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.

BRIEF OF APPELLANT

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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**

OPENING 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 Opening Brief of Appellant and requests this Court reverse three related judgment orders of the Honorable Jeffrey W. Parker, Judge of the Circuit Court of Fauquier County (the "Trial Court"): the Order and Letter Opinion entered February 26, 2009; the

Supplemental Order Upon Reconsideration entered April 22, 2009; and, the Final Order entered April 22, 2009.

I. STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

Theodore M. Smith ("Mr. Smith") sued the Estate of Evelyn B. Smith alleging that Evelyn B. Smith ("Mrs. Smith"), Mr. Smith's wife of sixty-one (61) years, breached fiduciary duties owed him through a general Durable Power of Attorney (the "Durable POA") in that on May 23, 2007, Mrs. Smith created two trusts – one each for their respective benefit – and funded them each by transferring equal half interests in six real properties, held jointly by the couple as tenants by the entireties until the transfers, into each of the two separate trusts as tenants in common. Mrs. Smith's Trust, rendered irrevocable upon Mrs. Smith's death on July 21, 2007, has remained in effect at all times relevant hereto. Mr. Smith's Trust was terminated by him on September 6, 2007, effective as of that date.

Mr. Smith's Second Amended Complaint alleged causes of action entitled: Breach of Fiduciary Duty (Count I) and Declaration of Statutory Election Rights (Count II). Carol Smith mirrored the request for declaratory relief with her counterclaim and raised various defenses to Count I asserting, *inter alia*, that Mrs. Smith acted within her authority to perform the acts complained of and that her undertakings were for the benefit and,

by virtue of the Durable POA, with the consent of Mr. Smith. Following Mr. Smith's death, Jean Mountjoy ("Ms. Mountjoy"), in her capacity as Executrix of the Estate of Theodore M. Smith, was substituted by consent as the real party in interest for Mr. Smith.

Ms. Mountjoy and Carol Smith cross-moved for partial summary judgment on the issue of whether Mrs. Smith breached any fiduciary duty owed to Mr. Smith. On February 26, 2009, the Trial Court denied Carol Smith's summary judgment motion, granted partial summary judgment in favor of Ms. Mountjoy, and held that Mrs. Smith's authority under the Durable POA did not expressly enumerate the power to create a revocable trust for Mr. Smith and, consequently, that the Trusts and Deeds were void per se.

On March 11, 2009, the Trial Court granted in part Carol Smith's Motion for Reconsideration. "Supplementing" its earlier ruling, the Court held that the conveyances of the six properties were void "because we didn't have a party who could receive title" and/or because the transfers to Mrs. Smith's Trust were unauthorized gifts.[1] Thereafter on March 11, a bench trial was held on unresolved issues relating to Ms. Mountjoy's breach of fiduciary duty claims. At the conclusion of Ms. Mountjoy's

[1] The parties' cross-claims regarding Mr. Smith's elective share claim were mooted by the Trial Court's decision voiding the real property transfers.

evidence, the Trial Court granted Carol Smith's Motion to Strike and entered judgment in her favor.

On April 22, 2009, after addressing post-trial issues including the addition of Carol Smith as a party to the case in her capacity as Trustee,[2] the Trial Court entered several orders including (1) its "Supplemental Order Upon Reconsideration", which (i) supplemented its February 26, 2009 Order denying Carol Smith's summary judgment motion; (ii) granted partial summary judgment in favor of Ms. Mountjoy; and (iii) reaffirmed on additional grounds that the deeds conveying the six properties were void and of no effect; and (2) its Final Order.

On May 20, 2009, Carol Smith filed her Notice of Appeal from the Order and Letter Opinion entered February 26, 2009; the Supplemental Order Upon Reconsideration entered April 22, 2009; and, the Final Order entered April 22, 2009. On October 28, 2009, this Court granted the Petition of Carol Smith on all issues presented.

II. <u>ASSIGNMENTS OF ERROR</u>

1. The Trial Court abused its discretion in refusing to consider Ms. Mountjoy's proffered deposition testimony in opposition to Ms. Mountjoy's partial summary judgment motion.

[2] Pursuant to the April 22, 2009 Order Adding Party Defendant, the Trustee was deemed to have participated fully in the underlying proceedings.

2. The Trial Court thrice erred as a matter of law in concluding Mrs. Smith's concurrent mutual conveyances into two revocable trusts of equal half interests in the couple's jointly held six real properties, were collectively void because:

a. she lacked the authority to create a trust for the benefit of Mr. Smith;

b. the transfer of half of each of the six real properties to Mrs. Smith's Trust as part of the overall conveyancing constituted an impermissible self-gift; and

c. half of each of the six real properties was conveyed to a non-existent entity.

3. The Trial Court erred as a matter of law in failing to uphold the real property transfers to Mrs. Smith as "trustee" in a resulting "naked trust" for Mr. Smith.

4. The Trial Court erred as a matter of law in failing to recognize Mr. Smith's actions as having ratified Mrs. Smith's creation and funding of the Trusts.

III. STATEMENT OF FACTS

Mr. and Mrs. Smith were married in 1946 and remained married until Mrs. Smith's untimely death on July 21, 2007. Because of Mr. Smith's failing health and poor medical history (including a debilitating and life-threatening heart attack), it was anticipated by all that Mr. Smith would pre-decease his wife. (Second Amended Complaint, ¶¶ 7, 25; Joint App. 45, 49.)

On May 19, 2006, Mr. Smith executed a general durable power of attorney naming Mrs. Smith as his attorney-in-fact. (Durable POA; Joint App. 92.) Mr. Smith provided in his Durable POA in relevant part that Mrs. Smith could, on his behalf,

> do and transact all and every kind of business whatsoever in my name as fully as though I was acting; said power to include, without in any way limiting the generality of the foregoing, full power and authority to do or to perform for me, any or all of the following, to-wit: . . . <u>sell</u> . . . <u>exchange</u>, . . . <u>contract for the sale</u>, . . . <u>exchange</u>, and acquisition of, and to <u>accept, receive, and possess any real or personal property whatsoever</u>, or interest thereon, <u>on such terms and conditions</u>, and under such covenants, as my said attorney in fact shall deem proper; [and/or] <u>convey</u>, subject to liens, mortgage, <u>subject to deed of trust</u>, and hypothecate, and in any way or manner deal with <u>all or any part of any real or personal property</u>, . . . and other property whatsoever, that I now own or may hereafter acquire. . . .

(Durable POA, ¶¶ 2, 3; Joint App. 92.) (Emphases added.) The Durable POA was neither revoked nor superseded prior to Mrs. Smith's passing and, therefore, remained in effect at all times relevant hereto.

Following a series of consultations with a long-time Fauquier County trust and estates planning attorney, Robert Miller ("Mr. Miller"), Mrs. Smith had Mr. Miller prepare *inter vivos* revocable trusts for herself and, in reliance on the Durable POA, for Mr. Smith (as revised and amended, respectively, "Mrs. Smith's Trust" and "Mr. Smith's Trust") (collectively, the "Trusts). Subsequently, Mrs. Smith made no further changes to the Trusts prior to her death on July 21, 2007. (Mr. Smith's Trust, Joint App. 95; Mrs. Smith's Trust, Joint App. 109.)

