IN THE

Supreme Court of Virginia

RECORD NO. 100305

DONALD GUNTER,

Appellant,

v.

ROBBIE S. MARTIN,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF THE QUALITY OF THE PERSONS FOR OR AGAINST WHOM THE CLAIM IS MADE" PRONG OF THE RES JUDICATA TEST WAS MET, THEREBY RESULTING IN THE GRANTING OF THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Preserved at App. 78).

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III. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF CAUSE OF ACTION" PRONG OF THE RES JUDICATA TEST HAS BEEN MET BECAUSE THE COURT FOUND THAT THE TRANSACTION OR OCCURRENCE AT THE ROOT OF EACH CASE WAS THE SAME – THE PATERNITY-STATUS OF THE DECEDENT, THEREBY RESULTING IN THE GRANTING OF THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Preserved at App. 78).

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JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Preserved at App. 78).

STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

In March of 2005, the Plaintiff below and Appellant herein, Mr. Donald L. Gunter filed a claim as an out-of-wedlock child against the Estate of George F. Martin in Colonial Heights, Virginia. (App. 80). The trial court dismissed the petition, with prejudice, for failure to comply with the requirements of Section 64.1-5.1 of the 1950 Code of Virginia. (App. 125, 158-159). That decision prevented Mr. Gunter from inheriting any personal or real property from the Estate of George F. Martin.

In the fall of 2008, Mr. Donald L. Gunter learned of this court's opinion in *Jenkins v. Johnson,* 276 Va. 30, 661 S.E.2d 484 (2008). In that case, an out of wedlock heir filed for partition, and the trial court dismissed the claim for failure of the plaintiff to meet the requirements of Section 64.1-5.1 of the 1950 Code of Virginia, just as had been the case with Appellant Gunter. This Court reversed that decision, holding that the affidavit requirements of the requirements of Va. Code § 64.1-5.1 only apply to personal property, not real estate. Accordingly, Appellant Gunter filed suit against Ms. Robbie S. Martin

once again, this time in the nature of partition[1]. (App. 1-6). That suit is the basis of this appeal.

On July 22, 2009, Ms. Robbie S. Martin, through her counsel, filed a Plea of Res Judicata. (App. 18-21). Mr. Gunter filed his Reply to Plea of Res Judicata on August 14, 2009. (App. 21-28). Ms. Robbie S. Martin, through her counsel, filed a supplemental letter memorandum of law on September 23, 2009, since the Plea filed on July 22, 2009 cited no caselaw whatsoever. (App. 30-36). A hearing on the plea was held five days later before the Honorable Judge Herbert C. Gill on September 28, 2009. (App. 37-67). Counsel for Appellant Gunter also filed a supplemental memorandum of law the following day. (App. 68-72).

By letter opinion issued to counsel on November 9, 2009, Judge Gill sustained the Plea of Res Judicata and dismissed the Complaint. (App. 73-76). An Order consistent with Judge Gill's ruling was entered, with the objections of the Plaintiff noted thereto, on November 18, 2009. (App. 77-77). Appellant Donald L. Gunter

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[1] The complaint was styled as: *In the Circuit Court of the City of Colonial Heights, Donald L. Gunter v. Robbie S. Martin, Complaint to Quiet Title & for Allotment or Sale of real Property in Lieu of Partition, CH09000162-00.*

timely filed his Notice of Appeal with the trial court on December 16, 2009.

STATEMENT OF FACTS

As previously stated herein, in 2005 Mr. Donald L. Gunter sought to file a claim as an out-of-wedlock child against the Estate of George F. Martin in Colonial Heights, Virginia. Mr. Gunter retained James E. Evans, Esquire of Gilliam & Evans to represent him in that cause. Evans drafted a petition, which Mr. Gunter signed and acknowledged as his signature before a notary on May 27, 2005. Mr. Evans filed it on that same day, just prior to the expiry of the statute of limitations on June 1, 2005[2]. (App. 80).

