In The

Supreme Court of Virginia

RECORD NO. 091470

CAROL SMITH, in her capacity as Executrix of the Estate of Evelyn B. Smith and in her capacity as Trustee of the Evelyn B. Smith Inter Vivos Revocable Trust,

Appellant,

v.

JEAN MOUNTJOY, in her capacity as Executrix of the Estate of Theodore M. Smith,

Appellee.

REPLY BRIEF OF APPELLANT

Thomas W. Repczynski (VSB No. 39967)
Christopher A. Glaser (VSB No. 43491)
Arianna Gleckel (VSB No. 74914)
BEAN, KINNEY & KORMAN, P.C.
2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
(703) 525-4000 (Telephone)
(703) 525-2207 (Facsimile)
trepczynski@beankinney.com
cglaser@beankinney.com
agleckel@beankinney.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

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IN THE
SUPREME COURT OF VIRGINIA

CAROL SMITH, in her capacity as Executrix of the Estate of Evelyn B. Smith and in her capacity as Trustee of the Evelyn B. Smith Inter Vivos Revocable Trust **Appellant**, v. **JEAN MOUNTJOY**, in her capacity as Executrix of the Estate of Theodore M. Smith **Appellee**.	Record No. 091470

REPLY BRIEF OF APPELLANT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Virginia:

Carol Smith, in her capacity as Executrix of the Estate of Evelyn B. Smith and in her capacity as Trustee of the Evelyn B. Smith Inter Vivos Revocable Trust (alternatively, "Carol Smith, Executrix;" "Trustee;" or, collectively "Carol Smith"), presents this Reply Brief of Appellant and renews her request that this Court (1) reverse the three related judgment orders of the Honorable Jeffrey W. Parker, Judge of the Circuit Court of Fauquier County (the "Trial Court") to the extent they grant summary

judgment in favor of Jean Mountjoy, in her capacity as Executrix of the Estate of Theodore M. Smith ("Ms. Mountjoy") and deny same to Carol Smith; and (2) enter summary judgment in favor of Carol Smith on the ratification issue, or alternatively, on the issue of Mrs. Smith's authority under Mr. Smith's Durable POA to create and fund Mr. Smith's Trust and Mrs. Smith's Trust as she did.

I. ARGUMENT

A. Summary Of Argument.

Evelyn Smith ("Mrs. Smith") acted properly at all times pursuant to her husband Theodore M. Smith's ("Mr. Smith") general durable power of attorney and otherwise. Thereafter, Mr. Smith legally and objectively ratified his wife's actions regardless of the actual or intended scope of authority he had initially reposed in her. As a consequence, the Trial Court's rulings to the contrary must be reversed.

B. Mr. Smith's General Durable Power Of Attorney Empowered Mrs. Smith To Act As She Did On His Behalf.

1. The Express And Implied Terms Of The Power of Attorney Govern.

Mrs. Smith derived both expressly enumerated and unenumerated implied powers from Mr. Smith's Durable POA. (See Smith's Brief, § V.C.1., at 23-32.) Ms. Mountjoy cannot in good faith challenge Mrs.

Smith's powers to hold and dispose of Mr. Smith's property. Instead, she denies that those general powers apply in the single context of "estate planning." Mr. Smith articulated no such restriction on the powers he granted to his wife of 61 years. Instead, he expressly extended to Mrs. Smith specific powers necessarily understood and intended to include the power to dispossess him of his property interests – including the powers to hold and dispose of their real properties held as tenants by the entireties. Ms. Mountjoy's suggestion that disposing of real property interests for the married couple was not somehow "estate planning," belies the obvious.[1(2)]

Excluding an undefined category of instances in which the powers might be exercised, inappropriately circumscribes efforts Mr. Smith took himself with counsel of his own choosing. Mr. Smith did not grant to his wife a "specific" or "limited" power of attorney. On the contrary, he gave her a general power which included the acknowledged authority to "sell,

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[1] Ms. Mountjoy's contention that Mrs. Smith was not empowered to dispose of the couple's properties solely in this undefined context would require that Mrs. Smith's real property transfer to Ms. Mountjoy's three children and their spouses only days before Mrs. Smith's death likewise not be interpreted within the "estate planning" context. (See JA at 72 & 146-47, Smith's MSJ Memo at ¶15 & Ex. 9.) She cannot expect to have one without the other.