At the time Mrs. Smith created the two Trusts, Mr. Smith and Mrs. Smith jointly owned six real properties as tenants by the entireties. (Second Amended Complaint, ¶¶ 20-21; Joint App. 48.) These six properties were identified as: (1) 7506 Carolina Road, Gainesville, VA; (2) 6275 Vint Hill Road, Warrenton, VA; (3) 20.01 Acre Lot, Vint Hill Road, Parcel B, Warrenton, VA; (4) 6199 Deborah Drive, Warrenton, VA; (5) 10.10 Acre Lot, Deborah Drive, Lot 3, Pomp Farm Estates, Warrenton, VA; and (6) 7138 Academy Road, Warrenton, VA (collectively, the "Six Properties"). (Second Amended Complaint, ¶¶ 20-21; Joint App. 48.)

On May 23, 2007, by two separate deeds (collectively "the Deeds"), Mrs. Smith – in reliance upon the Durable POA – severed the tenancy by the entireties interests in the Six Properties and, for and in consideration of the mutual exchange of their respective interests in the entirety of the properties (and all the rights and privileges appertaining thereto), transferred to "Evelyn B. Smith, Trustee" equal half interests in each of the Six Properties. (Joint App. 127, 135.) Shortly thereafter, on July 21, 2007, Mrs. Smith died unexpectedly, thereby rendering Mrs. Smith's Trust irrevocable. Pursuant to the terms of the Trusts, Carol Smith succeeded as Successor Trustee as to each and formally qualified as Executrix of Mrs. Smith's Estate on August 9, 2007.

On September 6, 2007, pursuant to and in accordance with the terms of Mr. Smith's Trust, Mr. Smith formally terminated Mr. Smith's Trust in writing effective on that date. (Notice of Termination; Joint App. 149.) Nearly eight months later, without repudiating – or even referencing – the September 6, 2007 termination of Mr. Smith's Trust, Mr. Smith filed suit on May 1, 2008. Thereafter, by and through his counsel in a letter dated September 26, 2008, Mr. Smith acknowledged Mrs. Smith's Trust, expressly recognized the trust's half interest in one of the Six Properties,

and demanded from the Trustee benefits to which he acknowledged entitlement under Mrs. Smith's Trust. (Joint App. 154-155.)

IV. QUESTIONS PRESENTED

1. Did the Trial Court abuse its discretion in refusing to consider Ms. Mountjoy's proffered deposition testimony in opposition to Ms. Mountjoy's partial summary judgment motion? (Assignment of Error 1.)

2. Did the Trial Court err as a matter of law in concluding Mrs. Smith's concurrent mutual conveyances into two revocable trusts of equal half interests in the couple's jointly held six real properties, were collectively void because she lacked the authority to create a trust for the benefit of Mr. Smith? (Assignment of Error 2.)

3. Did the Trial Court err as a matter of law in concluding Mrs. Smith's concurrent mutual conveyances into two revocable trusts of equal half interests in the couple's jointly held six real properties, were collectively void because the transfer of half of each of the six real properties to Mrs. Smith's trust as part of the overall conveyancing constituted an impermissible gift? (Assignment of Error 2.)

4. Did the Trial Court err as a matter of law in concluding Mrs. Smith's concurrent mutual conveyances into two revocable trusts of equal half interests in the couple's jointly held six real properties, were collectively

void because half of each of the six real properties was conveyed to a non-existent entity? (Assignment of Error 2.)

5. Did the Trial Court err as a matter of law in failing to uphold the real property transfers to Mrs. Smith as "trustee" in a resulting "naked trust" for Mr. Smith? (Assignment of Error 3.)

6. Did the Trial Court err as a matter of law in failing to recognize Mr. Smith's actions after the fact as having ratified Mrs. Smith's creation and funding of the Trusts? (Assignment of Error 4.)

V. ARGUMENT

A. Summary of Argument.

Relevant to this appeal, Mr. Smith's deceased wife of 61 years, Mrs. Smith, is alleged and was improperly found, in effect, to have breached her fiduciary duties to him as a matter of law when, with the assistance of learned legal counsel and in reliance upon her husband's Durable POA authorizing her to do so, she: (1) severed the couple's entireties interests in their real properties; (2) exchanged them mutually for equal half interests; and, (3) conveyed them into revocable trusts she had created for each of them respectively.

Mrs. Smith's independent right to create and fund a trust in her own name, coupled with Mr. Smith's having authorized Mrs. Smith to sever their

entireties interests and to hold and to dispose of his properties on such terms as she deemed proper (and his having legally ratified her actions afterwards), sufficiently support her actions in this regard. In other words, each component part of Mrs. Smith's estate planning efforts for the couple was grounded in the legal authority to take the specific action either before or after the fact.

Alternatively, even if the express trust Mrs. Smith created for Mr. Smith's benefit was itself somehow insufficient as a matter of law to be enforced as written, Mrs. Smith's having conveyed Mr. Smith's resulting interests in the Six Properties to herself as "trustee" for Mr. Smith's benefit coupled with her authority under the Durable POA to hold and to dispose of his property on such terms and conditions as she deemed proper, resulted in a naked trust for Mr. Smith's benefit. The powers to hold and to dispose of one's property confer, consequentially, the power to impress a trust thereon.

Regardless of the legal mechanism by which Mr. Smith's Trust was created, Mr. Smith ratified Mrs. Smith's actions with his initial decision to allow the severance of the properties and to accept ownership of the assets of Mr. Smith's Trust (i.e. the half interests in the real properties Mrs. Smith held in trust for his behalf) by terminating his trust pursuant to and in

accordance with the terms of the trust itself. In doing so, Mr. Smith confirmed the existence of Mr. Smith's Trust (and, concomitantly, Mrs. Smith's Trust) from the date of formation until the date of termination (a period of more than three months). Rather than immediately repudiating the estate plan Mrs. Smith had undertaken for them both (e.g. by moving to have the deeds voided *ab initio* or their respective trusts declared void as unauthorized ultra vires acts), Mr. Smith chose instead to act within the parameters Mrs. Smith established for him to hold individually his unencumbered half interests in the Six Properties. Further evidencing Mr. Smith's acceptance and ratification of Mrs. Smith's estate planning efforts is Mr. Smith's September 26, 2008 letter which unequivocally and without reservation demanded rights and benefits afforded him under Mrs. Smith's Trust.

Either Mr. Smith's ratification represented his "acceptance" of her "offer" to sever the couple's entireties interests, or Mrs. Smith's severing the entireties interests reflected her "acceptance" of his "offer" in his Durable POA to do so. Regardless of the applicable legal theory, by and through their respective actions, Mr. and Mrs. Smith mutually bound themselves and each other by and to the resulting severance of entireties interests in their Six Properties.

