issue is so fundamental to the estate administration process as to require no recitation of authority. All the authorities affirm the obligation of an estate to satisfy the decedent's just debts and none exist for the proposition adopted by the court below.

2. Under Virginia law, a just debt of a decedent is determined by the nature of the underlying obligation, and once determined as a personal obligation debt of the decedent the debt is always payable from his assets passing under his will.

The court erred as well in its ruling that the estate has no obligation for satisfaction of the mortgage debt by setting aside another fundamental principle of Virginia law that a personal debt obligation of a decedent, such as Mr. Dolby's mortgage debt at issue, is always a proper and legal debt of the decedent's estate, either from his personal estate in the first instance or from real property or specific assets if a testator directs in his will. Once

the initial determination is made that a particular debt is a personal obligation of the decedent, the obligation affixes to the estate to satisfy the debt. Owen v. Lee, *supra*, 185 Va. at 166-167, 169, 37 S.E.2d at 851-852; Brown v. Hargraves, 198 Va. 748, 750-751, 96 S.E.2d 788, 790-791 (1957); Pickett v. Spain, 254 Va. 107, 110, 487 S.E.2d 233, 235 (1997); Gaymon v. Gaymon, 258 Va. 225, 233, 519 S.E.2d 142, 146 (1999); Caine v. Freier, 264 Va. 251, 259, 564 S.E.2d 122, 127 (2002). As this Court stated in Caine, that is the case "*even though the debt is secured by a deed of trust given by the decedent during his life on real estate*" *and even if "the entire estate is vested in the surviving joint tenant, and the estate of the deceased takes nothing in the property*." Id., quoting Brown v. Hargraves, 198 Va. 748, 750, 96 S.E.2d 788, 790 (1957).

Over the years, litigants have attempted in numerous cases to erode this basic principle of Virginia common law, particularly so but not only in situations where a debt was secured by property passing outside the decedent's will. This Court, however, has consistently reaffirmed this rule of law premised on determining the nature of the underlying debt, stating time after time that if the decedent is personally obligated then his estate is obligated, and the fact that the debt is secured by property is irrelevant.

In Owen v. Lee, 185 Va. at 169, 37 S.E.2d at 852, the decedent had purchased real property subject to debt, but later affirmatively became personally obligated on the debt to the lender. The property passed under the will. This Court rejected the argument that the estate was not obligated on the debt and held that the personal obligation of the decedent on the debt, however incurred, was determinative and the debt was payable by the estate to the exoneration of the property.

In Brown v. Hargraves, decedent and another (not a spouse) held real property jointly with survivorship and were jointly obligated on two purchase money debts secured by the property. This Court rejected the argument that the property passed by survivorship subject to the debt and ruled that the decedent's estate was obligated to pay the decedent's half of the obligation as contribution to the joint debt on the basis of the decedent's personal obligation on the debt, stating the controlling principles as follows:

> The answer to the question presented us depends upon whether or not the obligation was one for which each of the makers thereof was personally liable…In this case, whether the debt was for a loan for money advance, for purchase-money, or was secured or unsecured, is not material in fixing liability. Where the obligation to pay the debt is personal…it is the nature of the obligation which controls. (Citation omitted). The debt evidenced by the notes was created when the notes were executed. The makers thereof became primarily liable, jointly and severally. The deeds of trust merely created liens on the realty, a collateral security for payment of the notes.

198 Va. at 751-752, 96 S.E.2d at 791. In doing so, this Court specifically rejected the argument that an exception to this general rule applies "under the principles of equity" as the Dolby Children now advocate again. Id., 198 Va. at 750, 96 S.E.2d at 790.

In Pickett v. Spain, 254 Va. at 108-110, 487 S.E.2d at 234-235, spouses held property as tenants by the entirety with survivorship, subject to a non purchase money joint personal obligation debt secured by the property. The husband's will made specific reference to the debt and directed that his estate pay no part of it, but instead that his wife would take the property by survivorship subject to the debt. This Court ignored the clear and unambiguous direction in the will to not pay the debt, rejected the argument that the widow had elected to accept the debt obligation as without basis, and ruled that she had a right to have the decedent's estate pay his half of the debt on the basis that the decedent was personally obligated on the debt.

In Caine v. Freier, 264 Va. at 259-260, 564 S.E.2d at 127, spouses held property as tenants by the entirety with survivorship, subject to a purchase money joint personal obligation debt secured by the property. This Court rejected the argument that the estate did not have any obligation to pay on the debt held as tenants by the entireties, and ruled

that because the decedent was personally liable on the debt his estate was obligated to pay his half of the debt.

