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 APPELLEE

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STATEMENT OF FACTS

This case comes before the Court from the Circuit Court of Fauquier County's consideration of cross motions for summary judgment submitted by Plaintiff/Appellee Jean Mountjoy ("Mr. Smith's Executrix") and Defendant/Appellant Carol Smith. During those proceedings, the parties stipulated to the material facts. (See Joint Appendix, "J.A." at 69-74; 171-75; 215-21; 233-34; 249-50). The trial court relied upon those facts in rendering its decision. (J.A. at 333-34).

Theodore M. "Ted" Smith ("Mr. Smith") and Evelyn B. Smith ("Mrs. Smith") were married in 1946 and remained so until their death. (J.A. at ¶ 5). They had one son, who tragically predeceased them in 1988. (J.A. at id.). During his life, Mr. Smith owned a horse tack shop and successfully invested in real estate in and around Fauquier County. (J.A. at 45, ¶ 2). Mrs. Smith was predominantly a stay-at-home mom and wife. (J.A. at 45, ¶ 3).

The Smith's marriage, although long-lasting, was not an overly happy one, and the couple often argued about money and family. (J.A. at 45, ¶ 6). Mrs. Smith repeatedly urged Mr. Smith to make an estate plan for their sizeable assets (J.A. at 47, ¶ 15; 48, ¶¶ 21, 23), but he refused, telling her he didn't want to make one. (J.A. at 47; ¶ 18; 172, ¶ 8; 333, ¶ 6).

In late April 2005, when he was eighty-four years old, Mr. Smith suffered a massive heart attack and underwent open heart surgery. (J.A. at 45, ¶ 7). The attack and surgery left Mr. Smith in a weakened physical condition, and he was mostly bed-ridden in the years thereafter. (J.A. at 171, ¶ 3; 333, ¶ 2). However, he still retained his mental faculties at all times relevant hereto. (J.A. at 333, ¶ 2).

A year later, while still physically incapacitated, Mr. Smith engaged his long-time attorney, Rick Nishanian, Esq., to prepare a power of attorney for him. (J.A. at 46, ¶ 9; Appellant's Br. at 23). On May 19, 2006, Mr. Smith executed a simple, two-page general durable power of attorney ("the DPOA") in favor of his wife. (J.A. at 93). The DPOA granted certain enumerated powers (J.A. at id., ¶¶ 1-5) and contained a general, all-embracing provision. (J.A at id., ¶ 6). But there was no mention of the words "estate plan", "*inter vivos* trust", "survivorship interests" or "gift" in the DPOA. (J.A. at id.).

In January 2007, contrary to Mr. Smith's express wishes (J.A. at 47; ¶ 18; 172, ¶ 8; 333, ¶ 6), Mrs. Smith engaged Robert Miller, Esq., a trusts and estates attorney, to prepare an estate plan for the couple. (J.A. at 70, ¶ 5; 71, ¶ 7, Appellant's Brief, hereinafter "Appellant's Br.", at 7). On May 23, 2007 Mrs. Smith executed, using the DPOA, the Theodore M. Smith *Inter*

Vivos Revocable Trust ("Mr. Smith's trust", J.A. at), and the Evelyn B. Smith *Inter Vivos* Revocable Trust ("Mrs. Smith's trust").

The trusts were not mirror images of one another. (J.A. at 333, ¶ 9). Mrs. Smith was the initial trustee of both trusts. (J.A. at 95, Article I; 109, Article I). The beneficiaries of Mrs. Smith's trust were Mrs. Smith's heirs, Carol Smith and Carrie Smith Parret. (J.A. at 111-112, Article VII). Upon Mrs. Smith's death, Mr. Smith received an income right in the corpus of Mrs. Smith's trust. (J.A. at 110, Article IV; 111, Article VI(A) and (B)). The beneficiaries of Mr. Smith's trust were also Mrs. Smith's heirs, Carol Smith and Carrie Smith Parret. (J.A. at 99, Article VIII(2)). Upon Mr. Smith's death, Mrs. Smith received the corpus of his trust outright. (J.A. at 97, Article VI(A).

Mrs. Smith funded the trusts on the same day she created them. (J.A. at 127-140). Mrs. Smith executed, using the DPOA, two deeds that transferred one-half shares of six properties the couple held as tenants by the entirety to their respective trusts. (J.A. at 127-140). The deeds were entitled "deed of gift", recited that "$0.00 consideration" was exchanged, and cited to the proper gift tax exemption section of the Virginia Code, *i.e.* § 58.1-811(D). (J.A. at 127; 135). The deeds effectively terminated Mr.

Smith's survivorship interests, created a tenancy in common and reduced the corpus of Mr. Smith's estate by half. (See generally, J.A. at 95-140).

On June 29, 2007, Mrs. Smith again used the DPOA to amend Mr. Smith's trust. (J.A. at 107).

Mrs. Smith never consulted Mr. Smith about any of the estate planning activities she performed pursuant to the DPOA, (J.A. at 173, ¶ 14; J.A. at 333, ¶ 10), and on July 21, 2007, she died. It was only after her death that Mr. Smith first learned, much to his shock and consternation, of his wife's secret estate planning activities. (J.A. at 49, ¶ 30; 173, ¶ 14; 174, ¶ 16; 333, ¶¶ 7, 10).

In July 2007, Carol Smith, Mrs. Smith's niece, qualified as Executrix of the Estate of Evelyn B. Smith and became the successor trustee of Mrs. Smith's trust. (J.A. at 56, ¶ 4; 109, Article I). Although she shares his last name, Carol Smith is of no blood relation to Mr. Smith. (J.A. at 45, ¶ 4; 56, ¶ 4).

After Mrs. Smith's death, Mr. Smith's physical condition improved, and he took action to undo the estate plan his wife wrongfully created for him. (J.A. at 46, ¶ 6). On September 6, 2007, Mr. Smith executed a "Notice of Termination of the Theodore M. Smith Inter Vivos Trust" ("the termination notice"). (J.A. at 148-50; 174, ¶¶ 16, 17). Carol Smith disputed the legal

sufficiency of the termination notice until December of 2008, claiming it failed "to satisfy its intended purpose". (J.A. at 5, ¶ 21, compare to J.A. at 11, ¶ 21; see, also, J.A. at 28, ¶ 24, compare to J.A. at 38, ¶ 24; see also, J.A. at 50, ¶ 31, compare to J.A. at 59, ¶ 31).

Nine months after terminating his trust, Mr. Smith filed this suit (J.A. at 1-8), which specifically alleged that Mrs. Smith's actions were "beyond the scope of the powers granted [in the DPOA]" and "without any actual authorization from [Mr. Smith]." (J.A. at 7, ¶ 1(c)). Mr. Smith subsequently amended his complaint on August 5, 2008 (J.A. at 24-33) and November 18, 2008. (J.A. at 44-53), both of which alleged the same basic allegations of wrongdoing as his initial complaint. Carol Smith answered each of the complaints, but never asserted the affirmative defense of ratification. (J.A. at 14-15; 41; 60-61).

On September 26, 2008, Mr. Smith made a demand on Carol Smith, in her capacity as successor trustee of Mrs. Smith's trust, for income due to him under the terms of Mrs. Smith's trust ("the demand letter"). (J.A at 154-155). Carol Smith refused his request, making no distributions of income to Mr. Smith. (J.A. at 202-203).

On November 21, 2008, Mr. Smith died. (J.A. at 63). Mr. Smith's sister, Jean Mountjoy ("Mr. Smith's Executrix"), qualified as the Executrix of

the Estate of Theodore M. Smith, and on December 12, 2008, was substituted as the party-plaintiff in this case. (J.A. at id.). On January 13, 2009, Carol Smith deposed Mr. Smith's Executrix. (J.A. at 344).

On January 29, 2009, the parties submitted cross-motions for summary judgment. In her Memorandum in Support of her Motion for Summary Judgment, Carol Smith raised for the first time her affirmative defense of ratification. (J.A. at 78-80). At no time did Carol Smith raise the issue of judicial estoppel. (J.A. 9-21; 35-43; 55-62; 65-91; 176-201; 215-331; 338-342; 374-448).

After receiving virtually identical statements of material facts, hundreds of pages of briefs and exhibits, and substantial oral argument of counsel, the trial court held that Mrs. Smith exceeded her authority under the DPOA by estate planning for Mr. Smith. (J.A. at 333-36). Because the unauthorized act of an attorney-in-fact is a nullity, the trial court voided Mr. Smith's *inter vivos* trust and the deeds Mrs. Smith executed to fund it as well as her own trust. (J.A. at id.). The trial court also ruled that the undisputed facts and pleadings did not establish that Mr. Smith had ratified Mrs. Smith's unauthorized actions. (J.A. at id.).