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

Mr. Smith's ratifying his wife's estate planning on their collective behalf moots any question regarding the legal propriety of her having taken the actions in the first instance. By accepting, in fact affirmatively insisting upon receiving, his proportionate share of the couple's assets from Carol Smith as Mr. Smith's trustee, Mr. Smith himself resolved the question whether a trust had come into existence on May 23, 2007. His formal declaration on September 6, 2007, that his trust was terminated as of that date—and not rescinded (or otherwise of no legal effect) effective May 23, 2007—confirmed that the Trust was then extant and, perhaps more to the point, had had life dating from its inception.

The Trial Court considered, but erred as a matter of law in rejecting, Mr. Smith's actions ratifying Mrs. Smith's actions on his behalf. Relying on undisputed facts relating to documented steps taken by Mr. Smith in regards to the Trusts, the Trial Court nevertheless concluded that there was nothing "to suggest on these facts that Mr. Smith ratified or acquiesced in the action of Mrs. Smith." (Feb. 26, 2009 Letter Opinion, p. 3; Joint App. 334.) Further, the Trial Court concluded as a matter of law that Mr. Smith's

formal termination[3] of the trust—effective September 6, 2007—served somehow to put Mr. Smith back in the position he was in prior to the May 23, 2007 transfers. Not only did the termination not have the effect of returning Mr. Smith to the legal ownership position he held prior to the creation and funding of the Trust, but also the unambiguous language of the September 6, 2007 "Notice of Termination" makes objectively clear that was not his intent.

1. Whether Undisputed Facts With Regard To Particular Actions By Mr. Smith Constitute Ratification Is A Pure Question Of Law Reviewable De Novo On Appeal.

Where as here, the undisputed facts and documents evidence Mr. Smith's relevant actions, the only question for the Trial Court to resolve was the legal question as to whether those actions constituted ratification of Mrs. Smith's estate planning efforts for the couple. On appeal, the Trial Court's resolution of the legal question is reviewed de novo. *See Oraee v. Breeding*, 270 Va. 488, 494, 621 S.E.2d 48, 50 (2005), *citing Davenport v. Little-Bowser*, 269 Va. 546, 552, 611 S.E.2d 366, 369 (2005).

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[3] "Termination" is defined as follows: "End in time or existence; close; cessation; conclusion." Black's Law Dictionary 1471 (6th ed. 1990). Similarly, to "terminate" something legally is "[t]o put an end to; to make to cease; to end." *Id.* The Notice of Termination at issue here did not reach back through time and seek a retroactive effect. By its very terms, it was effective as of the date executed, i.e. September 6, 2007.

2. Mr. Smith's Actions Constitute Legal Acceptance And Were Inconsistent With Rejection Of Mrs. Smith's Estate Planning Efforts.

a. Mr. Smith's Formal Termination of Mr. Smith's Trust Served To Ratify Mrs. Smith's Having Created And Funded Mr. Smith's Trust And, As A Consequence, The Entirety Of Her Estate Planning Efforts.

It is well settled in Virginia that a principal is bound by his agent's previously unauthorized act if the principal ratifies the act by 1) accepting its benefits with full knowledge of the relevant facts, or, 2) if upon learning of the act, the principal does not promptly disavow the act. *Kilby v. Pickurel*, 240 Va. 271, 275, 396 S.E.2d 666, 668 (1990) (internal citations omitted). A principal's ratification of an agent's otherwise voidable acts may be express or implied. *Piedmont Mt. Airy Guano Co. v. Buchanan*, 146 Va. 617, 625, 131 S.E. 793, 795 (1926). A principal also cannot subsequently disavow an agent's acts if the principal has previously adopted or acquiesced to the act in question. *Piedmont*, 146 Va. at 626, 131 S.E. at 795; *Winston v. Gordon*, 115 Va. 899, 907, 80 S.E. 756, 759 (1914); *see Jones v. Brandt*, 274 Va. 131, 139, n.2, 645 S.E.2d 312, 316, n.2 (2007) (acknowledging in footnote that ratification doctrine would have applied even though parties did not address issue).

Further, this Court has held that "if the principal knows that an agent has transcended his authority, he must promptly disavow the act, or he makes it his own." *Coastal Pharmaceutical Co. v. Goldman*, 213 Va. 831, 839, 195 S.E.2d 848, 854 (1973); *see also Cocoa Products Co. v. Duche*, 156 Va. 86, 95, 158 S.E. 719, 722 (1931) ("[T]he right to rescind must be exercised promptly upon the discovery of the facts authorizing rescission. Any unreasonable delay in rescission, or any further dealing or action in respect to the contract as though it were still in force amounts to a ratification or election to abide by the contract and is a bar to a subsequent rescission.").

With full knowledge of Mrs. Smith's estate planning efforts for the couple,[4] Mr. Smith chose not to disavow Mrs. Smith's severance of the couple's entireties interests in the Six Properties or the transfer of the

[4] The extent of the "fullness" of Mr. Smith's knowledge of his wife's actions at the time of his September 6, 2007 termination notice is not at issue here. Though professing to have been unaware of her actions prior to his wife's death (*see* Joint App. at 49, ¶ 27), Mr. Smith conceded in his Second Amended Complaint (filed November 12, 2008) that he gained full knowledge of "all" of his wife's allegedly "wrongful actions and self-dealing" when he undertook, in his words, to "undo" them, (Joint App. at 49, ¶ 30; *see* Cert. of Service, Joint App. at 54), beginning, apparently, with his September 6, 2007 Notice of Termination. (*See* Joint App. at 50, ¶ 31.) Of course, for reasons set forth herein, the termination did not serve to "undo" anything, though concededly it did serve to free the assets of Mr. Smith's Trust from the trust then-impressed upon them.

properties into the Trusts she had created for each of them.[5] To the contrary, in the presence of multiple attesting witnesses and before a Notary Public – and with the presumed understanding of the consequences of his actions – Mr. Smith chose instead to recognize the result of the Deeds and the severance of the couple's entireties interests in the Six Properties. Upon gaining a full appreciation for the estate planning efforts Mrs. Smith had undertaken, rather than repudiate them in their entirety, Mr. Smith took the requisite steps pursuant to the terms of the trust itself to take personal possession of his resulting half interests in the Six Properties, i.e. the assets of the Mr. Smith Trust. (Feb. 18, 2009 Hearing Tr. pp. 34-39; Joint App. 260-265.)

Specifically, on September 6, 2007, Mr. Smith issued a "Notice of Termination" formally terminating Mr. Smith's Trust, (Joint App. 149), and in so doing, "instructed and directed" the Trustee "to immediately and forthwith distribute, transfer and deliver . . . all assets of the Trust Fund, as

[5] In so doing, Mr. Smith might be said to have accepted what amounted to Mrs. Smith's "offer" to sever their entireties interests in the properties. *See Smith v. Smith*, 20 Va. Cir. 135, 138 (Chesterfield, 1990) (married persons may, by their actions, implicitly agree to sever a tenancy by the entirety). Such an agreement evokes basic contract principles of offer and acceptance but in a uniquely marital context. In fact, Mrs. Smith's transfers might themselves be deemed to have reflected her acceptance of Mr. Smith's offer (evidenced by his having empowered her to sever the interests in his Durable POA). *See Smith*, 20 Va. Cir. at 138.

the term is defined in the Trust." (Joint App. 149.) In addition to the obvious acknowledgement of the Trustee's then-existing authority over the "Trust Fund," Mr. Smith's termination both implicitly and explicitly recognizes the Trustee's powers up to that point: "Unless otherwise provided in this instrument, the Trustee shall have *no further* rights or powers under the Trust and *all powers heretofore granted to the Trustee by virtue of the Trust*, are hereby terminated and revoked." (Joint App. 149.) (Emphases added.)