[2] Ms. Mountjoy impermissibly asserts on appeal that Mr. Smith directed Mrs. Smith not to undertake such actions on his part. (Mountjoy Brief at 2, 14.) This contention was neither undisputed nor material to the Trial Court's ruling. (See supra note 4 & §1.D.)

convey, exchange, accept, receive and possess" and otherwise dispose of any and all interests he held or might hold in any of his assets.

Similarly, this Court's decision in Fleenor v. Hensley, 121 Va. 367, 93 S.E. 582 (1917), suggests no basis for the carveout language Ms. Mountjoy seeks to employ in interpreting its holding. Fleenor, as Ms. Mountjoy appears to acknowledge, (see Mountjoy Brief at 19), unequivocally and without exception states that "[a]ll persons who have the capacity to hold and dispose of property can impress a trust upon it." Fleenor, 121 Va. at 373-74, 93 S.E.2d at 584. Ms. Mountjoy seeks to insert "within the context of estate planning" into this standard without any basis. (See Mountjoy Brief at 19.) Ms. Mountjoy's cross-reference to Jones v. Brandt, 274 Va. 131, 645 S.E.2d 312 (2007), in this context further misses the mark. Where Jones warns of potential abuse when implying the power to dispose, Mr. Smith purposefully mooted the issue by unequivocally granting Mrs. Smith powers to dispose any and all interests as he himself might do.

2. The Uniform Power Of Attorney Act Is Irrelevant And Non-Binding.

Ms. Mountjoy concedes that Virginia's Uniform Power of Attorney Act (the "Act") has "not become effective" and it "does not yet have the force of law." (Mountjoy Brief at 21.) Yet, from this conditional legislation, Ms. Mountjoy would have this Court derive "clear insight" and ascribe "definitive

resolution" to any lingering questions about the propriety of Mrs. Smith's actions. There is, however, no evidence that the conditionally passed legislation will ever become binding law or that, if re-enacted, it would or could govern resolution of this case.

In fact, the Act itself contains language not cited to by Ms. Mountjoy expressly excluding application of the new law from these proceedings. See 2009 Virginia Laws Ch. 830, proposed Va. Code §§ 26-74.02(3) and (4). The Act takes into account the possibility that litigants in pending litigation at the time of possible enactment might be unfairly prejudiced by application of the new provision. Specifically, if re-enacted as written, the Act would not apply to litigation pending at the time of its effective date if "the court finds that application of a provision of this act would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies." Proposed Va. Code § 26-74.02(3).

Additionally, Ms. Mountjoy ignores the last of the Section 26-74.02 series of provisions relating to the (in-)application of the new law if re-enacted. This is particularly troubling since this last provision completely contradicts those actually cited by Ms. Mountjoy. As written, the new legislation provides: "An act done before July 1, 2009, is not affected by

this act." Proposed Va. Code § 26-74.02(4).[3] All relevant acts in this case of which Ms. Mountjoy complains were necessarily committed in or prior to Mrs. Smith's death in 2007 such that Fleenor still applies.

Moreover, the mere conditional passage of the Act so soon in the wake of this Court's pronouncement in Jones v. Brandt underscores that, contrary to Ms. Mountjoy's suggestion, the General Assembly was not convinced that the power "to create an inter vivos trust, terminate survivorship interests, or make a gift" must be expressly enumerated in a power of attorney. (Cf. Mountjoy Brief at 21-22.)

C. Mr. Smith Ratified Mrs. Smith's Estate Planning Actions.

1. Mr. Smith's Actions Served To Ratify Both Trusts.

a. Terminating Mr. Smith's Trust.

i. Unmistakable Indication of Mr. Smith's Intention to Avail Himself of Benefits.

