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January 7, 2010

BY HAND DELIVERY

The Hon. Trish Harrington, Clerk
Supreme Court of Virginia
100 North Ninth Street, 5th Floor
Richmond, VA 23219

**Re: *Ladysmith Rescue Squad, Inc. v. Donald H. Newlin,
as Executor and Trustee Under the Will
of Miller Hart Cosby, et al., - Record No. 09-1388***

Dear Ms. Harrington:

Enclosed for filing please find the required copies of the Joint Brief of Appellees in reference to the above styled matter. Also enclosed are two copies to be date-stamped and returned with the courier.

A copy has also been filed electronically, in PDF format, to SCVbriefs@courts.state.va.us.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Very truly yours,



Jeffrey D. McMahan, Jr.

JDM,Jr/rab

Enclosures

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January 7, 2010

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**IN THE
SUPREME COURT OF VIRGINIA**

Record No. 09-1388

LADYSMITH RESCUE SQUAD, INC.,

Appellant,

v.

**DONALD H. NEWLIN, AS EXECUTOR UNDER THE
WILL OF MILLER HART COSBY, et al.**

Appellees.

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STATEMENT OF THE CASE

Appellant Ladysmith Rescue Squad, Inc. (“Ladysmith”) challenges the decisions of the Circuit Court for the County of Caroline granting the separate motions of Appellees Donald H. Newlin and William J. Howell, as Trustees of the Trust established under Article III of the Will of Miller Hart Cosby (the “Trustees”), to divide the charitable remainder unitrust established under Article III of the Will of Miller Hart Cosby (the “Trust”) into two separate trusts and to commute one of those separate trusts. The Trustees, Appellee William Welford Orrock, and Appellee Upper Caroline Volunteer Fire Department, Inc. (collectively, the “Appellees”), by counsel, state as follows for their Joint Brief of Appellees.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Trial Court Correctly Decline to Interfere with the Trustees’ Exercise of Discretion to Divide the Trust Where Court Approval Is Not Required to Effect the Division and Where All of the Statutory Requirements for Division Are Clearly Met?
2. Does Ladysmith Lack Standing to Appeal the Circuit Court’s Commutation of a Trust in Which Ladysmith Has No Beneficial Interest?

3. Assuming Ladysmith Has Standing, Did the Circuit Court Correctly Apply the Requisite Statutory Factors to Commute the Fire Department Trust?

**FACTS NECESSARY TO CORRECT AND
AMPLIFY APPELLANT'S STATEMENT OF FACTS**

This case originated from a Bill of Complaint for Advice and Guidance, filed by the Trustees in the Circuit Court for Caroline County ("circuit court") on December 6, 2004, seeking direction regarding the source of the payment of certain debts, estate taxes, and costs of administration in the estate of Miller Hart Cosby. (Joint Appendix ["JA"] 1.) Lengthy and protracted litigation followed, which eventually resulted in a Settlement Agreement between all parties with an interest in the estate. (JA 51-53.) The parties filed the Joint Motion for Approval of the Settlement Agreement, which the circuit court approved in its Order entered on April 9, 2009. (JA 38.)

Under the terms of the Settlement Agreement, the Appellees agreed to request the circuit court to divide the Trust into two equal parts, one part for the benefit of Gloria G. Essaye, William Welford Orrock, and the Upper Caroline Volunteer Fire Department, Inc. (the "Fire Department"), and one part for the benefit of Gloria G. Essaye, William Welford Orrock, and Ladysmith. (JA 63.) The Appellees further agreed, if the division of the

Trust was approved by the circuit court, to request the circuit court to commute the separate trust for the benefit of the Fire Department. (JA 63-64.)

On April 1, 2009, the Trustees filed a Motion for Approval of Division of Trust pursuant to Va. Code § 55-544.17. Virginia Code § 55-544.17 provides that trustees can effect a division, without court permission, so long as all beneficiaries receive notice and the division does not materially impair the rights of any beneficiary or adversely affect achievement of the trust's purposes. In accordance with the Settlement Agreement, the Trustees proposed dividing the Trust into two equal trusts with the same income beneficiaries but with one trust (the "Fire Department Trust") having the Fire Department as the remainder beneficiary, and one trust (the "Ladysmith Trust") having Ladysmith as the remainder beneficiary.