In other words, upon learning of Mrs. Smith's estate planning efforts for the couple, Mr. Smith did not reject them outright and undertake a course of action to assure and revert to the *status quo ante*. On the contrary, Mr. Smith's actions on September 6, 2007, evidence his informed decision as of that time to recognize the existence of his trust, and the Trustee's then-existing rights and powers thereunder and to follow a course of action which his wife had empowered him to take in the trust document itself.

Mr. Smith's initiating the instant lawsuit nearly eight months after the September 6, 2007 termination and challenging the Durable POA upon which Mrs. Smith relied in creating the Trusts, evidences merely an after-the-fact attempt to avoid the trust, the existence and fruits of which he had

long since accepted. Having already ratified Mrs. Smith's actions with full knowledge thereof, Mr. Smith cannot later be allowed to deny his wife's authority to create the tenancy in common interests the ownership of which he had previously declared and assured by virtue of having terminated his trust.[6] *See Piedmont*, 146 Va. at 625, 131 S.E. at 79.

b. Mr. Smith's Subsequent Demands To Receive The Benefits To Which He Was Entitled Under Mrs. Smith's Trust Specifically Ratified Mrs. Smith's Actions.

In addition to having accepted the half interests in the Six Properties Mrs. Smith transferred into Mr. Smith's Trust, Mr. Smith subsequently determined as well to make formal demand for the benefits to which he believed he was entitled under Mrs. Smith's Trust. The September 6, 2007 recognition of Mr. Smith's Trust and the assets therein indirectly served to ratify the co-existence of Mrs. Smith's Trust, since the deeds effecting the severance and delivery of the assets into Mr. Smith's Trust (i.e. the Six Properties) were, likewise, the very same instruments funding Mrs. Smith's Trust.

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[6] As is detailed hereinafter, *see infra* § V.B.2.b., more than a year after the Notice of Termination, Mr. Smith acknowledged through counsel that subsequent thereto property transferred by Mrs. Smith was then "owned ½ by Theodore Smith and ½ by [Mrs. Smith's] Trust."

Though Mr. Smith alleges a course of action to "undo" his wife's planning efforts on his behalf, on September 26, 2008, without reservation or even reference to the pending litigation, Mr. Smith made demand on the Trustee for entitlements afforded him under specific provisions of Mrs. Smith's Trust. The September 26, 2008 demand letter by Mr. Smith's counsel, undisputed and accepted as part of the record for consideration on summary judgment, states in relevant part as follows:

> 1) Please consider the first item of this letter as a demand pursuant to ARTICLE VI of THE EVELYN B. SMITH INTER VIVOS REVOCABLE TRUST dated the 23rd of May, 2007 for Mr. Theodore M. Smith's entitlement under paragraph A. that provides: "For so long as my husband shall live, my Trustee shall pay to my husband's legal representative, for the benefit of my husband, all of the net income of the Trust Fund, in convenient installments but no less than annually."
> . . . .
> 2) Please consider the second item of this letter as a demand pursuant to ARTICLE VI of THE EVELYN B. SMITH INTER VIVOS REVOCABLE TRUST dated the 23rd of May, 2007 for Mr. Theodore M. Smith's entitlement under paragraph B. that provides: In addition, my Trustee is authorized, within its exclusive, sole, and absolute discretion, to pay to my husband's legal representative for the benefit of my husband, as much of the principal of the Trust Fund as my Trustee, exercising such sole and absolute discretion, shall deem necessary or proper for his reasonable support, maintenance and medical care.

(Joint App. 154.)

In addition, the September 26, 2008 demand letter makes reference to the couple's Gainesville property, one of the Six Properties (*see supra* §

III, p. 7), and confirms the tenancy in common ownership thereof. Specifically, Mr. Smith's counsel acknowledges that the Gainesville property as of the date of the letter was then "owned ½ by Theodore Smith and ½ by [Mrs. Smith's] Trust." (Joint App. at 155.)

Based on the foregoing actions by Mr. Smith, not only did Mr. Smith fail to disavow Mrs. Smith's actions in creating and funding both Mr. Smith's Trust and Mrs. Smith's Trust, he quite clearly and affirmatively ratified them by invoking the Trusts according to their own terms. In doing so, Mr. Smith necessarily accepted both of the Trusts and Mrs. Smith's having re-titled their interests in the Six Properties. Much as he had served his September 2007 notice pursuant to the express terms of his own trust, Mr. Smith ratified Mrs. Smith's Trust – if not implicitly with the earlier notice – by confirming its ownership of half of the couple's Gainesville property and acting within the four corners of the Mrs. Smith Trust documents as though the trust were fully in force and possessed of the property he claims it never received.

As aptly noted by the Trial Court, "[W]here, after discovery of such acts the principal, with full knowledge of the facts, acts in such a manner as to unmistakably indicate that he intends to avail himself of the benefits of the contract made by the agent, he will be deemed to have ratified such

acts in their entirety." (Letter Opinion at 3, citing *Piedmont*, 146 Va. at 625, 131 S.E. at 795; Joint App. 334.) There can be no question that by September 2008 (more than a year since the termination notice, which was itself precipitated with the alleged "shock and consternation" of first learning of "all" that his wife had done, and nearly four months since filing suit) that Mr. Smith was "availing himself of the benefits of Mrs. Smith's Trust. Yet, without explanation, the Trial Court states dismissively that the September 2008 demand letter does not constitute ratification. (*See* Joint App. 154.) Quite to the contrary, Mr. Smith's ratification of Mrs. Smith's actions barred Mr. Smith, and subsequently estops Ms. Mountjoy, from claiming that Mrs. Smith exceeded the scope of her authority in creating and funding the Trusts.

C. The Deeds Reflect Authorized Conveyances Of Mr. And Mrs. Smith's Interests In The Six Properties.

Whether or not ratified after the fact by Mr. Smith, Mrs. Smith had the unassailable right to create and fund her trust with her own property. She likewise had the right pursuant to the Durable POA to convey or exchange Mr. Smith's property for substitute interests and the power to accept, to hold, to dispose and, therefore, to impress a trust on such interests for Mr. Smith.

1. Mr. Smith's Durable POA Authorized Mrs. Smith To "Sell", "Convey", "Exchange", "Accept, Receive And Possess" His Entireties Interests In Their Real Properties "On Such Terms And Conditions" As She Deemed Proper.

a. Mr. Smith's Durable POA Authorized Mrs. Smith To Convey His Tenancy By The Entireties Interests In The Couple's Real Properties In Exchange For Separate Interests Held In Trust For His Benefit.