Carol Smith later moved the trial court to reconsider its decision. (J.A. at 338-43). In her memorandum in support of her motion for

reconsideration, Carol Smith proffered, for the first time, the deposition testimony of Jean Mountjoy. (J.A. at 339-340).

The trial court denied that motion and supplemented it previous ruling, holding that the deeds were also void because they constituted unauthorized gifts of Mr. Smith's property to Mrs. Smith and her heirs. (J.A. at 431, line 11, to 436, line 10). This appeal followed. (J.A. at 459).

SUMMARY OF THE ARGUMENT

Mrs. Smith's actions, considered in their proper context, were not authorized by Mr. Smith. When Mrs. Smith, with the assistance of her estate planning attorney, created an *inter vivos* trust for Mr. Smith, terminated his survivorship interests in their entireties property, funding their respective *inter vivos* trusts with the resulting tenancy in common interests, she was engaged in estate planning. However, Mr. Smith did not give Mrs. Smith actual, oral authorization to create an estate plan for him; to the contrary, he explicitly told her he did *not* want one. Consistent with this oral admonition, Mr. Smith's DPOA did not expressly authorize Mrs. Smith to engage in estate planning.

The trial court properly held that the "obvious meaning" of the express powers enumerated in paragraphs 2 and 3 of the DPOA, *i.e.* to sell, convey, exchange, accept, receive and possess Mr. Smith's property on

such terms and conditions as Mrs. Smith deemed proper, did not include the power to engage in estate planning. Nor could that power be implied from reading those paragraphs in concert. The correctness of the trial court's ruling in this regard is underscored by the General Assembly's recent enactment of the Virginia Uniform Power of Attorney Act, which prohibits the use of *any* power of attorney to create an *inter vivos* trust, terminate survivorship interests, or make a gift, unless such authority is expressly granted in the power.

The trial court also properly held that Mrs. Smith's termination of Mr. Smith's survivorship rights by transferring of one-half the resulting tenancy in common interests to her respective trust constituted an unauthorized gift of Mr. Smith's property. Because those actions were undertaken solely for estate planning purposes and served no legitimate business purpose, Carol Smith's own cited authority confirms the correctness of the trial court's holding. Moreover, no Virginia (or other) court has held that cross transfers of mutual survivorship interests constitutes consideration as a matter of law. Thus, if the Court were to rule in Carol Smith's favor, it would be making new law.

Refusing to reward the wrongfulness of Mrs. Smith's unauthorized actions, the trial court properly declined to exercise its equitable power to

impose a naked trust over the property resulting from the voided deeds for the benefit of Mrs. Smith and her heirs.

Carol Smith did not assert the affirmative defense of ratification in her pleadings, and therefore waived it. If the Court chooses to review the eleventh-hour defense, however, the two documents upon which Carol Smith solely relies do not prove by a preponderance of the evidence, much less establish as a matter of law, that Mr. Smith ratified Mrs. Smith's unauthorized actions. The question of ratification is a fact-specific one, which no Virginia court has resolved in the affirmative on summary judgment. Nor has any Virginia (or other) court held that the termination of a trust created without authority constitutes ratification as a matter of law. Thus, if the Court were to rule in Carol Smith's favor, it would be making new law.

Finally, the trial court did not abuse its discretion in declining to consider the Mountjoy Deposition, which was submitted to the court in support of Carol Smith's motion to reconsider her motion for summary judgment, over Mr. Smith's Executrix's objection, and in violation of the parties' agreement *not* to use the same. Nor is Mr. Smith's Executrix judicially estopped by virtue of that deposition. Carol Smith failed to assign error to that question, and even if she had, the doctrine is inapplicable

because the legal question of Mrs. Smith's authority under the DPOA is for the Court to decide, not Ms. Mountjoy.

ARGUMENT

I. MRS. SMITH WAS NOT AUTHORIZED TO ENGAGE IN ESTATE PLANNING FOR MR. SMITH

The primary issue before the Court is the proper legal construction of the DPOA, specifically whether or not it granted Mrs. Smith the authority to engage in *estate planning*, *i.e.* to create an *inter vivos* trust, terminate survivorship interests, and make gifts on Mr. Smith's behalf.[1] (See Appellant's Br. at 9-10, ¶¶ 2, 3, and 4). The trial court properly held that Mrs. Smith exceeded her authority under the DPOA by estate planning for Mr. Smith. (J.A. at 334). Because the unauthorized act of an attorney-in-fact is a nullity, the trial court voided Mr. Smith's *inter vivos* trust and the deeds Mrs. Smith executed to fund it. (J.A. at 335). The trial court also voided the deeds because they constituted unauthorized gifts of Mr. Smith's property to Mrs. Smith and her heirs. (J.A. at 431, line 11, to 436, line 10).

[1] Mr. Smith's Executrix's official position is and has always been that the act of "estate planning" necessarily includes, but is not limited to, the creation of testamentary substitutes, *i.e. inter vivos* trusts, the funding of *inter vivos* trusts, the alteration of survivorship interests in property for purposes of funding *inter vivos* trusts, and the gifting of property to *inter vivos* trusts. Mr. Smith's Executrix use of the term "to estate plan" in this brief is intended to include all of the acts described in this footnote.

A. Carol Smith Has Removed Mrs. Smith's Actions from the Context of Estate Planning

On appeal, Carol Smith attacks the trial court's rulings by removing Mrs. Smith's actions from their context, characterizing them as a series of innocuous property transactions that were permissible under the DPOA. (Appellant's Br. at 9-10, ¶¶ 2-4; pgs. 22-33). Mrs. Smith's actions, however, cannot be divorced from their proper context: she was engaged in estate planning for Mr. Smith against his express wishes.

With the assistance of her chosen estate planning attorney (Appellant's Br. at 7, J.A. at 70, ¶ 5; 71, ¶ 7), Mrs. Smith used the simple DPOA to create a testamentary substitute, *i.e.* an *inter vivos* trust, for Mr. Smith (J.A. at 95-108). She also created an *inter vivos* trust for herself. (J.A. at 70, ¶ 5; 172-73, ¶10; 333, ¶ 7). That same day, she stripped Mr. Smith of his survivorship interests in six, valuable real properties so that she could fund their respective trusts with one-half shares of the resulting tenancy in common interests. (J.A. at 127-148). These collective actions not only reduced the corpus of Mr. Smith's estate by half, but also guaranteed that the couple's property would pass to the beneficiaries of Mrs. Smith's exclusive choosing (including and especially Carol Smith[2])

[2] As stated earlier, Carol Smith is of no blood relation to Mr. Smith. The fact that they share the same last name is pure happenstance.

upon their death. (See, generally, J.A. at 95-126; see, also, Appellee's Br. at IV, below). Neither Virginia law, sound public policy, Mr. Smith himself, nor the plain language of the DPOA authorized Mrs. Smith to engage in such activities. Therefore, the Court should affirm the trial court's rulings on this question.

B. Virginia Law Prohibits Attorneys-in-Fact From Creating *Inter Vivos* Trusts, Terminating Survivorship Interests and Making Gifts for their Principals Unless Expressly Authorized

Virginia law prohibits the use of a general durable power of attorney to engage in estate planning unless such power is expressly authorized. "The law in Virginia is that a power of attorney will be strictly construed." Bank of Marion v. Spence, 155 Va. 51, 53, 154 S.E.2d 488, 489 (1930), citing Hotchkiss v. Middlekauf, 96 Va. 649, 653, 32 S.E. 36, 37 (1899). "The authority granted is not extended beyond the terms in which it is expressed." Hotchkiss, 96 Va. at 653, 32 S.E. 36, 37-38. General, all-embracing expressions should be interpreted as conferring only "those incidental powers necessary to accomplish objects as to which express authority has been given." Jones v. Brandt, 274 Va. 131, 137, 645 S.E.2d 312, 315 (2007), contra *Restatement (Second) of Agency* § 34, comment (e) (1958) (General, all-embracing expressions add nothing to the enumerated powers, and should be disregarded as "meaningless

verbiage"); Hotchkiss, 96 Va. at 653, 32 S.E. at 37-38 (general, all-embracing expression construed as not expanding powers beyond those expressly granted); Estate of Casey v. Commissioner, 948 F.2d 895, 900 fn. 4 (4th Cir. 1991) (same).