On September 6, 2007, Mr. Smith demanded that the Trust Assets be delivered to him free of trust. Speaking through his Notice of Termination to the acknowledged trustee of the Mr. Smith Trust, pursuant to the express terms of the trust which he identifies by name in the Notice, Mr. Smith unequivocally demanded "all assets of the Trust Fund, as the term is

[3] Such internal inconsistency within the proposed Section 26-74.02 merely supports further the notion that the Act is likely to be revised before it ever becomes binding law.

defined in the Trust." (JA at 149.) Such a demand unmistakably expresses Mr. Smith's intention to "avail himself" of particular benefits afforded to him only by virtue of Mrs. Smith's planning efforts. Whatever he may have verbalized to her previously,[4] Mr. Smith made a clear and unmistakable choice in September 2007 after his wife's passing to avail himself of his

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[4] Rule 3:20 of the Rules of this Court dictates that to determine whether a party is entitled to summary judgment, i.e. "whether any material fact is genuinely in dispute," the Trial Court shall take into account "the pleadings" in the case. Va. S. Ct. Rule 3:20; see McNew v. Dunn, 233 Va. 11, 14, 353, S.E.2d 713, 716 (1987) (denials in a defendant's Answer "put material facts genuinely in dispute") (applying former Rule 3:18).

In her Second Amended Complaint, Ms. Mountjoy alleged, "At no time did Mr. Smith authorize or direct [Mrs. Smith] to create an estate plan for him. (JA at 47, SAC ¶18.) Carol Smith, in turn, contested the issue by denying "that Mr. Smith did not authorize or direct [Mrs. Smith] to create an estate plan for him" and denying, based on lack of knowledge, any other implication the allegation might portend. (JA at 57-58, 60, Smith's Answer to SAC ¶¶18 & 46.) Against this backdrop, the Trial Court found as an "established material fact" as to this issue only that "Mr. Smith never directed Mrs. Smith to make an estate plan for him." (JA at 333, ¶6.) Such finding, however, does not support Ms. Mountjoy's persistence on appeal that Mr. Smith told Mrs. Smith he didn't want an estate plan, (Mountjoy Brief at 1, 7), or that she acted contrary to his express wishes, (id. at 2, 11). In any event, these allegations were not ultimately material to the Trial Court's conclusions.

Article X trust benefits.[5] In so doing, Mr. Smith knowingly accepted the severance of his wife's and his own entireties interests in the Six Properties and, with the dissolution of the Mr. Smith Trust, self-effectuated the transfer of the resulting half interests to himself free of trust.

The Trial Court's refusal to recognize the impact of Mr. Smith's unequivocal voluntary choice in this context constitutes reversible error.

ii. Failure to Timely Disavow.

Mr. Smith terminated his trust effective September 6, 2007. His Notice of Termination served simultaneously to define and bring to an end the trust period commencing May 23, 2007, during which Mr. Smith's properties were impressed with the trust. Subsequent efforts through the filing and prosecution of the instant suit many months later in May 2008 could not serve to erase the trust's lifeline, the length of which he had already taken steps to define.

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[5] The test for ratification does not require that Mr. Smith actually receive the benefits of which he indicates an intention to avail himself, merely the unmistakable indication of his intent to receive. See Piedmont Mt. Airy Guano Co. v. Buchanan, 146 Va. 617, 625, 131 S.E. 793, 795 (1926). Nevertheless, with the legal effect of the trust's termination vesting title to the trust properties in Mr. Smith, there was no evidentiary need for "documentation confirming that Mr. Smith received the assets of his trust." (Cf. Mountjoy Brief at 36.) See also Carter v. Hough, 86 Va. 668, 673-74, 10 S.E. 1063, 1064 (1890), where one B.G. Carter "availed himself" of his power to revoke a trust and, merely by so doing, "made himself thus the absolute owner" of the trust assets.

Having already acknowledged the Mr. Smith Trust and taken for himself the entirety of its corpus by its dissolution effective September 6, 2007, Mr. Smith cannot be heard to declare as a legal nullity thereafter his wife's actions in creating and funding the trust (and, concomitantly, his own actions taken pursuant to Article X thereof).

b. Demanding Benefits From Mrs. Smith's Trust.

Likewise, Mr. Smith's demands upon Carol Smith as trustee of Mrs. Smith's Trust, unmistakably evidence his intention to avail himself of the benefits of her trust as well. Ms. Mountjoy denies that Mr. Smith's demand for trust benefits constitutes an effort or intent to avail himself of the benefits of Mrs. Smith's Trust.[6] She apparently theorizes that by his demanding only some of the trust benefits to which he was entitled (i.e. only those not relating to disputed, tangible trust assets), the trust was nevertheless void. This theory is nonsensical in its circularity.