Mr. Smith specifically contemplated Mrs. Smith's use of the Durable POA to dispossess him of his entireties interest(s) in the real properties which the two of them jointly owned. Mr. Smith had engaged his long-time legal counsel to draft the Durable POA purposefully to enable Mrs. Smith to complete conveyances of their entireties properties. (Second Amended Complaint, ¶¶ 8-10; Joint App. 46.) By the terms of the Durable POA, Mrs. Smith was expressly authorized to

> sell, … exchange, … and contract for the sale, … exchange, and … to accept receive and possess any real or personal property whatsoever, or interest thereon, on such terms and conditions, and under such covenants, as my said attorney in fact shall deem proper, . . . [and to] convey, … all or any part of any real or personal property….

(Durable POA ¶¶ 2, 3; Joint App. 92.)

In this regard the Durable POA was not limited to a particular property or properties and, further, was not limited as to whom or in what manner any such disposition of property was to occur. Rather, Mr. Smith

empowered Mrs. Smith to dispose of "all or any part of any real or personal property" he had at the time, and to possess any property he might have in the future, titled as she reasonably saw fit.

Such expansive enumerated powers necessarily included the unenumerated power to impress a trust on the properties at issue. When one has the power to hold and dispose of property—as Mrs. Smith unquestionably had—such person likewise has authority to impress a trust on the property. *Fleenor v. Hensley*, 121 Va. 367, 373-74, 93 S.E.2d 582, 584 (1917).

i. Power to Convey.

The Trial Court's two-stage ruling (on summary judgment as supplemented on reconsideration) properly concluded as a threshold matter that the Durable POA afforded Mrs. Smith the legal authority to convey the Six Properties. As noted above, this general power is expressly enumerated in the Durable POA. Generally speaking, the Trial Court ruled, "She had the power to convey real estate." (Tr. March 11, 2009, 59:13-18; Joint App. 432.) Specifically, the Trial Court concluded: "Certainly I think there was the authority on the part of the grantor to make the conveyance." (Tr. March 11, 2009, 19:14-16; Joint App. 392.)

As to the issue of Mrs. Smith's general authority to convey Mr. Smith's entireties interests, therefore, but for the Trial Court's alternative bases for setting aside the transfers (i.e. as an unauthorized gift or transfer to a "non-entity") there appears to be no question about the actual power to convey having been granted her by Mr. Smith.

ii. Power to Exchange.

Similarly, Mr. Smith's having granted the power to "exchange" his property, i.e. substituting one asset for that of another,[7] evokes a recognition by Mr. Smith that Mrs. Smith might trade one asset for another on his behalf if she deemed it to be in his best interest to do so. As is discussed more fully below, *see infra* § V.C.2.b., the Deeds reflect on their face the mutual exchange of property interests effected thereby. To be sure, such an exchange must have been undertaken in furtherance of Mrs. Smith's fiduciary duties to Mr. Smith to be proper[8]—an issue mooted by the Trial Court's summary judgment ruling. Nevertheless, the undisputed facts

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[7] Among the many legal definitions of "exchange," is the following: "Mutual transfer of property other than for money although one of parties may pay a sum of money in addition to property." Black's Law Dictionary 562 (6th ed. 1990). In common usage, "exchange" means "to give up (something) for something else; part with for some equivalent; change for another." The Random House Dictionary of the English Language 675 (2d ed. 1987) (unabridged).

[8] Although even improper actions would not be actionable if ratified by Mr. Smith, of course. *See supra* § V.B.

regarding Mr. Smith's life expectancy at the time of the transfers actually rules out the need for further factual development as to whether Mrs. Smith was acting on his behalf. (Second Amended Complaint, ¶ 25; Joint App. 49.) She necessarily was. A finding to the contrary would be both legally and logically inconsistent.

The Six Properties are agreed by the parties to have been held as tenants by the entireties by the couple at the time of the Deeds. Absent any action by Mrs. Smith, therefore, she stood to receive unencumbered fee simple interests in the Six Properties upon Mr. Smith's anticipated passing. As the parties have conceded the universal expectation at the time of the Deeds that Mr. Smith was to pre-decease Mrs. Smith, any transfer on her part of any interest in the Six Properties would necessarily have left her with something less than her unencumbered fee simple expectancy. A transfer into a trust for Mr. Smith's benefit, therefore, must be deemed to have been done with the intent to benefit Mr. Smith.

iii. Power to Accept, Receive and Possess.

Mrs. Smith was not restricted to holding Mr. Smith's assets as they were titled at the time she assumed authority over them pursuant to the Durable POA. As already noted, she had the express power to "exchange" his property for something else if she deemed it proper to do so. In

addition, Mrs. Smith was expressly authorized to “accept receive and possess” his property interests “on such terms and conditions, and under such covenants” as she deemed proper. “In trust” is perforce such a term or condition.

Authorized as Mrs. Smith was to accept, receive and possess property in trust for Mr. Smith, her doing so cannot be an unauthorized act, even if it might somehow be voidable if she were to undertake to do so in an improper manner, i.e. in breach of her fiduciary duties to Mr. Smith. (*See infra* note 12.) The Trial Court did not reach the issue of whether Mrs. Smith, in fact, acted in such a manner having wrongly concluded as a threshold matter that the creation of Mr. Smith’s Trust was itself an unauthorized void act.

Unquestionably, Mrs. Smith was expressly granted authority to hold and dispose of Mr. Smith’s property. The powers to hold and dispose are the logical results derived from the above-described powers to “accept”, “receive”, “possess”, “convey”, and “exchange”. As Mrs. Smith had the power to hold and dispose of Mr. Smith’s interest in the properties at issue, the Durable POA need not expressly grant Mrs. Smith the power to impress a trust on the property. *See Fleenor*, 121 Va. at 373-74, 93 S.E.2d at 584.

The latter authority derives naturally from the sum of the two former powers.

In *Fleenor*, the purchaser of real property orally declared, prior to tendering the purchase monies, that the purchase was "for" two other individuals and that he would convey the property at such time as the individuals tendered to him the purchase price. This Court held that such declaration was sufficient to create a trust as "[a]ll persons who have the capacity to hold and dispose of property can impress a trust upon it." *Fleenor*, 121 Va. at 373, 93 S.E.2d at 584. It "is not essential to its validity that the beneficiary should have had notice of its creation or have assented to it" as the mere "acceptance by the trustee is all that is necessary to bind him." *Fleenor*, 121 Va. at 373-74, 93 S.E.2d at 584.

The Trial Court concluded that Mrs. Smith's creation of Mr. Smith's Trust was an unauthorized act as the Durable POA did not expressly provide Mrs. Smith with the authority to impress a trust on the property of which the Trial Court had already concluded she was authorized to hold and dispose. Pursuant to *Fleenor*, however, such power derives perforce from the power to hold and dispose of property. Mrs. Smith's impressing a trust upon Mr. Smith's property—for the benefit of Mr. Smith—was, therefore, an authorized act.

b. Mrs. Smith's Unenumerated Authority To Impose A Trust On Mr. Smith's Assets May Be Implied From The Expressly Enumerated Terms Of Mr. Smith's Trust.