The trial court cited all the foregoing cases except Gaymon in its letter opinion, but inexplicably ignored the essential principle in all the cases that personal debt is always payable by the decedent's estate. The court ignored that ruling in Owen altogether and dismissed the rulings in the other joint-debt cases on the supposed distinction that they were "*contribution* cases, where the surviving tenants were *jointly liable* for the underlying indebtedness." (Emphasis in original). Ltr. Op. 5, App. 618. This supposed distinction has no relevance and was the trial court's fundamental mistake in its reasoning leading to its rulings.

3. The court below misapplied and then misinterpreted the common law of Virginia that recognizes a hierarchy for satisfaction of a decedent's just debts from his testamentary assets to completely absolve Mr. Dolby's estate from any obligation to pay the personal obligation mortgage debt.

The trial court then erred again in looking to the rules for a related but different question not in dispute in the instant case (i.e., which assets passing under the will are charged with a just debt), then determined that those rules had application to the instant case, and then misinterpreted those rules as well.

Virginia law is also well settled in providing a default hierarchy for determining which assets passing under a decedent's will shall be used to pay the decedent's personal debts, but always determined in the context of the fundamental premise that the debts are always payable from some assets passing under the will.[5] Relying on Brown v. Hargraves, 198 Va. 748, 750, 96 S.E.2d 788, 790 (1957) and Owen v. Lee, 185 Va. 160, 164, 37 S.E.2d 848, 850 (1946), the court below in fact recognized and correctly stated that the general common law rule in Virginia is that the personal estate of a decedent is the primary fund for the payment of his debts, "absent testamentary direction to the contrary." Ltr. Op. 4, App. 617. Citing the same cases, the court also recognized that the general rule applies "even though [the debt] may be secured by a lien on real estate" given under a deed of trust given by the decedent in his lifetime. As Brown further stated, that is the case even if "the entire estate is vested in the surviving joint tenant, and the estate of the deceased takes nothing in the property", that is, that the secured property, whether passing under a

[5] Mr. Dolby could have made separate provisions outside his will altogether for payment of his Washington Mutual mortgage debt, and in that manner relieve his probate estate of the obligation to pay the debt, but did not.

decedent's will or outside that will, or in intestacy, is to be exonerated from the debt altogether. Brown, supra, 198 Va. at 750, 96 S.E.2d at 790.[6]

Having acknowledged those clear rules, however, the trial court then erred in finding that the rules did not apply to the mortgage debt at all (that is, the court ruled that the mortgage debt would not be paid out of either estate personal assets or estate real assets passing under the will) by its misunderstanding of the extent of the discretionary authority a testator has as encompassed in the phrase "*in the absence of a contrary testamentary direction*", the phrase in the rule the court ultimately relied upon to support its finding as to Mr. Dolby's supposed intention to absolve his estate from all liability to pay the debt. The court failed to note that the discretion of the testator in that term is limited to determining which estate assets (that is, personal, or real, or perhaps some combination, but always from assets passing under the will) shall be used to satisfy the debt. Instead, the court assumed that the term gave a testator discretion to let his estate abandon a just debt. That is simply wrong.

It is ancient and firmly established Virginia law, recognized in all the cases cited by the trial court, that the provision in the rule "absent a testamentary direction to the contrary" refers only to the right of a testator

[6] *See*, however, *supra* n. 3, at 10, regarding Va. Code § 64.1-157.1.

to alter the general rule (that his debts are to be satisfied first from his personal estate) by directing in his will instead that other assets (that is, assets other than his personal estate, namely his real estate) that pass under his will, if any, shall be used to satisfy the obligation of his debts in lieu of his personal estate as "the primary fund."[7]

There is no suggestion in any case that the term "*in the absence of a contrary testamentary direction*" would ever allow a testator to disavow or abrogate his estate's liability for his just debt. In Elliott v. Carter, 50 Va. 541, 549, 9 Gratt. 541, 549 (1853), a case raised at trial (Tr. 97, App. 213), this Court set forth in detail the order in which an estate's assets are utilized to satisfy an estate's debts as follows: (1) the personal estate ("personalty") at large not exempted by the terms of the will or necessary implication; (2) real estate ("realty") or interest therein expressly set aside by the will to pay debts; (3) real estate descended to the heir; (4) property, real or personal, expressly charged with debts and specifically devised or bequeathed subject to any such debts; (5) general pecuniary legacies; (6) specific legacies; and (7) real estate devised by the will. Only if the testator expresses some contrary intent can estate assets be utilized in a different order to satisfy estate debts. Id. at 548.

[7] In point of fact, Mr. Dolby had no real property interest pass under his Will. His entire probate estate is his "personal estate."