1. *Sound Public Policy Supports the Century-Old Rule of Strictly Construing Powers of Attorney*

Sound public policy, especially in the wake of an aging population, supports construing powers of attorney strictly. While powers of attorney provide a low-cost, flexible, and private form of surrogate decision making, "they also confer a great deal of authority without regular oversight or clear standards for agent conduct". Naomi Karp, J.D., *In Brief: Power of Attorney Abuse-What States Can Do About It*, AARP Public Policy Institute, December 4, 2008. Available at http://www.aarp.org/research/ppi/cons-prot/fraud/articles/.inb164_poa.html. As a result, there has been "an explosion" in the financial exploitation of principals who are unable to monitor their agent's transactions. Id. Such abuse is so prevalent that elder advocates often refer to powers of attorney as "licenses to steal." Id.

It is both prudent and necessary to protect principals from abuse at the hands of unscrupulous agents. Holding agents to the letter of their authority is just one of many ways that courts can reduce the opportunity for and incidence of power of attorney abuse. This Court has already

recognized the utility of employing such an approach and should not retreat from that sound rule of construction. See, e.g., Jones v. Brandt, 274 Va. 131, 137; 645 S.E.2d 312, 315 (2007) ("the policy that supports this rule of [strict] construction is that the power to dispose of the principal's property is so susceptible of abuse that [it] should not be implied.").

2. *Mr. Smith did not give Mrs. Smith Actual, Oral Authorization to Create an Estate Plan for Him*

Mr. Smith never gave Mrs. Smith actual, oral authorization to create an estate plan on his behalf. Carol Smith stipulated for purposes of summary judgment (J.A. at 215-21; 233-34; 249-50; 333-34) that Mr. Smith did not want an estate plan and repeatedly told Mrs. Smith as much (J.A. at 172, ¶ 8); that Mrs. Smith knew Mr. Smith did not want an estate plan (J.A. at 172, ¶ 9); that Mrs. Smith nevertheless made him an estate plan without consulting him about it (J.A. at 172, ¶ 10; 173, ¶¶ 12, 14); and that Mrs. Smith concealed the estate plan from him until she died. (J.A. at 174, ¶ 16).

3. *The Plain, Unambiguous language of the DPOA did not Expressly Authorize Mrs. Smith to Estate Plan for Mr. Smith*

Consistent with his oral admonitions, the plain, unambiguous language of Mr. Smith's DPOA did not expressly authorize Mrs. Smith to engage in estate planning. The DPOA is a durable general power of attorney. (See J.A. at 93, ¶ 7). Its plain, unambiguous language granted

certain enumerated powers. (See id. at ¶¶ 1-5). It also contained a general, all-embracing provision. (See id. at ¶ 6). Notably absent from the DPOA, however, was any provision granting Mrs. Smith the power to engage in estate planning. Indeed, the words "estate plan", "*inter vivos* trust", "survivorship rights" and "gift" do not appear anywhere in the DPOA. (J.A. at 93-94).

a. *The obvious meaning of the powers "to sell, convey, exchange, accept, receive and possess" does not include the power to engage in estate planning*

Though Mr. Smith never expressly authorized Mrs. Smith's estate planning activities, either orally or in writing, Carol Smith tries to argue that the powers enumerated in paragraphs 2 and 3 of the DPOA establish that "Mr. Smith specifically contemplated Mrs. Smith's use of the DPOA to dispossess him of his entireties interests" and "impress a trust" upon his resulting tenancy in common interests. (Appellant's Br. at 23-24).

The primary problem with this argument is that it exists in a vacuum. Mrs. Smith did not simply create a trust to hold property for Mr. Smith's benefit. (Appellant's Br. at 26). Instead, she created a *testamentary substitute* that was part of a complex estate plan ultimately inuring to the benefit of *her* heirs, not his. (J.A. at 95-108; 99, Article VIII(2)). And she did so against Mr. Smith's explicit wishes (J.A. 172, ¶¶ 8, 9; 333, ¶¶ 6, 7), with

an estate planning attorney of her choosing (J.A. at 18, ¶¶ 4, 5; 70, ¶¶ 5, 6), in secrecy (J.A. at 173, ¶ 14; 174, ¶ 16; 333, ¶¶ 7, 10).

Considering Mrs. Smith's actions in their proper context, the trial court construed paragraphs 2 and 3 of the DPOA, gave effect to their "obvious meaning", and correctly held that they did not authorize Mrs. Smith's estate planning activities. (J.A. at 258, lines 20-22; 259, lines 16-22; 334); see, Bank of Marion, 155 Va. at 53; 154 S.E.2d at 489 (strictly construing power and giving effect to the "obvious meaning" of its language). Paragraph 2 of the DPOA states in full as follows:

> To sell, lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the sale, lease, purchase, exchange, and acquisition of, 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;

Paragraph 3 of the DPOA states in full as follows:

> To repair, maintain, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgage, subject to deed oftrust, and hypothecate, and in any way or manner deal with all or any part of any real or personal property, goods, wares and merchandise, stocks, bonds, commercial paper, other securities, chooses in action, and other property whatsoever, that I now own or may hereafter acquire;

(J.A. at 93). The "obvious meaning" of the language in paragraphs 2 and 3 of the DPOA, does not include the power to create and fund a testamentary

substitute any more than it does the power to create a will, and the trial court properly held as much.

4. *Mrs. Smith was Not Impliedly Authorized to Create an* Inter Vivos *Trust for Mr. Smith*

Lacking faith in her "express authorization" argument, Carol Smith suggests that Mrs. Smith had the implied power to hold property 'in trust' for Mr. Smith. (Appellant's Br. at 29-31). According to Carol Smith, the delineated powers of paragraphs 2 and 3 of the DPOA, when read in concert, confirm that Mrs. Smith "had the implied inherent authority to impose a trust" on Mr. Smith's property interests. (Appellant's Br. at 27; 31; 32). However, the two cases Carol Smith cites in support of her argument, Jones v. Brandt and Fleenor v. Hensley (Appellant's Br. at 24, 27, 28), fail to support her argument.

In Jones, the Court held that that an agent had the power to designate the beneficiary of a certificate of deposit even though the durable power of attorney under which he acted did not expressly grant that power. 274 Va. at 136, 645 S.E.2d at 315. Critical to that holding, however, were the unique facts underlying it. Id. at 134-35; Id. at 313-14. The principal in Jones gave his agent "actual, oral authority" to designate a beneficiary on his CD. Id. at 136; Id. at 315. Both the principal and his agent believed that the power of attorney was sufficient to authorize the agent to designate a

beneficiary of the principal's choosing. Id. at 137; Id. at 315. Immediately after making the designation, the agent informed the principal, in writing, of the act. Id. There were no allegations of self-dealing or fraud made against the agent, id. at 136; id. at 315, and, in fact, the designation did not benefit the agent or his heirs. Nor was there an allegation that the agent had impermissibly gifted his principal's property. Id. at 136-37; Id. at 315.

In stark contrast to the facts of Jones, Mr. Smith never told Mrs. Smith to create an estate plan for him; to the contrary, he explicitly and repeatedly told her *not* to do so. (J.A. at 173, ¶¶ 8, 9). Nor did Mr. Smith believe the DPOA authorized Mrs. Smith's estate planning activities, as evidenced by his unwavering refusal to create an estate plan prior to executing the DPOA (J.A. at id.), his termination of the *inter vivos* trust promptly after learning of it (J.A. at 148-50; 174, ¶¶ 16, 17), and his filing of this lawsuit. (J.A. at 1-8). Arguably, Mrs. Smith did not believe the DPOA authorized her estate planning activities either, as she concealed them from Mr. Smith and failed to consult him about them. (J.A. at 173, ¶ 14; 333, ¶ 7).

More importantly, in this case, Mrs. Smith used the DPOA to benefit herself and her heirs in breach of her fiduciary duty. (J.A. at 99, Article VIII(2); 111-12, Article VII). Mrs. Smith also impermissibly gifted Mr. Smith's

property interests to her *inter vivos* trust. (J.A. at 127-48). Because Jones is necessarily limited to instances where self-dealing, fraud, or the gifting of a principal's property are not at issue, Id. at 136-37; Id. at 315, it is fails to support Carol Smith's position.