Consequently, on June 24, 2005, Ms. Martin, as the Administrator, through her counsel, filed a Motion to Dismiss the Petition on the basis that the Petition was notarized, but did not contain an oath or affirmation on behalf of the petitioner, Donald L. Gunter, making an allegation of parenthood[3]. (App. 85-87). The

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[2] The petition was styled as: In the Circuit Court of the City of Colonial Heights, Donald L. Gunter v. Robbie S. Martin, Individually and in Her Capacity as Administrator of the Estate of George F. Martin, CH05000048-00.

[3] Section 64.1-5.1(4) of the 1950 Code of Virginia requires the following:

motion was also based on the fact that no separate affidavit alleging parenthood had been filed with the Clerk of the Colonial Heights Circuit Court within one year of the date of George F. Martin's death.

The trial court granted the Administrator's motion to dismiss at a hearing on August 4, 2005, and the case was dismissed with prejudice because it was the opinion of the trial court that (1) the requirements of Section 64.1-5.1 of the 1950 Code of Virginia had not been met, and (2) it did not invoke or cite Va. Code § 64.1-5.1 and seek an adjudication of parenthood for a child born out of wedlock in connection with the probate of an intestate estate. (App. 125). Rather, the petition only asked for the Court to "allow an amended list of heirs to be filed and recorded," which clearly it did not have the power to do without first adjudicating paternity. (App. 85-87).

Mr. Donald L. Gunter learned of this court's opinion in *Jenkins v. Johnson,* 276 Va. 30, 661 S.E.2d 484 (2008) in the fall of 2008. In

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> No claim of succession based upon the relationship between a child born out of wedlock and a parent of such child shall be recognized in the settlement of any decedent's estate unless an affidavit by such child or by someone acting for such child alleging such parenthood has been filed within one year of the date of the death of such parent in the clerk's office of the circuit court of the jurisdiction wherein the property affected by such claim is located and an action seeking adjudication of parenthood is filed in an appropriate circuit court within said time.

that case, an out of wedlock heir filed for partition, and the trial court dismissed the claim for failure of the plaintiff to meet the requirements of Section 64.1-5.1 of the 1950 Code of Virginia, just as had happened to Appellant Gunter. This Court reversed that decision, holding that the affidavit requirements of the requirements of Va. Code § 64.1-5.1 only apply to personal property, not real estate. Accordingly, Mr. Gunter filed suit against Ms. Robbie S, Martin once again, this time in the nature of partition[4]. (App. 1-6). This suit is the basis of this appeal.

On July 22, 2009, Ms. Robbie S. Martin, through her counsel, filed a Plea of Res Judicata. (App. 18-21). After a hearing on the Plea, by letter opinion issued to counsel on November 9, 2009, Judge Gill sustained the Plea of Res Judicata and dismissed the Complaint. (App. 73-76). An Order consistent with Judge Gill's ruling was entered, with the objections of the Plaintiff noted thereto, on November 18, 2009. (App. 77-79).

ARGUMENT

[4] The complaint was styled as: In the Circuit Court of the City of Colonial Heights, Donald L. Gunter v. Robbie S. Martin, Complaint to Quiet Title & for Allotment or Sale of real Property in Lieu of Partition, CH09000162-00.

I. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF PARTIES" PRONG OF THE RES JUDICATA TEST WAS MET, THEREBY RESULTING IN THE GRANTING OF THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Assignment of Error I)

A. STANDARD OF REVIEW

The determination of whether or not res judicata ought to apply in a given case is a determination of law and is subject to de novo review. *See Pruden v. Plasser American Corp.,* 45 Va. App. 566, 612 S.E.2d 738 (2005); *Rusty's Welding Service, Inc. v. Gibson,* 29 Va.App. 119, 510 S.E.2d 255 (1999).

B. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF PARTIES" PRONG OF THE RES JUDICATA TEST WAS MET.