Counsel for the Appellees represented to the circuit court that the division would allow the Fire Department to seek commutation of the Fire Department Trust without affecting the interest or rights of Ladysmith in the Ladysmith Trust, and the circuit court agreed. (JA 31, 105.) The Trust, if divided, could continue to be administered under the same terms and accomplish the same purposes, regardless of whether the Trust was one whole or two halves. (JA 117-118). There would be no material effect on

any beneficiary's interest because the percentage and nature of each beneficiary's interest would remain the same after the division. (JA 31, 117-118.) While Ladysmith disagreed with the division, Ladysmith failed to offer any objection to the circuit court based on the range of investment opportunities and risk management benefits available to the Trustees in managing the Ladysmith Trust. Ladysmith specifically noted there was no contention about investment strategies and presented no evidence to support any objection based on the possible management of the Ladysmith Trust. (JA 115.) Ladysmith also failed to offer any evidence that the division of the Trust would adversely affect the primary purpose of the Trust, as expressed in Dr. Cosby's Will, which was to achieve the federal estate tax charitable deduction and favorable tax treatment. (JA 124.)

In accordance with the Settlement Agreement, the Trustees simultaneously filed a Motion to Approve the Commutation of the Fire Department Trust on the grounds that the requirements for commutation under Va. Code § 55-544.12 were met: (i) there were circumstances that were unanticipated by the settlor, and (ii) because of such circumstances, termination would further the purposes of the trust. The beneficiaries had differing interests and financial needs, particularly after incurring significant attorneys' fees during the protracted litigation over the administration of the

estate of Miller Hart Cosby ("Dr. Cosby"). Dr. Cosby could not have anticipated these differences or the protracted litigation. The express purposes of the Trust, to provide assets to the beneficiaries and to take advantage of the favorable tax treatment afforded a charitable trust, would not be negatively impacted. (JA 118-119, 124.)

A hearing was held before the circuit court on all three motions on April 9, 2009. Counsel for each of the Appellees argued in favor of approving the Settlement Agreement and the division and commutation proposed by the Trustees' motions.

Ladysmith joined in the Joint Motion for Approval of the Settlement Agreement. (JA 38, 40.) Ladysmith did not file a written opposition to either of the Trustees' other motions. At the April 9 hearing, counsel for Ladysmith argued against the division of the Trust and the commutation of the Fire Department Trust, claiming that the division and commutation would be contrary to Dr. Cosby's intent. (JA 110, 112, 114, 128.) Ladysmith based its argument on the contents of Dr. Cosby's Will but failed to offer any evidence that the requirements for commutation were not met.

The circuit court granted the Trustees' Motions, and on April 9, 2009, entered three separate orders: (1) approving the Settlement Agreement, (2) approving the division of the Trust into the Fire Department Trust and the

Ladysmith Trust, and (3) approving the commutation of the Fire Department Trust. (JA 38, 79, 83.) Nonetheless, at the conclusion of the April 9 hearing, counsel for Ladysmith insisted on handwriting his objection to the commutation Order and endorsing it. (JA 85.)

ARGUMENT

A. Standard of Review.

A court will never interfere with a trustee's honest exercise of discretion so long as it is not the product of "any fraudulent, selfish or improper purposes." *Trout v. Pratt*, 106 Va. 431, 442, 56 S.E. 165, 169 (1907); see also *Faulkner v. Davis*, 59 Va. 651, 681 (1868) ("court will never interfere with the exercise of a discretion which has been conferred by the author of a trust so long as it is fairly exercised"); accord *Lee v. Randolph*, 12 Va. 12, 42 (1807). There has been no evidence, or even allegation by Petitioner Ladysmith, that the Trustees' proposed division of the Cosby Trust or requested commutation of the Fire Department Trust was the product of any wrongful motive. See, e.g., *First & Merchants Nat'l Bank v. Rhodes*, 4 Va. Cir. 424, 428 (Lynchburg 1976) ("This Court should not interfere with the exercise of the [trustee's] discretion even if [it] were to disagree with [the trustee's] decisions. It is only for a gross abuse of such discretion that the Court should act.").

There is no established standard of appellate review for the division of a trust pursuant to Va. Code § 55-544.17, most likely because that statute permits a trustee to divide a trust without prior court permission, so long as the statutory requirements are met, as they were here.

The circuit court's application of the statutory requirements set forth in Va. Code § 55-544.12 to approve commutation of the Fire Department Trust presents a mixed question of law and fact. This Court would apply *de novo* review "giving deference to the trial court's factual findings in order to review the court's application of the law to those facts." *Daily Press v. City of Newport News*, 265 Va. 304, 309, 576 S.E.2d 430, 432 (2003) (citing *Caplan v. Bogard*, 264 Va. 219, 225, 563 S.E.2d 719, 722 (2002)).