Elliott held that if a court determines that adherence to the normal hierarchy of satisfying estate debts (charging personal estate assets before charging real estate assets) results in a disposition of assets contrary to a testator's overall intent from the will as a whole, the court can invoke equity to "equally and ratably" draw upon "property … *devised and bequeathed*." Elliott, 50 Va. at 549, 9 Gratt. At 549 (emphasis added). Thus, any analysis as to "absent a testamentary direction to the contrary" is limited to the order in which estate assets, those so *devised and bequeathed* passing under the decedent's will, both personal and real, may be used to satisfy estate debts to satisfy the overall property.

Conspicuous by its absence in Elliott, or in any other case, is any suggestion that a decedent can simply direct his executor to abandon a just debt as such a direction would conflict with the fundamental obligation of the executor to satisfy just debts. Likewise conspicuous by its absence in any of the cases is any suggestion that a testator can charge assets passing outside the will with the obligation to satisfy his personal debts. This Court has never held that a testator can bar a debt properly owed by him at death from being satisfied by his estate or require that such a debt be assigned to a person or property passing outside of the estate. The only authority for such a proposition is the erroneous ruling of the trial court

below. The trial court's misunderstanding of these principles of current Virginia law provides in part the foundation for its misinterpretation of Mr. Dolby's Will.

Having misread these cases to ignore the personal nature of the debt as the controlling factor under Virginia law, the court below then also misread Kellam v. Jacob, 152 Va. 725, 148 S.E. 835 (1929), to arrive at a false distinction (i.e., that Mrs. Dolby was seeking "exoneration") on which it then relied to claim an exception to that the general rule as to payment of debts from the personal estate and then to come to its conclusion that this mortgage debt was subject to the last sentence of Article 1.3 of the Will and thus did not have to be paid by the estate.[8] The court took Kellam as simply as an "exoneration" case, declared that the instant case likewise was an exoneration case, and used Kellam as authority that Mr. Dolby's estate itself could be and was under the Will fully and completely "exonerated" from any obligation to satisfy this personal debt obligation. A review of Kellam demonstrates the court's error in its reliance on that case as the foundation for its rulings.

[8] "Here Mrs. Dolby essentially argues the Estate should exonerate the mortgage debt on her survivorship property. In such cases, an exception to the general rule applies…" Ltr. Op. 5, App. 618.

At its essence, Kellam was simply a case where all the terms of a decedent's will were read together to determine the intent of the testator to charge some assets passing under his will with certain debts, but only with assets passing under that decedent's will, a fact-specific application of the usual rule for determining which assets of the testamentary estate shall be burdened with estate debts. The trial court, however, relied upon Kellam for the proposition that "a *decedent's personalty* is not to be used for the payment of his debts 'when to do so w[ould] defeat the manifest intention of the testator'" and for the further proposition that "technical refinements of the law" can be sacrificed in order to achieve a testator's intent. (Emphasis added). Ltr. Op. 5, App. 618, citing Kellam, 152 Va. at 731, 148 S.E. at 837. In so holding, the trial court morphed a limited, fact based holding in Kellam in which this Court declined to exonerate certain real property from a debt where to do so would not allow the overall intent of the decedent (to treat his children equally) to be carried out, into a general principle that would allow a testator to affirmatively "exonerate" his estate (i.e., the assets passing under his will, both real and personal) from the entire obligation to pay a just debt altogether. Exoneration, however, is not a doctrine to free a decedent's estate of a just debt as the trial court has now ruled.

In its analysis of Kellam, the trial court first erred by treating the phrase "decedent's personalty" to apply to a decedent's entire estate of assets passing under his will, and that error led it to conclude that the estate could not be forced to pay Mr. Dolby's debts at all when to do so would defeat what the court determined to be his testamentary intent. This is incorrect. When this Court used the word "personalty" in Kellam, it did so to contrast the personal property passing under the will with the real property passing under the will, not to contrast the testator's "personal estate" passing under the will with property *outside of the testator's will/estate*. The trial court's failure to recognize these correct distinctions led it to believe that a testator was empowered under his will to prevent a testator's debt from becoming his estate's debt and, in so doing, could also direct the burden of the debt to a person who never agreed to become obligated for the debt. If an estate has no "other assets", as with the Dolby estate, then the personal assets are the only fund for payment of debts.

Likewise, this Court in Kellam used the phrase "technical requirements of the law" only in context of interpreting all the terms of the Kellam will as a whole. In that limited context, the technical requirement of the law that would have applied as to a particular provision had it stood alone would not prevent the court from enforcing the overall intent of the

testator. The trial court in the case at bar, however, used the term to justify excusing an estate altogether from performing a primary duty to pay just debts. The "technical requirements of the law" that the trial court set aside was the fundamental principle that a decedent's estate is obligated to satisfy his just debts.