The Supreme Court of Virginia has consistently held that a litigant who seeks to bar a claim based upon the defense of res judicata must establish four elements: identity of the remedy sought; identity of the cause of action; identity of the parties; and identity of the quality of the persons for or against whom the claim is made. *State Water Control Bd. v. Smithfield Foods, Inc.,* 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001); *Balbir Brar Assoc., Inc. v. Consolidated*

Trading and Serv. Corp., 252 Va. 341, 346, 477 S.E.2d 743, 746 (1996); *Wright v. Castles,* 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986). For the purposes of this appeal, the appellant wishes to address the "identity of the parties" prong first.

The trial court correctly identified the four-part test for res judicata, as noted in its letter opinion of November 9, 2009, but erroneously found that "identity of parties" prong was met by the Defendant, Robbie S. Martin. (App. 73, 74). Appellant Gunter did concede in his reply pleading that the identity of the parties is the same, but specifically disputed that the quality of the persons was identical. (App. 24).

In the prior matter, Appellant Gunter sued Ms. Martin in her capacity as Administrator of the Estate of George F. Martin so as to take part in the personal estate of the decedent. (App. 80-81). In this case, Mr. Gunter was suing for partition of two parcels of real estate which he co-owns with Ms. Martin by intestate succession to real estate. (App. 1-9). Therefore, the quality of the parties is distinct between the two causes, and the doctrine of res judicata does not apply.

Nowhere in the letter opinion is this "identity of quality" prong of the four-part test discussed. True, the trial court addressed the separate identity of parties prong in its memorandum opinion, but as noted above, that prong was never in dispute. The significant point is that the identity of quality prong is mentioned in the court's opinion letter, but never addressed. Without a finding that all four prongs of the test have been satisfied, the judicially created doctrine of res judicata cannot be applied, and therefore it was erroneous for the trial court to apply it to Appellant's case and dismiss his complaint for partition.

II. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF REMEDY SOUGHT" PRONG OF THE RES JUDICATA TEST HAS BEEN MET BECAUSE THE COURT FOUND THAT THE REMEDY SOUGHT IN BOTH THE PRIOR CASE AND IN THE CASE AT BAR WAS MERELY AN ADJUDICATION OF PATERNITY, THEREBY RESULTING IN THE GRANTING THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Assignment of Error II).

A. STANDARD OF REVIEW

The determination of whether or not res judicata ought to apply in a given case is a determination of law and is subject to de novo review. *See Pruden v. Plasser American Corp.,* 45 Va. App. 566, 612

S.E.2d 738 (2005); *Rusty's Welding Service, Inc. v. Gibson*, 29 Va. App. 119, 510 S.E.2d 255 (1999).

B. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF REMEDY SOUGHT" PRONG OF THE RES JUDICATA TEST WAS MET.

The Supreme Court of Virginia has consistently held that a litigant who seeks to bar a claim based upon the defense of res judicata must establish four elements: identity of the remedy sought; identity of the cause of action; identity of the parties; and identity of the quality of the persons for or against whom the claim is made. *State Water Control Bd. v. Smithfield Foods, Inc.,* 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001); *Balbir Brar Assoc., Inc. v. Consolidated Trading and Serv. Corp.,* 252 Va. 341, 346, 477 S.E.2d 743, 746 (1996); *Wright v. Castles,* 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986).

The trial court correctly identified the four-part test for res judicata, as noted in its letter opinion of November 9, 2009, but erroneously found that "identity of remedies" prong was met by the Defendant, Robbie S. Martin. (App. 73, 74).

In *Smith v. Ware*, 244 Va.374, 421 S.E.2d 444 (1992), the Supreme Court of Virginia held that a prior judgment that a statute of limitations barred the devisee's unlawful detainer action against the surviving spouse was not res judicata as to spouse's complaint against devisee for commutation of dower interest in residence and for damages for withholding of dower interest; there was no identity of remedies. (emphasis added). Likewise, the fact that Virginia Code § 64.1-5.1(4) acted as statute of limitations barring his claims against the personal estate of the decedent is not res judicata in a subsequent suit for partition against the surviving spouse as there is no identity of remedies.