B. The Circuit Court Correctly Approved the Division of the Trust.

1. The Circuit Court Properly Declined to Interfere with the Trustees' Proper Exercise of Discretion Because the Trustees Had Statutory Authority to Divide the Trust.

Virginia Code § 55-544.17 permits division of a trust by a trustee, after notice to the qualified beneficiaries, as long as the result does not materially impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust. This section of the Code is

identical to section 417 of the Uniform Trust Code (2000) ("UTC"). The comments to UTC section 417 explain as follows:

This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved.

Comments, U.T.C. § 417.

The Trustees proposed a division of the Trust that would not change the rights of any beneficiary, but would simply separate the interests of Ladysmith and the Fire Department into two equally divided trusts, without changing any material terms of the Trust. Likewise, because the Trust would divide into separate trusts with identical terms other than the remainder beneficiary, the division alone would not affect the purposes of the Trust. Under the statute, the Trustees had the authority to divide the Trust without any need for approval from the circuit court, but pursuant to the terms of the Settlement Agreement, the Trustees were required to seek the circuit court's approval of the division. (JA 63.)

The circuit court carefully considered the facts and circumstances presented, and found that the division of the Trust would result only in administrative changes. Further, the circuit court found that the division

would have no effect on either the dispositive terms or the interest of any beneficiary and would not do any violence to the intention of Dr. Cosby. (JA 131.) The circuit court's order directed the Trustees to administer the two separate trusts "under the same terms as the trust under Article Third of the Will of Miller Hart Cosby." (JA 80.) Consequently, the circuit court correctly determined that the statutory requirements were met and properly approved the division of the Trust, and that decision should be affirmed.

2. Ladysmith's Assertion that Its Interest Is Adversely Affected Due to Missed Investment Opportunities and Lost Risk Management Benefits Allegedly Caused by the Division Is Not Properly Preserved.

For the first time on appeal, Ladysmith attempts to argue that its interest in the Trust is adversely affected by a reduction in the range of investment opportunities and the loss of risk management benefits as a result of the reduced size of the Ladysmith Trust corpus after the division. Ladysmith failed to raise this argument at the circuit court hearing, failed to put on any evidence regarding alleged investment opportunities or so-called lost risk management benefits, and thus has waived this argument on appeal. See Sup. Ct. R. 5:25. See also *Green v. Va. State Bar*, 278 Va. 162, 168, 677 S.E.2d 227, 235 (2009) ("Since [appellant] raises his objection for the first time on appeal to this Court, we will not consider this issue."). Furthermore, in direct contrast, counsel for Ladysmith argued at

the April 9 hearing that there was no contention about investment strategies. (JA 115.)

In any event, Ladysmith's share of the Trust is now and has always been a 50 percent interest in the remainder of the Trust corpus. This is, as the circuit court found, an identical interest that Ladysmith had before the division and that Ladysmith retained after the division; therefore there could be no material impairment to Ladysmith's rights or adverse effect on the purposes of the Trust. (JA 79, 131-132.) Thus, this point is without merit.

C. Ladysmith Does Not Have Standing to Appeal the Order Commuting the Fire Department Trust.

Ladysmith does not have any interest in the Fire Department Trust and is not a beneficiary of the Fire Department Trust and therefore has no standing to appeal the commutation of that trust. See, e.g., *Harbor Cruises, Inc. v. State Corp. Comm'n*, 219 Va. 675, 676, 250 S.E.2d 347, 348 (1979) (citing *Va. Ass'n of Ins. Agents v. Commonwealth*, 201 Va. 249, 110 S.E.2d 223 (1959); *Nicholas v. Lawrence*, 161 Va. 589, 593, 171 S.E. 673, 674 (1933)) (to demonstrate standing an appealing party "must show an immediate, pecuniary, and substantial interest in the litigation, and not a remote or indirect interest.").

Virginia Code § 55-541.03 defines a beneficiary as "a person that (i) has a present or future beneficial interest in a trust, vested or contingent, or

(ii) in a capacity other than that of trustee, holds a power of appointment over trust property.” Ladysmith does not fall into either of these categories. One purpose of the division of the Trust was to allow the Appellees to seek commutation of the Fire Department Trust without affecting the interests of Ladysmith. The division separated the beneficial interests of Ladysmith and the Fire Department into two separate trusts, and Ladysmith has no vested interest in the Fire Department Trust.