Kellam simply is no authority for the proposition that a testator can ''exonerate"/absolve the assets passing under his will of all obligation to pay one of his personal debts and shift the debt to an asset outside the will. By so ruling, the trial court simply provided an unjustified rationale for an unjustified reading of the last sentence of Article 1.3 to apply to the mortgage debt.

4. A testator has no power or authority solely by the terms of his will to absolve his estate of any liability to satisfy a just debt or to shift the obligation of the debt to property which secured the debt and which passed outside the will.

In reaching its conclusions regarding the estate's obligation to pay the mortgage debt, the trial court failed to recognize the scope or limits upon a testator's powers under a will. By the very nature of a will, a testator has no power solely by the terms of his will to absolve his estate of liability to satisfy a just debt. Such a power would be inherently inconsistent with the fundamental duty of the personal representative of an

estate to satisfy a decedent's personal debts, *supra at* 18-19, and the nature of a will does not allow a testator any authority to reach out beyond the estate to unilaterally impose an estate obligation on property passing outside the will to shift the obligation to be satisfied outside his will regardless of the rights of others.

A will is simply a document to pass title to assets of a decedent upon death. It is solely a creature of statute, authorized under Va. Code Ann. § 64.1-46 as an alternative to the laws of descent and distribution. Under that statute, a will has authority only over property that would pass by the laws of descent and distribution, that being personal property under Va. Code Ann. § 64.1-11 and real estate of inheritance under § 64.1-1.[9] See Baliles v. Miller, 231 Va. 48, 56-57, 340 S.E.2d 805, 810 (1986).

At law, moreover, there is no difference in testacy or intestacy as it relates to the mortgage debt. The mortgage debt is always Mr. Dolby's debt, and always only his alone, the Brookewood Property always passes outside the estate whether Mr. Dolby was testate or intestate, and the

[9] An estate in property passing by survivorship under Va. Code Ann. § 55-21, as was the Brookewood Property, is not an estate of inheritance, and hence is not subject to the terms of a will under Va. Code Ann. § 64.1-46. See also Va. Code Ann. § 64.1-45.3 where the legislature recognizes and provides for various other "nonprobate transfers on death" which likewise are not subject to the terms of a will. Any term in a will as to such non probate property has no effect whatsoever.

liability of a decedent's estate for a valid debt is not dependent on whether or not the decedent had a will. Had the law not allowed wills at all, or had Mr. Dolby simply died without a will, there would be no "contrary intention" to discuss and his children would have no argument as to their father's supposed "intent" that could magically absolve his estate of liability for satisfaction of his personal debt and shift the debt to property passing outside the will.

There is no authority in Va. Code Ann. § 64.1-46 that permits a testator to absolve his estate of an obligation that the law imposes upon an estate to pay the just debts of the decedent or by such unilateral action to burden the Brookewood Property that passed outside the Will with the debt. Considering that a will is simply an alternative to intestacy, and that the same obligation to pay debts exists in intestacy, if the law has no power to allow a decedent to absolve his estate of a just debt in intestacy, there is no authority to do so under a will, however attempted. The trial court's ruling amounts to an amendment to the authorizing statute, clearly a matter reserved for the Legislature. This second misunderstanding of current Virginia law as to the fundamental nature of a will also contributed to the foundation for the court's misinterpretation of Mr. Dolby's Will.

5. Any attempt by a testator in his will to absolve his estate from all obligation to satisfy his just debt would violate Virginia law and should not be given effect.

The trial court properly noted the "elementary" rule that the intent of a testator is to guide in the interpretation of all wills and that, when ascertained, the intent will be given effect "unless it violates some rule of law, or is contrary to public policy", citing Conrad v. Conrad's Ex'r, 123 Va. 711, 716, 97 S.E. 336, 338 (1918). As such, if a will in fact contained an intent that violates a rule of law or is contrary to public policy, such an intent is not enforceable under Virginia law. And the legal effect of even a clear intent itself is purely a question of law. See Pickett v. Spain, *supra*, at 254 Va. at 110, 487 S.E.2d 234-235 *(*direction in will to not pay a debt secured by property passing outside the will not given any effect as contrary to the obligation of the decedent as a joint debtor on the debt); Harrison on Wills, Fourth Ed., § 16.02, at 16-7.

Since the supposed intention of Mr. Dolby as found by the trial court to exempt the mortgage debt from the normal rules of Virginia law for payment of a decedent's debts is premised on a non existent power of a testator to accomplish, and because the ruling causes an irreconcilable conflict for the executors who are bound by law to pay the just debts of a decedent, the intention found by the trial court is not enforceable in

Virginia, even if that in fact had been the actual stated intention of Mr. Dolby. Any such intention could have no force and effect, and the primary, unambiguous provision in the Will to the executors "to pay all enforceable debts" would be the operative term that causes the mortgage debt to be payable by the estate. The Estate, thus, is obligated to pay the mortgage debt, and thereby exonerate the secured property, regardless of what Mr. Dolby's actual intent may have been.