"Powers of attorney are frequently classified as special and general, a more liberal construction in favor of the agent and third persons being allowed in the case of general than in the case of a special power." *Bukva v. Matthews*, 149 Va. 500, 514, 140 S.E. 674 (1927). Where the principal's intent is sufficiently expressed in the durable power, the agent is authorized to act in keeping with the expressed intent. *Jones v. Brandt*, 274 Va. 131, 138, 645 S.E.2d 312, 316 (2007).

In *Jones*, the agent pursuant to a power of attorney sought direction from the trial court regarding his authority to designate a "payable on death" beneficiary on a certificate of deposit. The agent conceded that the power of attorney did not expressly grant the authority to change the beneficiary. *Jones*, 274 Va. at 135, 645 S.E.2d at 314. Instead, the agent relied upon his express power to "sign, endorse or assign any note, check or other instrument of any nature whatsoever, negotiable or non-negotiable, for deposit, discount, collection or otherwise," and the power to "make, sign,

acknowledge and deliver any contract or other document relating to personal property." *Jones*, 274 Va. at 138, 645 S.E.2d at 315.[9]

The *Jones* Court acknowledged the impracticality of requiring that every possible power be expressly delineated, where delineated powers can be read in concert to establish inherent but unenumerated powers. In so declaring, the *Jones* Court upheld a so-called strict constructionist approach but recognized that it,

> is highly doubtful that every power of attorney, even as in this case one carefully drawn by a skilled draftsman, will always expressly confer the authority necessary to address every specific circumstance in which the principal nevertheless intends to give authority to the attorney-in-fact. Undoubtedly, standard provisions granting broad general power to the agent are intended by the principal to become applicable so as to avoid any potential unintended limitation in the authority expressly granted.

Jones, 274 Va. at 138, 645 S.E.2d at 315. In fact, to rule otherwise allows the specific to subsume the general completely. If every conceivable authority to be granted were required to be expressly enumerated, the concept of a "general power" would be lost completely amidst an endlessly long list of specifics.

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[9] The reference in *Jones* to its not applying to a case with an allegation of breach of a fiduciary duty does not preclude its applicability to such a case, especially where, as here, the Trial Court ruled the questioned transfers void as a threshold matter regardless.

The Trial Court erroneously insisted on finding an enumerated power to create a trust as a prerequisite to upholding Mrs. Smith's actions. However, to require Mr. Smith to have stated a power to impress a trust despite his having already expressly provided broadly-defined powers to hold and dispose would be to require a redundancy. As in *Jones*, one need only read the delineated powers in concert to confirm the inherent powers upon which Mrs. Smith and her counsel necessarily relied in pursuing the estate plan they did.

Inherent in the power to "accept, receive, and possess" property "on such terms and conditions, and under such covenants" as one deems proper is the power to receive and hold property "in trust" – by any account, a "term" or "condition" governing its possession. Empowered as Mrs. Smith was with the authority to hold property in trust, Mr. Smith must necessarily have intended as well that she be able to define the scope of any such entrustment within the parameters of the fiduciary duty she owed to Mr. Smith as the *cestui que trust*.[10] Further, with the delineated powers to exchange and convey interests in real property (including without exception those held by Mr. Smith as tenants by the entireties with his wife) Mrs.

[10] The Court may take note as well that Mr. Smith expressly empowered Mrs. Smith to subject his property interests to deeds of trust to the extent she deemed it to be in his best interest to do so. (Durable POA ¶ 3; Joint App. 92.)

Smith must have had the implied inherent authority to impose a trust on the property interests she conveyed to Mr. Smith otherwise unencumbered by her own pre-existing tenancy by the entireties rights, if she determined it to be in his best interest to do so.

2. Mrs. Smith Had The Independent Legal Authority To Create And Fund Mrs. Smith's Trust.

Having exchanged her entireties interests in the couple's Six Properties for his, Mrs. Smith was not restricted or otherwise bound by the Durable POA as to what she might do with her own half interests in the properties. The right to create Mrs. Smith's Trust is not now, nor has it ever been, an issue in this case.

Funding Mrs. Smith's Trust as she did was deemed void by the Trial Court as unauthorized self-dealing, i.e. unlawful gifts of Mr. Smith's property to herself. As both (1) the flip side of mutual exchanges of property interests by one authorized to convey them and (2) independent conveyances of half interests in the Six Properties, Mrs. Smith's transfers into her own trust were legally proper and therefore not subject to avoidance regardless of the legal propriety of Mrs. Smith's having created a separate trust for Mr. Smith.

a. Whether The Transfers In Question Constituted Impermissible Self-Gifts Is A Question of Law Subject to De Novo Review.

Where as here, the undisputed facts establish the terms of the transactions, the only question for this Court to resolve was the legal question as to whether the transactions at issue were "gifts" per se. With questions of law, a circuit court's resolution of the issue is reviewed de novo. *Oraee v. Breeding*, 270 Va. 488, 494, 621 S.E.2d 48, 50 (2005), *citing Davenport v. Little-Bowser*, 269 Va. 546, 552, 611 S.E.2d 366, 369 (2005).

b. Mrs. Smith's Transfers Into The Trusts Were Not Unauthorized Gifts.

A "gift" is defined as a "contract without a consideration." *Ott v. L&J Holdings, LLC*, 275 Va. 182, 188, 654 S.E.2d 902, 905 (2008), *citing Spooner v. Hilbish*, 92 Va. 333, 341, 23 S.E. 751, 753 (1895). Transferring one's valuable property rights constitutes consideration, which, by definition, means such a transfer must not be a gift. *Ott*, 275 Va. at 188, 654 SE.2d at 905. Specifically, cross-transfers of a couple's mutual tenancy-by-the-entireties interests in real property may form sufficient consideration so as not to constitute separate gifts. *See Ott*, 275 Va. 182, 654 S.E.2d 902 (2008).

One's entireties interest in property carries with it a bundle of valuable property rights, such as:

> the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the [co-tenant's] consent, and the right to block [co-tenant] from selling or encumbering the property unilaterally.

United States v. Craft, 535 U.S. 274, 282 (2002) (explicating entireties rights under parallel Michigan laws); *see Rogers v. Rogers*, 257 Va. 323, 326, 512 S.E.2d 821, 822 (1999). Exchanging such rights in property for equal and opposite rights of a co-tenant must, therefore by definition, constitute an exchange for value.

In *Ott*, Janet Ott, as both the principal beneficiary and as the personal representative of the estate of Admiral Monroe, challenged transfers of real property effectuated by Mrs. Monroe (the Admiral's wife) pursuant to a durable power of attorney. Admiral Monroe's power of attorney afforded Mrs. Monroe the authority to transfer and/or retitle the couple's jointly held properties (as does Mr. Smith's), but, unlike Mr. Smith's, expressly prohibited Mrs. Monroe's giving gifts to herself. *Ott*, 275 Va. at 184-85, 654 S.E.2d at 902-03. Notwithstanding that Mrs. Monroe had, in reliance on Admiral Monroe's power of attorney, transferred the real properties into a

limited liability company she created and controlled for estate planning purposes, *Ott* confirms that such deed manifested a transfer for consideration and was not a prohibited gift merely because it was titled a "Deed of Gift" and recited statutory authority exempting it from recordation taxes.