Jones is also inapposite because its holding was premised on the agent's power *to contract*, not his power dispose of the principal's property. Id. at 138; at 315. Of course this case, fraught with allegations that Mrs. Smith impermissibly disposed of Mr. Smith's property, is anything but a contract case. (J.A. at 2-6; 25-30; 45-50). For all these reasons, Jones is inapposite.

Likewise, in Fleenor, the Court acknowledged that "[a]ll persons who have the capacity to hold and dispose of property can impress a trust upon it." 121 Va. 367; 93 S.E. 582, 583 (1917). However, Fleener did not involve the use of a general durable power of attorney to create a testamentary substitute, and the agent's authority to "hold and dispose" of the beneficiaries' property was not in question. Id. at 582-83. Here, whether or not the DPOA authorized Mrs. Smith to "dispose" of Mr. Smith's property within the context of estate planning is not only in question, it is the primary question. Moreover, the Court has recently held that "the power to dispose of the principal's property is so susceptible of abuse that it should not be

implied." Jones, 274 Va. at 137; 645 S.E.2d at 315. For these reasons, Fleenor, too, is inapplicable.

C. The General Assembly Has Recently Prohibited All Attorneys-in-Fact from Creating *Inter Vivos* Trusts, Terminating Survivorship Interests and Making Gifts for their Principals without Express Authorization

Recent legislative action further underscores the correctness of the trial court's ruling. Keeping in step with national trends,[3] the General Assembly of Virginia recently enacted legislation to prohibit the use of general durable powers of attorney to engage in estate planning. See 2009 Virginia Laws Ch. 830 (S.B. 855) (attached as **Exhibit 1**); see, generally, Andrew H. Hook & Lisa V. Johnson, *The Virginia Uniform Power of Attorney Act*, 44 U. Rich. L. Rev. 107 (2009). The Virginia Uniform Power of Attorney Act ("the Virginia UPOAA") requires that *all* powers of attorney contain an express, specific grant of authority for actions having a high propensity for dissipating property or altering an estate plan. See id. at proposed Virginia Code § 26-72.01. Frequently referred to as "hot powers",

[3] See UNIFORM POWER OF ATTORNEY ACT § 201, 8B U.L.A. 37 (Cum. Supp. 2009). Since its enactment in 2006, the following states have adopted the UPOAA: Colorado, Idaho, Maine, Nevada, and New Mexico. Eight other states considered adopting it in 2009. See, The National Conference of Commissioners on Uniform State Laws (NCCUSL), *A Few Facts About the Uniform Power of Attorney Act*, available at: http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upoaa.asp; *Legislative Report by Act 2009 – Final*, available at http://www.nccusl.org/nccusl/LegByAct.pdf.

the acts requiring a specific grant of authority include, inter alia, the very acts at issue in this case: (1) creating, amending, revoking, or terminating an *inter vivos* trust; (2) creating or changing rights of survivorship; and (3) making a gift. Id. at proposed Virginia Code §§ 26-72.01(1) to (3).

Although enacted almost unanimously[4] by the General Assembly on April 8, 2009,[5] the Virginia UPOAA will not become effective unless it is reenacted during the 2010 Regular Session,[6] which convenes on January 13, 2010. However, according to the bill's supporters, including the AARP, the Virginia UPOAA should be quickly reenacted with minimal changes.

While it does not yet have the force of law, the Virginia UPOAA still may be applicable to this appeal.[7] If reenacted as presently drafted, the Virginia Uniform Power of Attorney Act *will apply retroactively* to powers of

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[4] The Senate passed the Virginia UPOAA by a vote of 40-0; the House of Delegates passed it by a vote of 87-9. (See attached **Exhibit 2**).

[5] The Virginia UPOAA was enacted a month *after* the trial court made its rulings in this case.

[6] The reason for the reenactment provision, according to the Chairman of the Courts of Justice Committee, Delegate David B. Albo, is to allow interested parties like attorneys, banks and other businesses an opportunity to become familiarized with the new standardized power of attorney form created by the Act.

[7] AARP, the nationally renowned non-profit organization for elder issues, has expressed interest in providing the Court with an amicus brief on the Virginia UPOAA, if the Court believes it would be helpful.

attorney, as well as to judicial proceedings concerning powers of attorney like this one. See 2009 Virginia Laws Ch. 830 at proposed Virginia Code §§ 26-74.02(1) and (3) ("This act applies to a power of attorney created *before*, on, or after July 1, 2009 … This act applies to a judicial proceeding concerning a power of attorney commenced *before* July 1, 2009"). Thus, this case would fall squarely within the Virginia UPOAA's purview, and the issue of Mrs. Smith's authority under the DPOA could be moot.[8]

Regardless of whether or not it is reenacted, however, the Virginia UPOAA provides clear insight as to the legislature's intent with regard to the proper construction of general powers of attorney and the "hot powers" at issue here. By enacting the Virginia UPOAA, the General Assembly confirmed that the power to dispose of a principal's property and alter his estate plan is so susceptible of abuse that not only it should *never* be implied, it must be *expressly granted* to be exercised. Id. at proposed Virginia Code §§ 26-72.01(1) to (3). Thus, the General Assembly has definitively resolved any lingering question as to the propriety of agents who engage in estate planning pursuant to general powers of attorney. For

[8] In Virginia, an appellate court will apply a statute adopted after the date of a judgment entered by a trial court, even though that statute changes the law in effect on that date and requires reversal of a judgment correct when entered. Bain v. Boykin, 180 Va. 259, 23 S.E.2d 127 (1942); Fletcher v. Tarasidis, 219 Va. 658, 250 S.E.2d 739 (1979).

all of these important reasons, the Court should affirm the trial court's holding that Mrs. Smith was not authorized to engage in estate planning for Mr. Smith.

II. MRS. SMITH IMPERMISSIBLY GIFTED MR. SMITH'S PROPERTY TO HERSELF AND HER HEIRS

In addition to engaging in unauthorized estate planning for Mr. Smith, Mrs. Smith also impermissibly gifted Mr. Smith's property interests to herself and her heirs.

A. The Deeds Mrs. Smith Executed to Transfer the Couples' Entireties Property to Her *Inter Vivos* Trust Constituted an Impermissible Gift

The trial court correctly held that Mrs. Smith's use of the DPOA to transfer property the couple held at tenants by the entirety via two deeds of gift to her *inter vivos* trust constituted an impermissible gift. (J.A. at 451; 431, line 10, to 436, line 10). "A gift has been defined as a contract without a consideration." Spooner v. Hilbish, 92 Va. 333, 341, 23 S.E. 751, 753 (1895). Here, the deeds Mrs. Smith executed to effectuate the transfer were made without consideration. Indeed, they are entitled "deed of gift", recite that "$0.00 consideration" was exchanged, and cite to the proper gift

tax exemption section of the Virginia Code, *i.e.* § 58.1-811(D). (J.A. at 127-148).[9]

Further, the beneficiary of Mrs. Smith's *inter vivos* trust was *not* Mr. Smith, but rather Mrs. Smith and her heirs, Carol Smith and Carrie Smith Parret. (J.A. at 111-112, Article VII). Mr. Smith, on the other hand, possessed a mere income right in Mrs. Smith's trust (J.A. at 110, Article IV; 111, Article VI(A) and (B)), which, of course, did not entitle him to title ownership of the trust res, including but not limited to the one-half interests the six properties. Nor could he revoke Mrs. Smith's trust and receive the trust res outright, as he was not the original trustor or the present trustee. (J.A. at 109; 109 at Article I). Because the deeds of gifts Mrs. Smith executed expressly stated that they were made without consideration and inured to the benefit of herself and her heirs, not Mr. Smith, they constituted impermissible gifts of Mr. Smith's property.

[9] To the extent Carol Smith argues that consideration for the transfers exists by virtue of the couple's *inter vivos* revocable trusts themselves, the same is easily refutable. Mr. Smith's possession of the right to revoke *his* trust does not make this an even transfer that was supported by consideration. While Mr. Smith nominally held a right to revoke his trust, that right was hidden from him along with the rest of Mrs. Smith's estate planning efforts. Had Mrs. Smith not predeceased Mr. Smith, he would likely never have discovered her treachery.

B. Cross Transfers of Mutual Survivorship Interests Do Not Constitute Sufficient Consideration as a Matter of Law

Although the deeds expressly stated that they were gifts, Carol Smith argues, citing Ott v. L&J Holdings, LLC, 275 Va. 182, 654 S.E.2d 902 (2008), that the transfers were supported by consideration because "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." (Appellant's Br. at 33). Simply put, Ott does not stand for this proposition.[10] See Ott, 275 Va. at 189; 654 S.E.2d at 906.