6. Recently enacted legislation altering the common law relating to payment of a decedent's debt that is secured by real or personal property passing under a decedent's will affirms that the common law rule for satisfaction of a decedent's just debt secured by property passing outside the decedent's will remains unchanged.

The Virginia legislature has recently taken action to alter a portion of prior Virginia common law regarding payment of a decedent's debts by enactment of a new statute effective July 1, 2007, Va. Code Ann. § 64.1-157.1. Of relevance to the instant action is that the Legislature has considered the common law regarding payment of a decedent's just debts and made certain changes but in doing so made no change whatsoever to the fundamental principles relevant to the instant case that all remain unchanged. The only change made by the Legislature in the statute was to alter the initial presumption as to which of the decedent's assets passing

under the decedent's will by devise or bequest are to be charged with payment of the decedent's debts but the Legislature did not extend the new presumption rule to debts secured by property passing outside the will. By necessary implication, the Legislature's action ratified the validity of the common law rules that were not altered as the appropriate and continuing law and public policy of Virginia.

As previously noted, *see supra* at 25, under prior law the general common law rule was that the decedent's personal estate was the primary fund for payment of a decedent's just debts, even if the debt was secured by any property passing under the will (or outside the will), and under the rule the secured property would be exonerated from the debt by payment from the personal estate. The testator, however, had the right to direct that other property passing under the will, including property which secured the debt and passed under the will, be the source of payment of his estate for payment of the debt. This Court stated in Gaymon v. Gaymon, *supra*, 258 Va. at 233, 519 S.E.2d at 146, that *"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*." (Emphasis added). The new statute simply reverses the initial presumption by providing that where an estate debt is secured by real or personal property that passes under the will, the property

will pass under the will subject to the debt unless the testator provides otherwise in the will.[10] The debt, however, remains fully payable from the decedent's assets passing under the will, not from assets passing outside the will, and the decedent remains free to make a specific direction.

Importantly, the Legislature did not alter the fundamental principle that the nature of the underlying debt governs the liability of a decedent's estate for a debt, and did not alter the principle that a personal debt obligation of a decedent is payable by the assets of his testamentary or intestate estate. Moreover, the Legislature did not alter the principle that a personal debt obligation of a decedent that is payable from his personal estate also acts to exonerate from the debt any property which secures payment of the debt, whether the secured property passes under the will or whether it passes to another by survivorship such as in Pickett v. Spain and Caine v. Freier, *supra*, and as in the instant case.

If the trial court below is correct that a testator has equal authority under his will to burden assets passing under his estate or passing outside

[10] The new statute does not address the issue of how a debt is to be satisfied if the underlying property is not sufficient to pay the debt in full. As this court noted, however, in Gaymon, 258 Va. at 233, 519 S.E.2d at 146, n. 1, that in such a situation "Of course, if the property were sold to satisfy the liens but proceeds were insufficient, the unpaid balance could be satisfied out of the personal estate." This Court did not suggest, as the trial court ruled, that a testator could simply absolve his estate of all responsibility for the debt.

his estate with his personal debt obligations, the expectation would be that a new statute dealing with the precise issue would apply to both situations. But that did not occur and Va. Code Ann. § 64.1-157.1 provides no basis for the trial court to enlarge upon the action of the Legislature. Even statutory change is to be strictly limited in its effect. It is black letter law that any statute in derogation of the common law is to be strictly construed and not to be enlarged in its operation by construction beyond its express terms. See, e.g., Bostic v. About Women Ob/Gyn, 275 Va. 567, 576-577, 659 S.E.2d 290, 295 (2008)(strictly construing Va. Code § 8.01-401.1, pertaining to reliance of experts upon hearsay documents). To the contrary, the lack of any change to the basic rule of exoneration in the case of a debt secured by property passing outside the will by survivorship is a recognition by the Legislature that a decedent simply has no power in his will under Va. Code Ann. § 64.1-46 to totally absolve his estate from payment of a just debt by unilaterally charging the debt against assets held with another that pass outside his will.

There is no public policy argument to support the change to the common law produced by the ruling of the court below. The action of the Legislature on the essentially identical issue for the treatment of debts secured by property passing under a will affirms that if any change is

appropriate for the treatment of debts secured by property passing outside a will that it too be accomplished by the Legislature upon due consideration of all aspects of public policy potentially to be affected.