As noted by this Court in *Ott*, neither a "deed of gift" reference nor citation to statutory exemption authority (nor both) is sufficient to deem such a transfer a gift where the exchange is found to have been made for consideration. The deed in *Ott* referenced virtually the same language as set forth in the Smith deeds. (*Compare Ott*, 275 Va. at 186, 188, 654 S.E.2d at 904, 905 *with* Joint App. 127, 135.) Moreover, the Deeds in the present matter themselves recite and, with their signing, effectuate the cross-transfer of the consideration.

As a consequence, no factual question remains for the Trial Court regarding the consideration issue. Rather, this Court is called upon to reverse the finding of the Trial Court and conclude as a matter of law that the exchange of the couple's entireties interests constituted a sufficient exchange for consideration such that these transfers were, per se, not "gifts." *See Ott*, 275 Va. at 188, 654 S.E.2d at 905.

3. Ms. Mountjoy's Having Conceded Mrs. Smith's Authority To Make The Transfers Precludes Her From Challenging The Legality Of The Conveyances.

a. The Trial Court Abused Its Discretion In Refusing To Consider Ms. Mountjoy's Proffered Deposition Testimony Affirming Mrs. Smith's Authority To Make The Transfers.

"A trial court's exercise of its discretion in determining whether to admit or exclude evidence will not be overturned on appeal absent evidence that the trial court abused that discretion." *Wright v. Kaye*, 267 Va. 510, 517, 593 S.E.2d 307, 310 (2004) (*quoting May v. Caruso*, 264 Va. 358, 362, 568 S.E.2d 690, 692 (2002)). Whether a trial court's actions conflict with the procedural requirements set forth in a rule of this Court or a statute is a question of law that is reviewed de novo. *Lloyd v. Kime*, 275 Va. 98, 106, 654 S.E.2d 563, 568 (2008), citing *Collins v. Shepherd*, 274 Va. 390, 397, 649 S.E.2d 672, 675 (2007).

The Trial Court abused its discretion in refusing to consider deposition testimony of Ms. Mountjoy proffered by Carol Smith in opposition to Ms. Mountjoy's partial summary judgment motion. Specifically, the Trial Court confirmed that as to the deposition, the court "didn't – really didn't look at it." (March 11, 2009 Hrg. Tr. at 75:8-9; Joint App. 448.) In fact, although rightly denying Ms. Mountjoy's requested sanctions for Carol Smith's having made the proffer, the Trial Court went so

far as to suggest that it was improper to have proffered the testimony at all: "I didn't think it was appropriate for me to really consider." (March 11, 2009 Hrg. Tr. at 75:6-8; Joint App. 448.)

Rule 3:20 of the Rules of this Court states: "No motion for summary judgment or to strike the evidence shall be *sustained* when based in whole or in part upon any discovery depositions under *Rule 4:5*, unless all parties to the action shall agree that such deposition may be so used." Va. Sup. Ct. R. 3:20 (emphasis added); *see* Va. Code § 8.01-420 (codifying Rule 3:20). While discovery depositions cannot support a summary judgment finding without agreement of the parties, use of a deposition in opposing such a motion is perfectly appropriate. *Lloyd v. Kime*, 275 Va. at 106, 654 S.E.2d at 568 ("The Rule and statute do not apply to the use of depositions to *oppose* a motion for summary judgment.") (emphasis in original); W. Hamilton Bryson, *Virginia Civil Procedure* § 9.05(10)(e) (4th ed. 2005) (cited in *Lloyd*).

The Trial Court's refusal to consider deposition testimony of Ms. Mountjoy in opposition to her own summary judgment motion was a reversible abuse of discretion. Similarly, it would be improper to grant summary judgment in favor of Ms. Mountjoy based exclusively on the critical issue of Mrs. Smith's authority where Ms. Mountjoy's proffered

deposition testimony repeatedly and unequiv-ocally concedes Mrs. Smith's authority under the Durable POA. Wherefore, this Court should reverse the Trial Court's summary judgment in favor of Ms. Mountjoy and remand the matter for further proceedings if otherwise warranted.

b. Ms. Mountjoy Is Judicially Estopped From Denying That Mrs. Smith's Conveyances Were Authorized.

Judicial estoppel "forbids parties from assuming successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Lofton Ridge, LLC v. Norfolk S. Ry. Co.*, 268 Va. 377, 380-81, 601 S.E.2d 648, 650 (2004). As suggested by the foregoing, the doctrine may bar inconsistent positions within the same action. *Lofton Ridge*, 268 Va. 377 at 381, 601 S.E.2d at 650.

Ms. Mountjoy, herself, repeatedly and matter-of-factually during her deposition conceded Mrs. Smith's authority to transfer the couple's properties and to sign particular deeds, specifically including the deed transferring the five Fauquier County properties into the couple's Trusts:

> Q Is there any deed in this case that you contend that Evelyn didn't have authority to execute . . . ?
>
> A Not that I know of.
>
> (Tr. Mountjoy Depo. at 50:17 – 50:20; Joint App. 349.)

* * *

Q Now I'm looking at the Second Amended Complaint. And there are six properties that are described. And those six properties are covered by two deeds, May 23rd, 2006 [sic], I believe. Do you contend, you as the Plaintiff in this case, contend that Evelyn lacked the authority to execute those deeds on behalf of Ted?

A. What was the date?

Q May 23rd, 2006 [sic].

A She had the power of attorney to do so.

(Tr. Mountjoy Depo. at 51:13 – 51:22; Joint App. 350.)

* * *

Q Again, just so I'm clear, Plaintiff contends that deed in front of you [the May 23, 2007 deed transferring the five Fauquier real properties into the couple's respective trusts] was executed within Evelyn's authority under the power of attorney?

A Uh-huh (indicating yes.)

(Tr. Mountjoy Depo. at 53:21 – 54:3; Joint App. 352.)

(Defs' Motion for Limited Reconsideration, at 3; Joint App. 341.)

In directing the Trial Court to these inconsistencies, Carol Smith stressed that Ms. Mountjoy's concessions in this regard must necessarily preclude a finding that Mrs. Smith's transfers were "somehow per se void *ab initio*" (Defs' Motion for Limited Reconsideration, at 4; Joint App. 341.)

As noted, the Trial Court expressly and wrongly refused to consider the testimony. To have done so constituted an abuse of the court's discretion.

4. Even If Mr. Smith's Trust Itself Was Void, The Real Property Transfers To Mrs. Smith As Mr. Smith's "Trustee" Of Mr. Smith's Trust Resulted In An Implied "Naked" Trust Over The Transferred Assets For His Benefit.