In Ott, the principal's spouse of fifty years used a durable general power of attorney to transfer property the couple held as tenants by the entireties to an LLC. Id. at 184-87; at 903-04. The principal's daughter later challenged the deed effectuating the transfer as an impermissible gift. Id. Because the face of the deed was ambiguous, parol evidence was admitted to determine whether it was a gift or made for value.[11] Id. The evidence established that the deed was made for value, but not by virtue of

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[10] Nor has Mr. Smith's Executrix been able to locate a case that stands for this proposition in Virginia or any other jurisdiction.

[11] Carol Smith has conceded for purposes of summary judgment (J.A. at 178; 424, line 18 to 426, line 20) and this appeal (Appellant's Br. at 33, 35) that parol evidence is not necessary to resolve the question of whether or not Mrs. Smith engaged in impermissible gifting of Mr. Smith's property when she executed the deeds.

so-called cross-transfers of mutual survivorship interests as Carol Smith contends. (See Appellant's Brief at 33-35). Instead, the trial court held, and the Court affirmed that "the transfer of property was undertaken for legitimate business reasons, and that [the principal] and [agent] each received benefits, including possible future tax benefits, commensurate with their respective percentage interests." Id. at 189; at 906 (*emphasis added*). Critical to this holding was the fact that the agent had not been engaged in self-dealing. Id.

Here, Mrs. Smith's use of the DPOA to deed six properties the couple held as tenants by the entirety to the trustee of her *inter vivos* trust (*i.e.* herself) was not undertaken for any "legitimate business purpose", such as to unite the multiple parcels as a single tract to facilitate their sale. See id. at 185; at 904. Nor is there any evidence in the record to support that Mr. Smith received any kind of tax benefit as a result of the transfers.[12] Instead, the sole purpose of the deeds was to effectuate Mrs. Smith's estate plan and benefit the heirs of her exclusive choosing. In other words, she was

[12] To the extent Carol Smith may attempt to argue that the estate plan provided tax benefits to Mr. Smith, the same is refuted by the terms of the couple's respective *inter vivos* trusts and the state of the tax codes at the time the *inter vivos* trusts were created. Under federal and Virginia tax laws, estate tax is only imposed upon the death of the last surviving spouse. IRC § 2056(a) (1986); see also, Virginia Code § 64.1-160 (1950, as amended). Even then, it is only imposed for the benefit of heirs, not the spouses themselves. See id.

self-dealing, which under Ott, bars her from claiming the transaction was for value (by virtue of the cross transfers of entireties interests or otherwise). Id. at 189; Id. at 906.

Nor did Mr. and Mrs. Smith receive benefits commensurate with their respective interests. Mrs. Smith was the initial trustee of *both* trusts (J.A. at 95, Article I; 109, Article I), and therefore had the discretion to dispose of the corpus of either as she deemed appropriate. Mr. Smith, however, had no comparable right. In addition, Upon Mr. Smith's death, Mrs. Smith received the corpus of his trust outright. (J.A. at 97, Article VI(A). However, upon Mrs. Smith's death, Mr. Smith only received a mere income right in the corpus of Mrs. Smith's trust. (J.A. at 110, Article IV; 111, Article VI(A) and (B)). Thus, Mrs. Smith more benefits than Mr. Smith, which was *not* commensurate with their so-called one-half property interests in the six properties.

Ultimately, because the undisputed facts establish that Mrs. Smith had no "legitimate business purpose" for executing the deeds, did not provide Mr. Smith with "benefits commensurate with his respective interest", and was self-dealing, Carol Smith's own cited authority requires the Court to affirm the trial court on this question. Ott, 275 Va. at 185-89, 654 S.E.2d at 904-06.

C. The Court Will be Creating New Law if it Holds that Cross Transfers of Mutual Survivorship Interests Constitute Sufficient Consideration as a Matter of Law

Carol Smith fails to cite any authority of this Court (or that of any other jurisdiction) to support her contention that cross transfers of mutual survivorship interests constitute consideration as a matter of law. (See Appellant's Br. 15-16). Nor has Mr. Smith's Executrix been able to locate any such authority. Thus, to reverse the trial court on this issue, the Court would necessarily have to create new law. Such a drastic measure is not appropriate here, where it is undisputed that the agent secretly engaged in estate planning to benefit her heirs in contravention of her principal's express wishes. (J.A. at 172, ¶¶ 8, 9, 10; 173, ¶ 14, 174, ¶ 16; 249 line 10, to 250 line 2; 333, ¶¶ 6, 7, 10). Moreover, the enactment of the Virginia UPOAA confirms the General Assembly's intent to prohibit the use of general powers of attorney to terminate survivorship interests and make gifts of the principals' property, and may moot the issue entirely upon its expected reenactment.

III. MR. SMITH NEVER RATIFIED MRS. SMITH'S UNAUTHORIZED ACTIONS

A. As a Threshold Matter, Carol Smith Failed to Assert the Affirmative Defense of Ratification and Therefore Waived It

Carol Smith failed to assert and therefore waived her affirmative defense of ratification, and this Court should not consider it on appeal. In Virginia, it has long been held that "affirmative defenses must be specifically pled or they are deemed waived." Monahan v. Obici Medical Mgmt. Servs., Inc., 271 Va. 621, 632; 628 S.E.2d 330, 336 (2006). "Exceptions to this general rule have been recognized where the issue addressed by an affirmative defense was not disclosed in a plaintiff's pleading and only became apparent as the evidence was being received at trial." Id. at 632; Id. at 336-37. Consistent with the majority of jurisdictions, this Court has acknowledged that ratification is an affirmative defense. See, e.g., Ward v. NationsBank of Virginia, N.A., 256 Va. 427, 433; 507 S.E.2d 616, 619 (1998); see, also, 61A Am. Jur. 2d *Pleading* § 322 (2009) ("Ratification is an affirmative defense that requires an affirmative, specific pleading.").

Here, Carol Smith never asserted the affirmative defense of ratification in her Answer to the Complaint (J.A. at 14-15), Amended

Complaint (J.A. at 41) or Second Amended Complaint (J.A. at 60-61).[13] Although Carol Smith repeatedly "reserve[d] the right to rely on any and all other defenses … that might be identified through investigation" (J.A. at 15; 41; 61), she knew or should have known about the affirmative defense of ratification long before answering even the initial complaint in June 2008. Indeed, Carol Smith's ratification defense is primarily based on a document that was in her possession in September of 2007 (J.A. at 149).[14]

Despite having knowledge of this document, Carol Smith unjustifiably failed to timely plead her affirmative defense, amend her Answer to include it, or otherwise place Mr. Smith's Executrix on notice of her intention to rely upon it. In fact, no mention of ratification was made until six weeks before trial, when Carol Smith first raised the affirmative defense in her

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[13] Carol Smith asserted several affirmative defenses in her Answer to Mr. Smith's Executrix's Second Amended Complaint (J.A. at 60), but ratification was not one of them.

[14] The fact that Mr. Smith's Executrix also was in possession of this document is not sufficient notification to Mr. Smith's Executrix of Carol Smith's reliance on the affirmative defense of ratification. See RCSH Operations, LLC v. Third Crystal Park Associates, LP, 115 Fed. Appx. 621, *7-*9 (4th Cir. 2004) ("It is no answer to say, as does [defendant], that [plaintiff] had possession of these two documents before the litigation began and thus could have anticipated the [affirmative] defense of waiver. [The Rules] impose on [defendant] the obligation to plead the waiver defense so that it could be addressed in discovery and at trial. It is precisely the sort of procedural gamesmanship raised by the circumstances presented here that [the Rules are] intended to foreclose.")

Memorandum in Support of her Motion for Summary Judgment.[15] (J.A. at 78-80). Even then, just three paragraphs of the twenty-four page memorandum were allocated to the subject. Id. It was, in Carol Smith's own words, no more than a "fallback position". (J.A. at 277, lines 21-22).

Carol Smith's late revelation of her affirmative defense prejudiced Mr. Smith's Executrix. Learning of the defense just a week before the close of discovery, Mr. Smith's Executrix had little opportunity to investigate, let alone discover the factual basis for, Carol Smith's affirmative defense. Nor could she discuss the merits of it with Mr. Smith, as he was deceased by that time. (J.A. at 63; 332). Furthermore, because Mr. Smith's Executrix had no notice of the defense, she was unable to move for summary judgment on that basis, if she had deemed it advisable.