[6] Ms. Mountjoy now asserts that she has "never disputed" Mrs. Smith's Trust, only certain assets therein. (See Mountjoy Brief at 37-38.) This posture is confusing since Ms. Mountjoy's court-ordered relief included the setting aside of Mrs. Smith's Trust as void.

Notwithstanding Ms. Mountjoy's equivocation on appeal as to what Mr. Smith may have intended by his September 2008 demand letter,[7] the letter itself leaves no room for question as to his motivation and intent. Without reservation or reference to the pending litigation, Mr. Smith, again acting fastidiously in accordance with and pursuant to the terms of the trust document itself (Article VI), recognizes the authority of Carol Smith as the trustee of the Mrs. Smith Trust, and demands his "entitlement" under paragraphs A and B thereunder (i.e. "all of the net income of the Trust Fund" and a discretionary amount of the principal as well). (JA at 154.)

Again, regardless of how or whether Carol Smith responded to Mr. Smith's demand, his intent to avail himself of the benefits could not be more unmistakable. The Piedmont ratification standard (see infra note 5) is therefore equally and unmistakably satisfied without the need for further factual development. Summary judgment in favor of Carol Smith on this issue is therefore warranted.

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[7] Ms. Mountjoy's suggests now that Mr. Smith's September 2008 demands are to be interpreted as formal requests for rent on the half-interests in properties Carol Smith arguably held unlawfully as trustee of the Mrs. Smith Trust and that such demands were "entirely consistent with [Mr. Smith's] position that the property rightfully belonged to him." (Mountjoy Brief at 38.) Yet, in the same letter making these demands for Trust Fund entitlements, Mr. Smith's (now Ms. Mountjoy's) counsel also notes that for more than a year after Mrs. Smith's death, Mr. Smith was actually sending to Carol Smith "1/2 of the rents on the real property." (JA at 154.)

2. Ratification Was Timely Raised And Appropriately Considered By The Trial Court.

Ms. Mountjoy raises for the first time on appeal (and without having even appealed or assigned cross-error to the issue) the question of "undue surprise" and prejudice allegedly suffered by the Trial Court's having allowed and ruled upon the question of ratification. She argues only now that Carol Smith somehow waived the defense of ratification despite Ms. Mountjoy's having failed to raise this waiver issue to the Trial Court at any time. However, as Ms. Mountjoy concedes, the ratification issue was raised in the context of Carol Smith's Motion for Partial Summary Judgment, briefed by both parties, argued to and thereafter ruled upon by the Trial Court as a basis for denying Carol Smith the relief she sought. At no point during the lower court proceedings did Ms. Mountjoy suggest that she was in any way prejudiced thereby.

Rule 5:25 of the Rules of the Supreme Court of Virginia provides, "[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." This Court has "repeatedly refused to consider issues or objections raised for the first time on appeal." Buck v. Jordan, 256 Va. 535, 545, 508 S.E.2d

880, 885 (1998) (string cite omitted); see, e.g., Cardinal Dev. Co. v. Stanley Constr. Co., Inc., 255 Va. 300, 305, 497 S.E.2d 847, 850 (1998).

This Court has said in a long line of authority that it will not consider the merits of an argument where a party "failed to state an objection at the time" of the complained-of event. Angstadt v. Atlantic Mutual Ins. Co., 254 Va. 286, 291, 492 S.E.2d 118, 121 (1997). The purpose behind the Rule's "requiring timely specific objections is to afford a trial court the opportunity to rule intelligently on the issues presented, thereby avoiding unnecessary appeals." Buck, 256 Va. at 545, 508 S.E.2d at 885, citing Chawla v. BurgerBusters, Inc., 255 Va. 616, 622, 499 S.E.2d 829, 832 (1998).