Assuming *arguendo* this Court were to uphold the determination that the creation of Mr. Smith's Trust was beyond Mrs. Smith's authority under the Durable POA (and that Mr. Smith did not otherwise ratify her actions as set forth *supra*), the Deeds transferring Mr. Smith's interests in the Six Properties to Mrs. Smith as his "trustee" resulted in an implied "naked" trust over those interests for his benefit. (*See* Hrg. Tr. Mar. 11, 2009, 20:17 – 25:14; Joint App. 393-398.)

Mrs. Smith, as attorney-in-fact for Mr. Smith, transferred Mr. Smith's half interests in the Six Properties to Mrs. Smith as "trustee" for the benefit of Mr. Smith. The Trial Court equated "Evelyn Smith, trustee", the intended grantee under the Deeds, with a "non-entity" that "vanished" along with the trust document defining Mr. Smith's Trust.[11] The Trial Court erred as a matter of law, therefore, in not upholding Mrs. Smith's transfer from herself

[11] "The case here was she was the trustee created under that trust [Mr. Smith's Trust]. And if that trust is no longer there, she vanishes." (Hrg. Tr. March 11, 2009, 62:9-12; Joint App. 435.)

personally to herself in her fiduciary capacity on behalf of her husband (namely as his trustee).

Voiding the express trust document which defined the intended trust terms by which the transferred *res* was to be bound does not of itself serve to nullify an otherwise valid conveyance to the trustee of the intended trust.[12] *See Burton v. Irwin*, 212 Va. 104, 181 S.E.2d 624 (1971) (in will context, an intended express trust voided for indefiniteness or which otherwise failed, would default to a resulting trust for the intended beneficiaries); *see also* 19 Michie's Jurisprudence, *Trusts and Trustees*, § 37 (implied trust results when intended express trust – generally created either by will or deed – fails in whole or in part). *C.f. Spicer v. Wright*, 215 Va. 520, 211 S.E.2d 79 (1975) (overturning resulting trust finding where intended beneficiary and terms of intended benefits of trust deemed insufficient).

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[12] As authorized acts under the Durable POA, the conveyances in the Deeds were, if undertaken in an improper manner, at worst voidable. *Princess Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust*, 243 Va. 53, 61, 413 S.E.2d 599, 604 (entity empowered to dispose of real property interests failing to do so properly rendered improper conveyance merely voidable). As a consequence, even if deemed to have been done improperly, Mrs. Smith's conveyances were subject to being ratified by Mr. Smith. *See Princess Anne*, 243 Va. at 61, 413 S.E.2d at 604, *citing Crump v. Bronson*, 168 Va. 527, 537, 191 S.E. 663, 667 (1937).

The Trial Court *Stewart v. Stewart*, 122 Va. 642, 95 S.E.2d 388 (1918), by improperly deeming void *per se* a deed to Mrs. Smith, a then-living person, to receive and hold the deeded property in trust for Mr. Smith. This conclusion does not follow from the simple premise of *Stewart* that you cannot transfer real property to a dead man. *See Stewart*, 122 Va. at 644, 95 S.E.2d at 389. Nor does this conclusion have support under Virginia law.

Although, generally speaking, "a deed transferring land to one who has no legal existence does not pass title," *Community Credit Union Services, Inc. v. Federal Express Services Corp.*, 534 A.2d 331, 334 (D.C. 1987) (citations omitted), "[u]nder principles of equity, such a deed is valid between the grantor and grantee." *Id.*; 23 Am Jur 2d, *Deeds* § 21 (West 2002).

The American Jurisprudence 2d article on "Deeds" includes the following regarding intended transfers to "grantees in being" under a name other than their true name:

> The rule that a deed which names as grantee a nonexistent person is void applies only when the named grantee does not in fact exist, and not to the situation where a person in existence is described by a fictitious or assumed name. If a living or legal person is identifiable as the grantee named in the deed, the deed is valid.

23 Am Jur 2d, *Deeds* § 21 (West 2002), citing *Roeckl v. F.D.I.C.*, 885 P.2d 1067 (Alaska 1994); *Hartman v. Thompson*, 104 Md. 389, 65 A. 117 (1906); *Allgood v. Allgood*, 134 S.C. 233, 132 S.E. 48 (1926); *Marky Inv., Inc. v. Arnezeder*, 112 N.W.2d 211 (Wis. 1961).[13]

Mrs. Smith was a living person at the time of the transfer by Deeds to her in her fiduciary capacity; that is to say, she was not deceased as was the grantee in *Stewart*. A finding that the trust agreement from which she was presumed to derive her fiduciary capacity was unauthorized does not render her non-living, but would merely render fictitious the title by which she assumed fiduciary control as trustee of Mr. Smith's share of the Six Properties. There is no denying in this case that Mrs. Smith was the intended recipient of the legal title to the equitable property interests she was to hold on Mr. Smith's behalf. What she was called in the Deeds does not bear on the question of whether the Deeds intended that Mr. Smith's interests in the Six Properties be conveyed to her person. In any event, what she was called in the document could not and did not change her state of being, namely "not dead."

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[13] In the Maryland case cited in the aforementioned AmJur article, the court quotes as authoritative an even earlier Georgia opinion which stated in part as follows: "if the grantee is in existence and can be identified, it is immaterial by what name he may be called, and he may even assume a name for the occasion." *Hartman v. Thompson*, 104 Md. 389, 402 (Md. 1906), citing *Davis v. Hollinsworth*, 84 Am. St. Rep. 238 (Ga.).

Under the rationale of *Burton*, Mrs. Smith continued to hold Mr. Smith's interests in the Six Properties post-transfer in trust for Mr. Smith's behalf. She held them, pursuant to the Durable POA, by virtue of a mutual exchange of property interests (i.e. his for hers) which the Durable POA expressly authorized her to undertake.[14]

Stewart does not dictate a different result; it simply does not apply here. A deed to an identifiably live person is valid. The May 23, 2007 Deeds were therefore valid.

VI. CONCLUSION

The Trial Court failed to trace to a logical conclusion any of the separate theories propounded by Ms. Mountjoy to set aside the real property transfers at issue. Considered individually, none of Ms. Mountjoy's theories supports the Trial Court's legal conclusion that the transfers were void. Moreover, the Trial Court's misapplication of Rule 3:20 forced the court to exclude otherwise admissible testimonial evidence which estopped Ms. Mountjoy from challenging Mrs. Smith's authority to have made the transfers in the first instance. Thereafter, Mr. Smith's ratification of Mrs. Smith's actions as a matter of law serves as a sufficient

[14] The scope of the resulting naked trust pursuant to which she would be consequently found to have held the property interests under this theory was rendered a moot point by Mr. Smith's subsequent termination of his trust.

basis for reversing and remanding this matter to the Trial Court for further proceedings.

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 reverse the Order and Letter Opinion entered February 26, 2009; the Supplemental Order Upon Reconsideration entered April 22, 2009; and, the Final Order entered April 22, 2009 with respect to the assignments of error raised herein and remand this matter to the trial Court for further proceedings consistent with such reversal.

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

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VII. 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 Brief of Appellant and Joint Appendix 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 7th day of December, 2009.

2. Fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Joint Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia, this 7th day of December, 2009.

Thomas W. Repczynski, VSB No. 39967