Because of the unfair surprise and prejudice that necessarily results from late revelation of unanticipated legal theories, Virginia courts have repeatedly declined to grant summary judgment on an affirmative defense that has been waived. See e.g., Winslow, Inc. v. Scaife, 224 Va. 647, 299 S.E.2d 354 (1983) (trial court erred in granting summary judgment to defendant who raised new and contradictory affirmative defense for the first

[15] Carol Smith did *not* move for summary judgment on her affirmative defense of ratification. (See, J.A. at 65-67). Instead, she sought summary judgment solely on Counts I and II of the Second Amended Complaint. (Id.).

time on summary judgment); Palace Laundry v. County Club of Fairfax, 1992 WL 884601 (Fairfax Co., Va. Cir. Ct. 1992) (trial court recognized it would be erroneous to deny plaintiff's claim based on an affirmative defense that was not pled and therefore waived) (attached as **Exhibit 3**); Bernard M. Carlton, Inc. v. Del Guidice, 1984 WL 276323 (Loudon Co., Va. Cir. Ct. 1984) (trial court refused to consider affirmative defense where not pled and answer not amended) (attached as **Exhibit 4**); see, generally, RCSH Operations, LLC v. Third Crystal Park Associates, LP, 115 Fed. Appx. 621, *7-*9 (4th Cir. 2004); S. Wallace Edwards & Sons, Inc. v. Cincinnate Ins. Co., 353 F.3d 367, 372-74 (4th Cir. 2003) (applying Virginia law).

For all of these reasons, Carol Smith waived her affirmative defense of ratification, no exception applies, and the Court should not consider it on appeal.

B. Carol Smith is not Entitled to Judgment on her Affirmative Defense of Ratification

Even if the Court determines that Carol Smith did not waive her affirmative defense and reviews this assignment of error, she is still not entitled to judgment because she has failed to prove by a preponderance of the evidence, much less establish as a matter of law, that Mr. Smith ratified

Mrs. Smith's unauthorized actions by terminating his trust and making a demand on Mrs. Smith's trust.

1. *Carol Smith Failed to Prove by a Preponderance of the Evidence, Much Less Establish as a Matter of Law, that Mr. Smith Ratified Mrs. Smith's Unauthorized Actions*

Virginia law requires the party alleging the affirmative defense of ratification, here Carol Smith, to prove by a preponderance of the evidence that the ratifying party, "with full knowledge of the facts, act[ed] in such a manner as to unmistakably indicate that he intend[ed] to avail himself of the benefits of the contract made by the agent[.]" Piedmont Mt. Airy Guano Co. v. Buchanan, 146 Va. 617, 625, 131 S.E. 793, 795 (1926), citing Southern Amusement Co. v. Ferrell-Bledsoe Furniture Co., 135 Va. 429; 99 S.E. 716 (1919). Virginia law also requires proof that the principal failed to promptly disavow the unauthorized act of his agent. Id., citing Winston v. Gordon, 115 Va. 899, 80 S.E. 756 (1914). "Because ratification involves a determination of the principal's intent, it presents a question of fact to be determined by the fact-finder from all surrounding circumstances." 3 C.J.S. *Agency* § 590 (2009); see, e.g., Harrison v. Gardner Inv. Corp., 132 Va. 238; 111 S.E. 234, 239 (1922) (the question of whether the purchaser had ratified an unauthorized contract held for the jury).

Carol Smith has failed to meet her burden. As the trial court properly concluded (J.A. at 335), the two documents upon which Carol Smith bases her entire ratification argument, *i.e.* the termination notice (J.A. at 149-50) and the demand letter (J.A at 154-55), simply do not amount to an unmistakable indication that Mr. Smith availed himself of the benefits of Mrs. Smith's unauthorized actions. Nor do they establish that Mr. Smith unreasonably delayed in disavowing Mrs. Smith's authority.

a. *Carol Smith has not met her burden to prove that Mr. Smith "unmistakably availed" himself of the benefits of Mrs. Smith's unauthorized actions*

Mr. Smith did not unmistakably avail himself of the benefits of Mrs. Smith's unauthorized actions by terminating his trust and making a demand on Mrs. Smith's trust. (Appellant's Br. at 13-22). The language of the termination notice, standing alone, fails to prove by a preponderance of the evidence, much less establish as a matter of law, that Mr. Smith unmistakably availed himself of the benefits of Mrs. Smith's unauthorized actions. The termination notice states, in full, as follows:

> **NOTICE OF TERMINATION OF THE**
> **THEODORE M. SMITH INTER VIVOS REVOCABLE TRUST**
>
> **I, THEODORE M. SMITH**, pursuant to Article X (Reserved Rights) of THE THEODORE M. SMITH Inter Vivos Revocable Trust dated May 23, 2007, and all amendments thereto (hereinafter collectively the "***Trust***"), do hereby revoke, cancel

> and terminate the Trust in whole and its entirety, which termination shall be effective immediately as of the date of this instrument bearing my signature. The Trustee of the Trust is hereby instructed and directed to immediately and forthwith distribute, transfer, and deliver to me c/o V. Rick Nishanian, Esq., Vanderpool, Frostick & Nishanian, P.C., 9200 Church Street, Suite 400, Manassas, Virginia 20110, all assets of the Trust Fund, as the term is defined in the Trust. 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.
>
> **IN WITNESS WHEREOF**, I have hereunto set my hand and seal confirming my intent to revoke, cancel, and terminate the aforesaid Trust.
>
> /s/ _____
> THEODORE M. SMITH,
> Trustor

(J.A. at 149).

As the trial court properly held, this empty language "is not ratification." (J.A. at 334) (emphasis in original). First, if Mr. Smith had approved of the estate plan his wife had created for him, there would have been no reason for him to "revoke, cancel, and terminate" the trust. A true ratification of Mrs. Smith's actions would have been if Mr. Smith had accepted the Trust as written and the property transfers as made. But he did not do that; instead, he terminated the trust within six weeks of learning of it. (See Appellee's Br. at III(B)(1)(b), below).

Second, although the termination notice recites that the Trustee, Carol Smith, is "to immediately … distribute, transfer, and deliver to me … all assets of the Trust Fund," there is no evidence in the record establishing that Mr. Smith actually received and availed himself of the assets of the Trust Fund. There is no deed evidencing that Carol Smith delivered the assets of Mr. Smith's trust to Mr. Smith. There is no correspondence, cancelled checks or any other documentation confirming that Mr. Smith received the assets of his trust. There is no requests for admission, interrogatory responses or court orders. There is simply nothing at all.

This utter lack of evidentiary support is easily explained: until December of 2008, Carol Smith disputed the legal sufficiency of the termination notice, claiming it failed "to satisfy its intended purpose". (J.A. at 5, ¶ 21, compare to J.A. at 11, ¶ 21; see, also, J.A. at 28, ¶ 24, compare to J.A. at 38, ¶ 24; see also, J.A. at 50, ¶ 31, compare to J.A. at 59, ¶ 31). Accordingly, upon being served with the termination notice, Carol Smith did nothing at all, proceeding as if it didn't exist; that is, of course, until the summary judgment proceedings began. (J.A. at 73, ¶ 20; 78-80).

Neither does the second document, Mr. Smith's letter demanding a distribution of the net income and discretionary principal from Mrs. Smith's trust (J.A. at 154), establish that Mr. Smith unmistakably availed himself of

the benefits of Mrs. Smith's unauthorized actions. First, the demand letter is dated September 26, 2008—approximately five months a*fter* this lawsuit was filed. In his lawsuit, Mr. Smith specifically alleged that Mrs. Smith's actions were "beyond the scope of the powers granted [in the DPOA]" and "without any actual authorization from [Mr. Smith]." (J.A. at 7, Request for Relief at ¶1(c)). Thus, it cannot be said that the September 2008 demand letter ratified Mrs. Smith's unauthorized actions as a matter of law.

Second, Carol Smith's argument completely fails when one considers that Mrs. Smith's trust contained multiple assets, both tangible and non-tangible, disputed and non-disputed.[16] Pursuant to the clear terms of Mrs. Smith's trust, which Mr. Smith has never disputed, Mr. Smith *was entitled to receive* distributions of income earned on, and discretionary principal from, *all* of the trust assets. (J.A. at 111, Article VI(A) and (B)). The demand letter did not specify from which assets Mr. Smith sought a distribution of income or discretionary principal. (J.A. at 154). However, viewing this evidence in a light most favorable to Mr. Smith's Executrix and giving her the benefit of all inferences to be drawn therefrom, as the Court must do on summary judgment, it is clear, especially in light of the pending litigation, that Mr.