Nor does Ladysmith have a contingent interest in the Fire Department Trust. The terms of the Trust provided that, upon the death of all of the income beneficiaries, the Trustees would distribute the remaining principal and income to the Fire Department and Ladysmith, in equal shares. (JA 8.) If, however, the Fire Department and/or Ladysmith did not qualify as a charitable organization at the time any assets were to be distributed, then the Trustees would have “absolute discretion” to distribute the assets to one or more other organizations that did qualify. (*Id.*) Under these terms, even if the Fire Department were not qualified to receive its share of the Trust, that does not create any interest for Ladysmith, as the Trustees would have absolute discretion to choose another qualified charity.

Because Ladysmith has no present or future beneficial interest, vested or contingent, in the Fire Department Trust, Ladysmith has not

suffered any harm by the commutation of the Fire Department Trust and lacks standing to appeal that point. See IVA Austin W. Scott & William F. Fratcher, *The Law of Trusts*, § 391 (4th ed. 1989) (“*Scott on Trusts*”) (noting that the class of those who have standing to enforce a charitable trust is limited to the Attorney General, trustees and persons entitled to receive benefits under the trusts that are not benefits to which members of the general public are entitled); Restatement (Second) of Trusts, § 391 (1959) (same).

Ladysmith’s counsel’s insistence on endorsing the commutation Order at the April 9 hearing cannot confer standing to appeal the commutation of a trust in which Ladysmith has no interest. The circuit court correctly found that the division isolated the issue of commutation with respect to the Fire Department’s share of the Trust and recognized that one of the separate trusts could be commuted “without affecting the other,” regardless of Ladysmith’s opposition. (JA 105.) This ruling should be affirmed.

D. **Even if Ladysmith Had Standing, the Circuit Court Properly Exercised Its Discretion to Commute the Fire Department Trust.**

Assuming, *arguendo*, that Ladysmith had an interest in the Fire Department Trust, and therefore standing to appeal that ruling, the circuit

court correctly determined that the statutory requirements were met and properly approved the commutation.

1. The Circuit Court Correctly Determined that the Statutory Requirements Were Met for Commutation.

Virginia Code § 55-544.12 permits a court to terminate a trust if, because of circumstances not anticipated by the settlor, termination will further the purposes of the trust. The trust property must then be distributed by the trustee in a manner consistent with the purposes of the trust. *Id.*

Under this statute, the circuit court first needed to consider whether there were circumstances that were unanticipated by Dr. Cosby. See Restatement (Third) of Trusts § 66 (2003) (“Although the unanticipated circumstances in cases falling under this Section are likely to be circumstances that have changed since the creation of the trust, the rule of the Section does not require changed circumstances. It is sufficient that the settlor was unaware of the circumstances in establishing the terms of the trust.”).

Here, the unanticipated circumstances include: (1) that the beneficiaries had disagreed in the past and would likely continue to disagree over the interpretation of certain provisions of the Will, (2) that protracted litigation between the beneficiaries of the Will had been and

would continue to be necessary, (3) that some of the beneficiaries incurred attorneys' fees as a result of the protracted litigation, and (4) that all of the beneficiaries of the Fire Department Trust would prefer to end that trust based on differing interests and financial needs.

Ladysmith claims, again for the first time on appeal, that this finding is not justified because the circuit court did not take evidence at the April 9 hearing. (Opening Brief of Appellant 2.) This argument is waived, Sup. Ct. R. 5:25, and is a red herring. It was undisputed before the circuit court, as Ladysmith acknowledges, that the beneficiaries of the Fire Department Trust all agreed that they wished to terminate the Fire Department Trust. (JA 110, 117, 124, 135.) This was further evidenced by the Settlement Agreement signed by all beneficiaries that specifically called for the beneficiaries of the Fire Department Trust to seek commutation. (JA 63.) The circuit court took these undisputed facts into consideration, applied the factors set forth in Va. Code § 55-544.12, and found that these were circumstances that were unanticipated by Dr. Cosby within the meaning of the statute. Moreover, Va. Code § 55-544.12 does not require the circuit court to formally take evidence at all, and Ladysmith had the opportunity to put on countervailing evidence, if there had been any, but it did not do so.