B. The Court Below Misinterpreted Mr. Dolby's Will which is Clear and Unambiguous that the Mortgage Debt in Fact is Payable from his Personal Estate Assets.

Article 1.3 of Mr. Dolby's Will initially and primarily directs payment of his debts. In the last sentence of the Article 1.3 which reads "[m]*y 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*", there is a limited exception for debts secured by property passing under the Will, which is not the case with the mortgage debt which was secured by the family residence which passed outside the Will. The Will is silent as to debts secured by property passing outside the Will, which is to be expected considering the clear law of Virginia as to payment of debts. The court below purported to not only interpret the Will but to divine Mr. Dolby's entire "estate plan" but in doing so overlooked the plain language of the Will under which all relevant terms to satisfy all enforceable debts are read consistently only by reading the last sentence of Article 1.3 to apply only to debts secured by property passing under the will itself. The mortgage debt,

therefore, is not subject to the last sentence of Article 1.3 and the estate is responsible for its payment.

1. Mr. Dolby's will affirmatively directs payment of all his just debts.

Mr. Dolby's actual primary intent and direction regarding his assets is found in the clear obligation on the executor in Article 1.3 of the Will that "*I expressly empower my executor to pay such [all legally enforceable debts…without limitation as required by law] debts and expenses.*" There is no doubt as to its meaning, that <u>all</u> just debts, including the mortgage debt, are to be paid from assets passing under the Will, but significantly the court below made no mention of this primary direction in its opinion or final order.

2. The last sentence of Article 1.3 of Mr. Dolby's will does not apply to the mortgage debt and the debt is therefore to be paid by the assets of Mr. Dolby's personal estate.

The debt payment exception language in the last sentence of Article 1.3 clearly applies only to debts secured by property which is owned by Mr. Dolby at his death and which passes under his Will. That is not the case with this mortgage debt and its secured property. Mr. Dolby owned no separate interest in the Brookewood property at his death that would pass under the Will, and the exception language simply does not apply by its clear terms. The ruling of the trial court that the last sentence of Article 1.3

does apply to debts secured by property passing outside the Will is inconsistent with the other mandatory direction to the executors to pay all enforceable debts. The provisions are consistent, however, when the last sentence of Article 1.3 is read to apply only to debts of Mr. Dolby which are secured by property passing under his Will.

A will is to be interpreted if at all possible solely from the language used by the testator and not from other sources as the testator's expressed intent in the words he used is the only relevant intent. Conrad v. Conrad's Ex'r, 123 Va. 711, 716, 97 S.E. 336, 338 (1918). In ascertaining that intent, it is presumed that a testator used words in their ordinary meaning, ordinary words in their ordinary meaning, and technical words in their ordinary technical meaning. Id. In the interpretation of the language of a will, all the terms are to be read together and reconciled if at all possible in determining intent. Spicely v. Jones, 199 Va. 703, 706, 101 S.E.2d 567, 569 (1958); Jessup v. Jessup, 221 Va. 61, 75, 267 S.E.2d 115, 124 (1980). Where the terms of a will have a plain meaning, the plain meaning is applied by the court and there is no need for further inquiry, and that is the case even if the result "may seem to others to be unjust" since a court cannot know the secret motives of a testator. Pitman v. Rutledge, 198 Va. 567, 571, 95 S.E.2d 153, 156 (1956); McKinsey v. Cullingsworth, 175 Va. 411, 414-415, 9 S.E.2d 315-316 (1940).

The last sentence of Article 1.3 applies to debts secured by "real or personal property owned by me at my death, and such property shall pass subject to such mortgage, lien, or pledge." (Emphasis added). The context for the interpretation of the language of all wills is that a will applies only to property owned by a decedent at death which is an estate of inheritance and that therefore "passes" under the will. Va. Code Ann. § 64.1-46. The Brookewood Property clearly was not so "owned by" Mr. Dolby at his death, and the property did not pass under his Will. Rather, that property was owned by Mr. and Mrs. Dolby jointly as tenants by the entirety with survivorship, not an estate of inheritance, and passed outside the will. The phrase used was not "property owned by me at my death or by me and any other person at my death."

The very purpose of a will is to pass title to estates of inheritance and in the ordinary meaning use of words the term "property owned by me at my death" in the context of a will can only reasonably refer to property owned by the testator that passes under the will. The word "pass" itself as used in the last sentence of Section 1.3 is a technical term which has a clear and plain meaning in the context of a will, that is, it can only refer to property which in fact does "pass" under the will.