[16] There is no evidence in the record as to the nature and value of Mrs. Smith's trust res when the September 2008 demand was made. Indeed, Carol Smith has never accounted to Mr. Smith or his executrix as to the assets held by Mrs. Smith's trust.

Smith did not intend to unmistakably avail himself of the *disputed*, *tangible* property held by Mrs. Smith's trust when he made the September 2008 demand.

Even if he did, that would not be inconsistent with his position. Mr. Smith has always maintained that Carol Smith, as successor trustee of Mrs. Smith's trust, was unlawfully holding title to one-half his property. (See, generally, J.A. at 1-8; 24-34; 44-54; 156-175; 358-373). Making a demand for the rental income earned on that property would be entirely consistent with his position that the property rightfully belonged to him. For all these reasons, Mr. Smith did not unmistakably avail himself of the benefits of Mrs. Smith's unauthorized actions as a matter of law.

b. *Carol Smith has not met her burden to prove that Mr. Smith failed to disavow Mrs. Smith's unauthorized actions within a reasonable period of time*

Carol Smith has not produced any evidence, much less established as a matter of law, that Mr. Smith failed to disavow Mrs. Smith's unauthorized actions within a reasonable period of time. Beyond the four corners of the termination notice and demand letter, Carol Smith has failed to produce any evidence showing that Mr. Smith did not promptly disavow Mrs. Smith's authority. The Joint Appendix is simply silent on these critical

elements of proof (mostly because Carol Smith's affirmative defense of ratification was not timely identified as an issue in the case).[17]

Nevertheless, facts in the record confirm that Mr. Smith attempted to disavow Mrs. Smith's unauthorized actions within a reasonable period of time of learning of them. Carol Smith stipulated for purposes of summary judgment that Mr. Smith had no knowledge of Mrs. Smith's actions until after her death on July 21, 2007. He terminated his trust just six weeks later on September 6, 2007, which was a prompt act of disavowal, even if an unsuccessful one according to Carol Smith. (See Appellee's Br. at III(B)(1)(a)). The only inference that can be reasonably drawn from Mr. Smith's prompt termination of his trust is that he disapproved of it; if he felt otherwise, he would have kept it "as is".

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[17] If ratification had been properly raised in Carol Smith's pleadings, facts not now in the record could have been brought to bear on the issue. Mr. Smith's Executrix proffers the following facts not in the record: In early August 2007, just days after Mrs. Smith died, Mr. Smith confronted Robert Miller, Esq., Mrs. Smith's estate attorney, and angrily voiced his objection to the trust that had been drafted and funded for him in contravention of his express wishes. By mid-August, he had retained counsel to dispute Mrs. Smith's unauthorized actions. Active negotiations between counsel for the parties ensued over the next nine months. When it became clear that those negotiations were at a standstill, this suit was filed.

[17] Mr. Smith's Executrix has been unable to locate any Virginia case where the affirmative defense of ratification was decided on summary judgment.

C. The Court Will be Creating New Law if it Reverses the Trial Court and Enters Final Order in Carol Smith's Favor on her Affirmative Defense of Ratification

Carol Smith fails to cite any authority of this Court (or that of any other jurisdiction) to support her contention that the termination of a trust created without authority constitutes ratification as a matter of law. (See Appellant's Br. 15-16). Of the cases Carol Smith does cite (see, id.), not one should compel the Court to make that novel finding because each of them was decided at a trial on the merits, not summary judgment.[18] See, e.g., Kilby v. Pikurel, 240 Va. 271, 275, 396 S.E.2d 666, 669 (1990) (bench trial); Piedmont Mt. Airy Guano Co. v. Buchannan, 146 Va. at 623-25, 131 S.E. at 794-95 (jury trial); Winston v. Gordon, 115 Va. 899, 80 S.E. 756, 758 (1914) (evidentiary presentation to a special jury); Coastal Phrma. Co. v. Goldman, 213 Va. 831, 838, 195 S.E.2d 848, 854 (1973) (bench trial).[19]

Moreover, the evidence presented in those cases *conclusively established* that the principal "unmistakably availed" himself of his agent's unauthorized act or failed to "promptly disavow" his agent's authority. See,

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[18] Mr. Smith's Executrix has been unable to locate any Virginia case where ratification was decided in the affirmative on summary judgment.

[19] Jones v. Brandt, although cited by Carol Smith, is inapplicable here, as ratification was not before the Court on appeal. 274 Va. 131, 139 n.2; 645 S.E.2d 312, 316 n.2 (2007). Cocoa Products Co. of America v. Duche, 156 Va. 86, 158 S.E. 719 (1931), a contract rescission case, also has no application here.

e.g., Kilby, 240 Va. at 275, 396 S.E.2d at 669 (principal waited at least a year and a half to disavow agent's settlement authority, accepting benefits of the settlement in the meantime); Buchannan, 146 Va. at 623-25, 131 S.E. at 794-95 (principal *never* disavowed the agent's authority; dispute concerned whether there *was* a contract, not agent's *authority* to contract); Winston, 115 Va. 899, 80 S.E. at 761 (shareholders waited at least six months to disavow corporate director's authority); Goldman, 213 Va. at 838, 195 S.E.2d at 854 (shareholders enthusiastically ratified corporate merger, only claiming it was unauthorized when it proved unprofitable). Here, the undisputed evidence established that Mr. Smith disavowed Mrs. Smith's unauthorized acts within a reasonable period of time and did not unmistakably avail himself of them as a matter of law. (See Appellee's Br. at III(B)(1)(a) and (b), above).

Ultimately, Carol Smith's inability to produce any authority holding that the termination of a trust created without authority constitutes ratification as a matter of law is fatal to her argument. (See Appellant's Br. 15-16). For the Court to reverse the trial court on this issue, it would have to create new law. In addition to the reasons already discussed, such a drastic measure is not appropriate where, as here, it is undisputed that the agent secretly engaged in estate planning in contravention of her principal's

express wishes. Ratification of what essentially amounts to a fraudulent unauthorized act, as opposed to a neutral or even beneficial unauthorized act, should carry the highest burden of proof for obvious reasons: a fraud should never be sanctioned upon inadequate, deficient or non-existent proof.

For all these reasons, the Court should affirm the trial court's rejection of Carol Smith's fleeting ratification defense. However, should the Court find merit in the defense and consider reversing the trial court, it should remand for a rehearing because, at the very least, the evidentiary record lacks unequivocal facts from which to make a proper judgment on ratification.

IV. REFUSING TO REWARD MRS. SMITH'S UNLAWFUL ACTS, THE TRIAL COURT PROPERLY DECLINED TO IMPOSE AN EQUITABLE TRUST IN FAVOR OF MRS. SMITH AND HER HEIRS

Ignoring the unlawful nature of Mrs. Smith's actions, Carol Smith faults the trial court for failing to exercise its discretionary power to impose an equitable "naked trust" in her favor over the six properties. (Appellant's Br. at 40-44). It is a well established legal maxim that "those who seek equity must do equity." Lindsey v. Clark, 193 Va. 522, 527, 69 S.E.2d 342, 345 (1952); Cline v. Berg, 273 Va. 142, 147-48, 639 S.E.2d 231, 233-34 (2007). Manifestly, an agent who abuses a power of attorney to the

financial benefit of herself and her heirs, and who exploits her principal's physical inability to monitor her transactions has not done equity. Under the circumstances, the imposition of an equitable "naked trust" would necessarily reward Mrs. Smith's unlawful acts, instead of condemning them. Such an outcome would be contrary to the purpose of equity, which seeks to remedy fraud or oppression, not perpetuate it. 30A C.J.S. *Equity* § 97 (2009). The trial court properly declined to reward Mrs. Smith's unauthorized actions by imposing a naked trust in favor of her heirs and beneficiaries, and the Court should affirm that well-reasoned determination.

V. CONSIDERATING DEPOSITION TESTIMONY ON CROSS MOTIONS FOR SUMMARY JUDGMENT IS INAPPROPRIATE

The trial court properly exercised its discretion in declining to consider the deposition testimony of Jean Mountjoy ("Mountjoy Deposition") when reviewing Carol Smith's Motion for Limited Reconsideration. Rule 3:20 states, in relevant part, that "[n]o motion for summary judgment … shall be *sustained* when based in whole or in part upon discovery depositions …, unless all parties to the action agree that such deposition may be so used." Va. Sup. Ct. R. 3:20 (2009) (*emphasis added*). Although this Court's recent decision in Lloyd v. Kime, 275 Va. 98, 107-08, 654 S.E.2d 563, 568-69

(2008), permits, en dicta,[20] the use of deposition testimony *to oppose* a motion for summary judgment, the trial court nevertheless appropriately declined to consider the Mountjoy Deposition.