However, the trial court erroneously ruled that "in both cases the Plaintiff sought the determination of paternity in order to determine ownership interests in the decedent's property and assets. The 'identity of remedy sought' prong. . .is satisfied because the essential remedy of both cases, that is the adjudication of paternity, is the same." (App. 73, 75).

Looking again at the issues from a more general perspective, the first case asked the Court to determine Appellant Gunter's rights in Mr. Martin's estate, both real and personal property, as Mr. Martin's

biological son. The second case asked the Court to determine Appellant Gunter's rights in Mr. Martin's real property, as Mr. Martin's biological son. The distinction between the two cases is that rather than passing to the estate as personal property passes, "title to real property vests in a decedent's heirs at the moment of decedent's death." *Jenkins, et al. v. Johnson, et al.*, 276 Va. 30, 33 (2008). The Supreme Court of Virginia noted this distinction and differentiated between real property and personal property in *Jenkins*.

III. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF CAUSE OF ACTION" PRONG OF THE RES JUDICATA TEST HAS BEEN MET BECAUSE THE COURT FOUND THAT THE TRANSACTION OR OCCURRENCE AT THE ROOT OF EACH CASE WAS THE SAME – THE PATERNITY-STATUS OF THE DECEDENT, THEREBY RESULTING IN THE GRANTING OF THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Assignment of Error III).

A. STANDARD OF REVIEW

The determination of whether or not res judicata ought to apply in a given case is a determination of law and is subject to de novo review. *See Pruden v. Plasser American Corp.,* 45 Va. App. 566, 612 S.E.2d 738 (2005); *Rusty's Welding Service, Inc. v. Gibson,* 29 Va.App. 119, 510 S.E.2d 255 (1999).

B. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF CAUSE OF ACTION" PRONG OF THE RES JUDICATA TEST WAS MET.

The Supreme Court of Virginia has consistently held that a litigant who seeks to bar a claim based upon the defense of res judicata must establish four elements: identity of the remedy sought; identity of the cause of action; identity of the parties; and identity of the quality of the persons for or against whom the claim is made. *State Water Control Bd. v. Smithfield Foods, Inc.,* 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001); *Balbir Brar Assoc., Inc. v. Consolidated Trading and Serv. Corp.,* 252 Va. 341, 346, 477 S.E.2d 743, 746 (1996); *Wright v. Castles,* 232 Va. 218, 222, 349 S.E.2d 125, 128 (1986).

The trial court correctly identified the four-part test for res judicata, as noted in its letter opinion of November 9, 2009, but erroneously found that "identity of the cause of action" prong was met by the Defendant, Robbie S. Martin. (App. 73, 75).

More specifically, the doctrine of res judicata only applies if the cause of action a plaintiff asserts in the pending proceedings is the same as the cause of action asserted in the former proceeding. *City*

of Virginia Beach v. Harris, 259 Va. 220, 229, 523 S.E.2d 239, 243 (2000). *See also Smith v. Ware*, 244 Va. 374, 376, 421 S.E.2d 444, 445 (1992). Stated another way, the questions is whether the first litigation involved the same transaction, which some courts have referred to as "cause of action", and this concept has produced some confusion, because sometimes both courts and lawyers indiscriminately use the term "cause of action" when they mean "right of action", and the two are not the same. *Winchester Neurological Consultants, Inc. v. Landrio,* 74 Va. Cir. 480, 2008 WL 5521828 (2008). A "cause of action" is a set of operative facts which under the substantive law may give rise to a right of action. *Roller v. Basic Construction Co.,* 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989). Therefore, one transaction (cause of action) may give rise to myriad rights of action.