Ms. Mountjoy did not give either the Trial Court or Ms. Smith an opportunity to consider or respond to the objection now voiced for the first time on appeal. Had the issue been raised at the appropriate time, Ms. Smith could have formally sought to amend her pleadings in a way which the Trial Court, in effect, informally found her to have done in any event. By considering the arguments of the parties relating to the ratification question, without objection by Ms. Mountjoy to the alleged procedural

defect,[8] the Trial Court effectively treated any procedural defect as cured when considering the issue of ratification as a defense to Evelyn Smith's alleged wrongdoing. Arguing the issue on the merits amounted to Ms. Mountjoy's consent to Carol Smith's right to do so. Failure to argue to the Trial Court that raising the issue on summary judgment was procedurally flawed served to waive any objection Ms. Mountjoy may have had to Carol Smith's having done so.[9]

D. This Appeal Must Be Decided On Undisputed Facts Properly Before The Trial Court On Summary Judgment.

Ms. Mountjoy improperly seeks to augment the record on appeal with untimely and unsupported proffers. In particular, Ms. Mountjoy seeks to re-litigate the ratification issue with "facts" she concedes are "not in the

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[8] In fact, this Court has never deemed ratification an "affirmative defense" requiring specific pleading. See generally Sinclair and Middleditch, Virginia Civil Procedure § 9.2[D] (2008 & 2009-2010 Supp.) (compiling affirmative defenses under Virginia law as identified by Professor Hamilton Bryson – ratification not among them); see also H. Bryson, Bryson on Virginia Civil Procedure, Chapter VI (as cited by Sinclair and Middleditch). Though the Court in Ward v. NationsBank of Virginia, N.A., did note in passing the defendant's having called it an "affirmative defense," 256 Va. 427, 433, 507 S.E.2d 616, 619 (1998), the matter was neither relevant nor essential to the Ward court's decision.

[9] Even now, Ms. Mountjoy misrepresents the Winslow case's relevance in this regard. (See Mountjoy Brief at 31.) The Winslow court found the defendant barred by estoppel from presenting a new defense on summary judgment for having already taken an "inconsistent and contradictory position" in prior litigation. Winslow, Inc. v. Scaife, 224 Va. 647, 653, 299 S.E.2d 354, 358 (1983).

record." (Mountjoy Brief at 39, n.17.) She contends she did not have the opportunity to bring the proffered facts to bear on the issue. To the contrary, as Ms. Mountjoy herself notes, Carol Smith briefed the ratification issue to the Court with a week still left in the discovery period and "six weeks before" the summary judgment hearing. (Mountjoy Brief at 30, 31.) Ms. Mountjoy simply made no effort to bring the matters to the Trial Court's attention. As a consequence, none of the newly proffered facts may be considered at this stage of the proceedings.[10]

II. CONCLUSION

For the foregoing reasons, Carol Smith, in her capacity as Executrix of the Estate of Evelyn B. Smith and in her capacity as Trustee of the Evelyn B. Smith Inter Vivos Revocable Trust, requests that the Supreme Court of Virginia grant the requested relief, or such relief as to the Court seems proper, and remand this matter to the trial Court for further proceedings consistent with such reversal.

[10] Regardless, the proffered facts do not serve in any way to change or call into question the express language within the four corners of the Notice of Termination. (See infra § I.C.1.a.i.)

Carol Smith, in her capacity as Executrix of the Estate of Evelyn B. Smith and in her capacity as Trustee of the Evelyn B. Smith Inter Vivos Revocable Trust

By Counsel

By: _____

Thomas W. Repczynski, VSB No. 39967
Christopher A. Glaser, VSB No. 43491
Arianna Gleckel, VSB No. 74914
Bean, Kinney & Korman, P.C.
2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
(703) 525-4000; (703) 525-2207 (Fax)
trepczynski@beankinney.com
cglaser@beankinney.com
agleckel@beankinney.com

III. CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that:

1. Three copies of the foregoing Reply Brief of Appellant have been served, via U.S. Mail, postage prepaid, upon opposing counsel, Mark E. Kellogg, Travis W. Markley, and Rebecca D. Weir, Becker, Kellogg & Berry, P.C., 5501 Backlick Road, Suite 220, Springfield, Virginia 22151 on this 19th day of January, 2010.

2. Fifteen paper copies and one electronic copy on CD of the foregoing Reply Brief of Appellant and have been hand-filed with the Clerk of the Supreme Court of Virginia, this 19th day of January, 2010.

Thomas W. Repczynski, VSB No. 39967