Because of the procedural posture of this case, *i.e.* cross motions for summary judgment, the Mountjoy Deposition necessarily *supported* Carol Smith's motion for summary judgment as much as it *opposed* Mr. Smith's Executrix's. This is especially true given that Carol Smith's admitted purpose for proffering the Mountjoy Deposition (*on appeal*) is to estop Mr. Smith's Executrix from denying Mrs. Smith's authority under the DPOA (Appellant's Br. at 36-40), which was the precise basis of her motion for summary judgment. (J.A. at 74-78).

In addition, unlike Lloyd, the parties here specifically agreed *not* to use any deposition testimony during the summary judgment proceedings (J.A. at 372), and Mr. Smith's Executrix specifically objected to Carol Smith's inappropriate use of the same. (R at 362; 367-373).

Furthermore, Carol Smith's proffer was untimely. Carol Smith had the Mountjoy deposition in-hand prior to moving for summary judgment (J.A. at

[20] This holding in Lloyd was arguably dicta, as the defendant in Lloyd proffered deposition testimony *in support of* his motion for summary judgment, and the plaintiff did not object to its use, even going so far as incorporating it into his own briefs. 275 Va. 98, 107-08, 654 S.E.2d 563, 568-69 (2008).

367 at ¶1; 344-357)). Yet she did not proffer it until *after* the trial court had ruled on the cross motions. (J.A. at 339-340). By that time, she had already emphatically argued in her opening, reply and opposition briefs, as well as at the hearing on the cross motions, that there were no material facts in dispute and that the case was ripe for summary judgment. (J.A. at 69-74; 215-220; 233 at ¶13-22 to 234 at ¶1-9; 249 at ¶10-22 to 250 at ¶1-10; 253 at ¶8-12). Defendant's last minute proffer, while perhaps not sanctionable, failed to create a question of material fact where there previously was none. Nor does it now, on appeal, create a question of judicial estoppel. For all these reasons, the trial court properly exercised its discretion to not consider it. (J.A. at 448).

Even assuming, arguendo, that the trial court abused its discretion in declining to consider the Mountjoy Deposition, any such abuse was harmless. The excerpt proffered by Carol Smith contains no facts at all. (J.A. at 340; 344-357). Instead, it recites the uninformed legal opinions of Ms. Mountjoy, a lay witness who had been the party plaintiff for all of a month when deposed. (J.A. at 63-64; 344). As conceded by Carol Smith, the Court, not Ms. Mountjoy, decides the legal import of the DPOA language. (J.A. at 249 at ¶10-22 to 250 at ¶1-10).

A. Mr. Smith's Executrix is Not Judicially Estopped from Obtaining Summary Judgment by Virtue of the Mountjoy Deposition

1. *Carol Smith Never Raised this Question in the Trial Court and Failed to Assign Error to It on Appeal*

Carol Smith never raised the question of whether Mr. Smith's Executrix should be judicially estopped from denying Mrs. Smith's authority to engage in estate planning under the DPOA. (J.A. at 9-21; 35-43; 55-62; 65-91; 176-201; 215-331; 338-342; 374-448). Accordingly, the trial court did not render any ruling upon it. (J.A. at 332-338; 449-456).

Likewise, in her Petition for Appeal, Carol Smith failed to assign error to the trial court's failure to consider whether Mr. Smith's Executrix was judicially estopped from denying Mrs. Smith's authority to engage in estate planning under the DPOA. (See J.A. at 459). Rule 5:17 states, in relevant part that "[o]nly errors assigned in the petition for appeal will be noticed by this court." Va. Sup. Ct. R. 5:17(c) (2009). Because Carol Smith failed to assign error to this question, and because it was never raised in the trial court, the Court should not review it.

2. *In the Alternative, Judicial Estoppel is Inapplicable Here*

If the Court chooses to consider whether Mr. Smith's Executrix should be judicially estopped despite Carol Smith's failure to raise it in the trial

court or assign it error on appeal, the equitable doctrine nevertheless is inappropriate here because it (1) applies only to facts, not legal positions; (2) requires the prior inconsistent position to have been relied upon by the court in rendering its decision, which it was not; and (3) would require a factual determination, which is inappropriate on summary judgment.

The doctrine of judicial estoppel prevents a party from assuming contradictory positions in the course of a suit to protect the integrity of the judicial process. Virginia Elec. and Power Co. v. Norfolk Southern Ry. Co., 278 Va. 444, 464, 683 S.E.2d 517, 527 (2009). Certain conditions are prerequisites for its application, however: the inconsistent or contradictory assertions must be assertions of fact, not law or legal theory, and the prior inconsistent position must have been relied upon by the court in rendering its decision. Id.

Carol Smith contends that Mr. Smith's Executrix assumed inconsistent positions with regard to whether Mrs. Smith had the authority to execute particular deeds. (Appellant's Br. at 38-39). Whether or not Mrs. Smith was authorized under the power of attorney to execute particular deeds is a *legal question* not a factual one. Parties are entitled to present alternative legal theories based on the same underlying factual allegations

without being subject to claims of estoppel. Bentley Funding Group LLC, 269 Va. at 326-327; 609 S.E.2d at 54-55.

Even assuming, arguendo, that the scope of Mrs. Smith's authority under the DPOA presented a question of fact, the factual allegations of Mr. Smith and his executrix have remained the same throughout the litigation, in spite of several amendments to narrow and clarify the nature of this dispute. (See J.A. at 1-8 compare to J.A. at 24-34 com to J.A. at 44-54). In addition, the facts alleged in Mr. Smith's Executrix's Second Amended Complaint were practically identical to the ones comprising Mr. Smith's Executrix's Statement of Undisputed Material Facts in support of her Motion for Summary Judgment. (See J.A. at 44-54 compare to J.A. at 171-174).

Mr. Smith's Executrix's legal theories have also remained the same. In her Second Amended Complaint, Mr. Smith's Executrix contended, inter alia, that Mrs. Smith acted beyond the scope of the powers granted [in the DPOA] and/or was not authorized to make an estate plan for Mr. Smith or make gifts of his property. (See J.A. at 52, ¶5). On summary judgment, Mr. Smith's Executrix argued, first and foremost, that "Mrs. Smith Exceeded Her Authority Under the DPOA". (J.A. at 156-158).

Because Mr. Smith's Executrix's legal *and* factual arguments were consistent in her Second Amended Complaint and on summary judgment, the trial court did not rely on an "inconsistent position" in rendering its decision, and thus, judicial estoppel is inapplicable. Bentley Funding Group LLC, 269 Va. at 326-327, 609 S.E.2d at 54-55; see e.g., Berry v. Klinger, 225 Va. 201, 207, 300 S.E.2d 792, 795 (1983) (Plaintiffs who alleged in their complaint that contract was unambiguous would not be permitted to claim ambiguity at trial).

CONCLUSION

For the reasons argued above, the Court should affirm the trial court and hold that Mrs. Smith was not authorized to engage in estate planning for Mr. Smith under the DPOA; that Mrs. Smith impermissibly gifted herself and the heirs of her exclusive choosing Mr. Smith's property interests; that Mr. Smith did not ratify Mrs. Smith's unauthorized and unlawful actions; that the imposition of an equitable "naked trust" was not warranted under the circumstances; and that the consideration of deposition testimony on cross-motions for summary judgment is inappropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 5:26(d), fifteen bound copies and one electronic copy on CD of this Brief of Appellee were hand-filed with the Clerk of this Court and three bound copies of the same were sent, via U.S. Mail, postage prepaid, to Counsel for the Appellant at the address listed below, this the 4th day of January, 2010.

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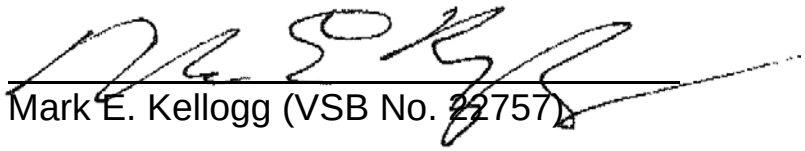

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