The Court's opinion letter cites Virginia Supreme Court Rule 1:6 in its analysis and finds that "both causes involve the same cause of action since they arise out of the *same transaction or occurrence*." (App. 75). Rule 1:6, defining *res judicata* claim preclusion states that "a party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final

judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, *transaction or occurrence*." Va. Sup. Ct. R. 1:6 (emphasis added). Significantly, Rule 1:6, by its specific language, applies to "judgments entered in civil actions commenced after July 1, 2006." However, the first judgment was entered in a case which was commenced on May 27, 2005. Therefore, Rule 1:6 does not apply, and the trial court erroneously relied on the wrong standard its decision

Prior to enactment of Rule 1:6, the test for analyzing "identity of the cause of action" prong was narrower, and was "whether the same evidence is necessary to prove each claim." *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 576 S.E. 2d 504 (2003) quoting *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 567 (1987). *See Va. Imports Ltd. V. Kirin Brewery of Am., LLC,* 50 Va. App. 395, 410, 650 S.E.2d 554, 561, fn. 6 (2007).

In his prior action, which was a cause of action alleging parenthood, Appellant Gunter would have had to present evidence of the following: (1) That the Circuit Court of Colonial Heights had subject matter jurisdiction pursuant to Virginia Code § 64.1-45.1; (2)

An affidavit, filed within one year in the Colonial Heights Circuit Court, alleging that he was the out of wedlock child of the decedent pursuant to Virginia Code § 64.1-5.1(4); (3) That he was the biological child of Mr. Martin through proofs sufficient to satisfy the requirements of Virginia Code § 64.1-5.2; (3) That he was not the child of the surviving spouse.

Under Virginia Code § 64.1-1, the title to decedent Martin's real property passed at the moment of his death to Defendant Robbie S. Martin and Plaintiff Donald L. Gunter in 1/3rd and 2/3rd shares respectively, according to their statutory shares. *See Spinks v. Rice*, 187 Va. 730, 742, 47 S.E.2d 424, 429 (1948); 1 Page on the Law of Wills § 1.4 at 18 (4th ed. 2003); 1 Harrison on Wills and Administration § 1.03 (3rd ed. 1986).

Therefore, in the suit for partition, Gunter must present evidence of the following: (1) That upon his death, the decedent was seized of a parcel or parcels of real estate; (2) That in accordance with Virginia Code § 8.01-261(3)(a) said parcel or parcels are situated within the City of Colonial Heights; (3) That he was the biological child of Mr. Martin through proofs sufficient to satisfy the requirements of Virginia Code § 64.1-5.2; (4) any liens or encumbrances on the

subject land; (5) the identity of the other heir or heirs so that partition can be properly and conveniently made.

It is significant to note that unlike the estate action, which required as part of its proof that an affidavit was filed within one year in the Colonial Heights Circuit Court, alleging that Appellant Gunter was the out of wedlock child of the decedent, this cause does not. That statutory requirement "by [its] plain language, appl[ies] only to 'the settlement of [a] decedent's estate,' and do[es] not apply to the determination of heirs to, and the partition of, real property passing by intestate succession." *Jenkins v. Johnson,* 276 Va. 30, 661 S.E.2d 484 (2008).

The only overlapping element of proof in the respective causes of action is paternity. The remaining elements require distinct proof. According to *Davis*, "the mere fact that some evidence relevant" in Mr. Gunter's first cause of action may be relevant to prove his other cause of action "does not, for purposes of res judicata, mean that plaintiff has only one cause of action." *Davis*, 265 Va. at 166. Furthermore, the evidence required in one claim would not be relevant, and likely not even admissible in the other claim. See *Id.* at 166-67 (noting "It is a fundamental principle of jurisprudence that

evidence which is not relevant is not admissible."). For example, evidence of an affidavit required in the estate case would not be relevant in the partition action, and evidence of liens on decedent's real property would not be evidence in the estate action. Certainly, there is a difference between some overlap in evidence and overlap in an element of the claims; however, it is apparent that the trial court used the incorrect standard of review and that the divergence in the remaining elements is great enough to warrant denial of the *res judicata* claim.