As further directed by Va. Code § 55-544.12, the circuit court considered whether the termination would further the purposes of the Fire Department Trust. The circuit court acknowledged that the termination would mean a change from the dispositive provisions of the Fire Department Trust, but found that the termination would still further a primary purpose of the Fire Department Trust because it would provide assets to the income beneficiaries and the Fire Department. This was entirely proper. See Restatement (Third) of Trusts § 89, comment e(3) (2007). (“Departure from a normally controlling provision in the trust terms, however, may be authorized or directed by court order pursuant to § 66 [the court’s power to modify because of unanticipated circumstances]...”).

Next, the circuit court considered the other primary purpose of the Trust, as expressed in Dr. Cosby’s Will, which was to achieve the federal estate tax charitable deduction and favorable tax treatment. (JA 124.) The circuit court noted there was no expressly stated intention of Dr. Cosby to disallow commutation. (JA 131.) The circuit court also found that the commutation of the Fire Department Trust very closely carried out Dr. Cosby’s intent, thereby fulfilling the second requirement of § 55-544.12. (JA 132.)

Finally, the circuit court analyzed the method of distribution to the beneficiaries of the Fire Department Trust. The comments to UTC section 412 provide, in pertinent part:

[E]ffectuating a distribution consistent with the purposes of the trust requires an examination of what the settlor would have intended had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the section does not so prescribe.

The proposed distribution of the Fire Department Trust assets in proportion to the actuarial values of the beneficiaries' interests was consistent with the purposes of the trust. The method of calculating the beneficiaries' interests was also in accordance with the method prescribed by the Internal Revenue Service for terminating charitable remainder trusts. Thus, the distributions would be consistent with the purposes of the Fire Department Trust as required by Va. Code § 55-544.12.

Having found that all of the statutory requirements were met, the circuit court correctly approved the commutation of the Fire Department Trust, and its decision should be affirmed.

2. Ladysmith's Legal Arguments in Opposition to the Commutation Are Misplaced.

All of the cases cited by Ladysmith as support for the position that the Fire Department Trust should not have been commuted are inapposite

because those cases involved non-charitable trusts, which follow a different standard for termination under Va. Code. § 55-544.11. Ladysmith's discussion of a contrary intent by the settlor and consent by all of the beneficiaries is wholly inapplicable here because Va. Code § 55-544.11 may not be used to terminate a trust with charitable interests, such as the Fire Department Trust.

Moreover, Ladysmith's reliance on *Landmark Commc'ns, Inc. v. Sovran Bank, N.A.*, 239 Va. 158, 165, 387 S.E.2d 484, 488 (1990) and *Schmucker v. Walker*, 226 Va. 582, 586, 311 S.E.2d 108, 110 (1984) is misplaced. *Landmark* and *Schmucker* both involved the attempted termination of a trust with undetermined remainder beneficiaries, where vesting could not be determined until the death of all the income beneficiaries, and where consent from all beneficiaries could not be obtained because one or more beneficiaries may have been unborn. That is not the situation presented here, where all beneficiaries and their interests are known, unanticipated circumstances occurred, and all beneficiaries desire commutation of the Fire Department Trust.

Contrary to Ladysmith's assertions, the circuit court carefully read Dr. Cosby's Will, properly considered Dr. Cosby's intent, and concluded that Dr. Cosby's intent would be, to a very close extent, carried out by the

commutation of the Fire Department Trust. (JA 130, 132.) The circuit court found evidence of unanticipated circumstances and considered whether the termination would further the purposes of the Fire Department Trust. After examining the method of distribution, the circuit court found that distributions would be consistent with the purposes of the Fire Department Trust. Thus, the circuit court concluded that the statutory requirements of Va. Code § 55-544.12 were met and correctly approved the commutation of the Fire Department Trust.

CONCLUSION

For these reasons, Appellees respectfully request that this Court affirm the circuit court's orders of April 9, 2009, granting the motions to divide the Trust and commute the Fire Department Trust.

Respectfully submitted,

DONALD H. NEWLIN AND WILLIAM J.
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CERTIFICATE OF FILING AND SERVICE

The undersigned counsel hereby certifies Rule 5:26(d) has been complied with in that on January 7, 2010, the required copies of this Joint Opening Brief of Appellees have been filed with the Clerk of this Court via hand delivery and electronic mail to scvbriefts@courts.state.va.us, and served the required copies via U.S. Mail, postage pre-paid, upon:

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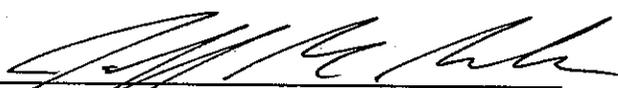
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