The language in the second part of the sentence requires the same conclusion: “such property”, that is the property owned by Mr. Dolby at his death, is then directed to “pass subject to such mortgage, lien or pledge.” The purpose of a will is to pass estates of inheritance, and thus again the only reasonable use of the word “pass” is to refer to real or personal property passing under the will. The entire sentence is simply Mr. Dolby’s exercise of his right as a testator to direct from what assets passing under his Will certain debts shall be paid. There is absolutely no basis to expand the plain meaning as the trial court did to thereby violate Virginia’s first principles of estate administration.

Lastly, the trial court’s interpretation of the last sentence is inconsistent with the initial language of Article 1.3 that the executors are to satisfy all just debts of the decedent, which can only be done from assets passing under the Will (and/or the related Trust). The last sentence of Article 1.3 is consistent with that initial direction to pay debts only if that sentence applies only to debts secured by property which passes under the Will. The trial court can only be correct if one accepts the premise that a testator may give conflicting directions in a will, that in one clause he can direct payment of all his enforceable debts (which is consistent with Virginia law) and then in a later clause totally exempt his estate from the debt

(which is contrary to Virginia law). But such a premise is contrary to the rules for interpretation in Virginia that require a court, if at all possible, to interpret different parts of a will to be consistent with each other. Such consistency is indeed possible if the last sentence of Article 1.3 is interpreted to apply only to debts secured by property passing under Mr. Dolby's Will, in which case it is then clear that the mortgage debt, one of Mr. Dolby's enforceable debts, is payable by his estate.

C. The Trial Court Erroneously Received Parol Evidence of Mr. Dolby's Intent and Incorrectly Concluded that the Evidence Supported Finding that the Estate Should Not be Obligated to Pay the Mortgage Debt.

At hearing in the court below, the parties stipulated to various undisputed facts relevant to the aid and direction sought by the executors and trustees in their complaint, including the Will of Mr. Dolby. The executors and trustees offered no additional evidence. Tr. 24: 2-7, App. 140. Counsel for the Dolby daughters then called as a witness Katherine Lauth, one of Mr. Dolby's daughters. Counsel inquired of the witness regarding her father's intent and wishes. Counsel for Mrs. Dolby objected on grounds of relevance since the will was not ambiguous. The objection was overruled, and additional testimony was then received as to Mr. Dolby's intentions and relationship with his daughters.

1. The trial court's receipt of extrinsic evidence of testamentary intent was not proper.

Extrinsic evidence to aid in the interpretation of a will is only proper where there is an ambiguity in the language of the will. Gasque v. Sitterding, 208 Va. 206, 211, 156 S.E.2d 576, 580 (1967); Hoffman v. First Virginia Bank, 220 Va. 834, 841, 263 S.E.2d 402, 407 (1980). The trial court made no finding of any ambiguity in the pertinent language of Mr. Dolby's Will but nonetheless received into evidence testimony of witnesses regarding such intention over objection of Mrs. Dolby. The court's ruling was not proper and all such evidence should not have been considered.

In ascertaining testamentary intent, "[i]f the language of a will is plain and unambiguous, extrinsic evidence is never admissible to contradict or alter its meaning." Baliles v. Miller, 231 Va. 48, 57, 340 S.E.2d 805, 810 (1986). Ambiguity does not exist just because the parties offer and argue opposing meanings. This Court has stated "[w]e have defined 'ambiguity' as 'the condition of admitting of two or more meanings, of being understood in more than one way ….'" at the same time. Baker v. Linsly, 237 Va. 581, 586, 379 S.E.2d 327, 330 (1989) (internal citation omitted). Such ambiguity, if any, must appear on the face of the instrument to support the receipt of parole evidence. Ott v. L&J Holdings, *supra*, 275 Va. at 187-188, 654 S.E.2d at 905. Even in cases where an ambiguity is found, direct statements of a

testator's intent are never admissible unless there is an equivocation where language in the instrument describes two or more things equally well. See Baliles v. Miller, *supra*, 231 Va. at 57-58, 340 S.E.2d at 811.

There is no ambiguity in Mr. Dolby's Will, as discussed above, certainly no equivocation, and trial court made no such findings. No ambiguity has ever been argued by the Dolby daughters and none identified by the court below. There was no basis, therefore, for the trial court to overrule Mrs. Dolby's objection to receipt of extrinsic evidence, and it was clear error for the court to admit such evidence.[11]

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[11] Counsel for Mrs. Dolby made clear her position in his opening statement (Tr. 14: 9-20, App. 130) that there was no need for extrinsic evidence of intent to be received since the estate was obligated to pay the debt under Pickett v. Spain, *supra* regardless of the terms of the will. Upon the direct testimony of Kimberly Lauth about her father's testamentary intent, counsel for Mrs. Dolby objected to the testimony on the grounds that "*Well, like I stated in my opening, Your Honor, I think none of this is relevant to begin with…but I think it's irrelevant because there's no real ambiguity here and it's not necessary to bring that in. So I would object for that reason…*" (Emphasis added). Having made his objection, counsel for Mrs. Dolby had no need to repeat the objection to relevancy at each successive question of that witness or of others. See, Va. Code Ann. § 8.01-384(A); Helms v. Manspile, 277 Va. 1, 5-6, 671 S.E.2d 127, 129 (2009)(objection, once made, need not be reiterated where there has been no waiver or withdrawal of the objection). Moreover, Mrs. Dolby repeated her objection in her motion for reconsideration post hearing. (App., Motion, ¶ 13, at 623). See, e.g., State Highway Comm'r v. Easley, 215 Va. 197, 201-202 207 S.E.2d 870, 873-874 (1974)(objection preserved for appeal because, among other reasons, it was made in a post-hearing "exception" filed with the trial court); Helms, 277 Va. at 5-6, 671 S.E.2d 129 (argument preserved for appeal because it was made in a post-hearing written submission to the trial court; the written submission, by asserting the party's position, constituted an objection to the trial court's ultimate adverse ruling).

2. The evidence did not support the ruling that there was no evidence that Mr. Dolby wanted his wife to have the house and then have his estate pay the mortgage debt.

Despite having received parol evidence in error, the Court's factual ruling as to Mr. Dolby's intent as to the mortgage debt is simply without any support in the parol evidence received or in any other evidence. To the contrary, all the evidence points to the fact that Mr. Dolby intended Mrs. Dolby to receive their marital home free and clear of the mortgage debt.

It is undisputed that Mr. Dolby wanted Mrs. Dolby to have the house instead of passing to his Trust since he added her to the title as a gift just weeks before he signed his Will. The best evidence of Mr. Dolby's intent regarding the debt is the direction in his Will to satisfy his debts. Even counsel for the Dolby daughters conceded at trial in her opening statement that "[c]*ertain deeds that [Mr. Dolby] took…suggest, as Mr. Saunders raised, that he did intend for the property to be held by himself, or, in the event of his passing, by his wife free and clear*. *I think he had that plan in place*." Tr. 20: 1-8, App. 136.

There in fact was no direct evidence as to what Mr. Dolby wanted as to his debt, except for the language of the Will itself which unequivocally directs satisfaction of <u>all</u> enforceable debts. Nothing in the testimony of Mr. Dolby's daughter, Kimberly Lauth, supports the specific factual finding of

the court below. The substance of her testimony was that Mr. Dolby loved his children, that she believed he wanted to provide for them, and that he had provided for them through their mother's trust, nothing more. Perhaps the most salient testimony was that of John Hale, Mr. Dolby's attorney who drafted the Will, when he testified "*I don't know what was in Al's mind*." Tr. 25:8-18, App. 141. And that is the critical point, namely that no one could know any secret intent in Mr. Dolby's mind, and that is why a court is to look only to the language of a will to ascertain a testator's intent when there is no ambiguity in the document. See Wells v. Weston, 229 Va. 72, 78, 326 S.E.2d 672, 676 (1985) (secret, unexpressed intent not relevant to interpretation and construction of document).

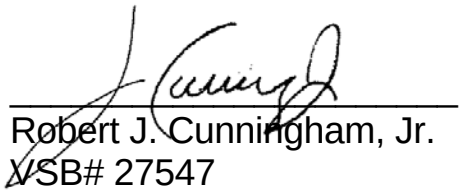
Not disputable, however, are the facts that Mr. Dolby was actively in the process of taking steps to provide more for his wife as of the time he signed his Will, as the deed in particular demonstrates, and that he knew his children were provided for by the family JCD Trust that held significant assets for their benefit, facts which support and are entirely consistent with the plain meaning of the Will that the debt is payable by the estate. The court's determination of Mr. Dolby's intent as to this debt was premised solely upon its evaluation of the minimal testimony offered as to the

relationship of Mr. Dolby with his daughters, a giant leap and matter of pure speculation, not supported by any relevant evidence and thus clear error.

CONCLUSION

For the foregoing reasons, 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.

Christine Dolby
By Counsel



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RULE 5:26(d) CERTIFICATE

The undersigned hereby certifies, in accordance with Rule 5:26(d), that on the 9th day of October, 2009, the required copies of this Appellant's Brief and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia together with an electronic copy of the Brief and Appendix on CD, and that the required copies of the Brief and Appendix have been mailed to all opposing counsel and parties of record as follows:

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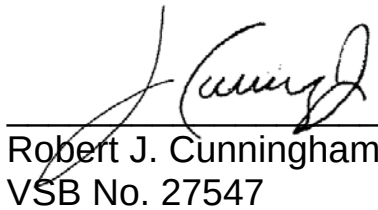

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