IV. THE TRIAL COURT ERRED IN RULING THAT JENKINS V. JOHNSON, 276 VA. 30, 661 S.E.2D 484 (2008) DID NOT CREATE OR FORM A NEW RIGHT, AND THUS THE EXCEPTION TO OR BLOCKING OF RES JUDICATA AS CARVED OUT IN MOWRY V. CITY OF VIRGINIA BEACH, 198 VA. 205, 211, 93 S.E.2D 323, 327 (1956) DID NOT APPLY IN THE CASE AT BAR THEREBY RESULTING IN THE GRANTING OF THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Assignment of Error IV).

A. STANDARD OF REVIEW

A trial court judgment as to whether or not this court's ruling in *Jenkins v. Johnson*, 276 Va. 30, 661 S.E.2d 484 (2008) created or formed a new right, thereby precluding the application of res judicata

to Appellant Gunter's case, is predicated entirely upon questions of law and is therefore reviewed de novo. *Sheets v. Castle*, 263 Va. 407, 559 S.E.2d 616 (2002); *Pruden v. Plasser American Corp.*, 45 Va. App. 566, 612 S.E.2d 738 (2005); *Rusty's Welding Service, Inc. v. Gibson*, 29 Va.App. 119, 510 S.E.2d 255 (1999).

B. THE TRIAL COURT ERRED IN RULING THAT JENKINS V. JOHNSON, 276 VA. 30, 661 S.E.2D 484 (2008) DID NOT CREATE OR FORM A NEW RIGHT.

Assuming *arguendo* that Appellee Martin established that under the four-prong test that res judicata ought to apply and bar the partition action brought by Appellant Gunter, the change in the litigants' rights brought about by this Court's ruling in *Jenkins* precludes the application of the court-created doctrine of res judicata.

The doctrine of res judicata does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants. *Mowry v. City of Virginia Beach*, 198 Va. 205, 93 S.E.2d 323 (1956) (citing *Atlantic Coast Line R.R. Co. v. Com.*, 191 Va. 241, 255, 61 S.E.2d 5; *Huntington Brick etc. Co. v. Public Service Comm.*, 107 W.Va. 569, 149 S.E. 677). In particular, the Supreme Court of

Virginia held in *Jenkins*[5] that 64.1-5.1(4) does not serve as a bar to the determination of heirs to, and the partition of, real property passing by intestate succession, thereby altering the rights of Appellant Gunter as a litigant.

Nevertheless, the trial court held that "in its analysis [in *Jenkins*] the Supreme Court of Virginia parsed through the statutory language and distinguished when the provisions of the rule applied and when they did not apply. At no point did the Supreme Court create a new right or change any law." (App. 75).

Respectfully, Gunter disagrees. The distinction between the two cases is that rather than passing to the estate as personal property passes, "title to real property vests in a decedent's heirs at the moment of decedent's death." *Jenkins, et al. v. Johnson, et al.*, 276 Va. 30, 33 (2008). Had *Jenkins* been on the books at the time he filed his initial claim as an out-of-wedlock child, he would and could have filed his suit for partition immediately after his first claim had been dismissed, or he would have included a separate claim for partition with his initial petition. The Supreme Court of Virginia noted this distinction and differentiated between real property and personal

[5] 276 Va. 30, 661 S.E.2d 484 (2008)

property but did not do so until 2008, and Appellant Gunter filed his claim for partition shortly thereafter.

CONCLUSION

Therefore, the appellant respectfully argues that the trial court erred in applying the doctrine of res judicata to his case, erred further in ruling that Jenkins did not create a new right for the litigants, thus blocking the application of the doctrine of res judicata, that the trial court's decision ought to be reversed and this cause remanded to the trial court for further proceedings and trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Opening Brief of Appellant, and one electronic copy (via email or CD) have been filed with the Clerk of the Supreme Court of Virginia by certified mail and three (3) copies, and one electronic copy, have been mailed, first class, postage prepaid to:

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on this 6th day of July, 2010.

David G. Hubbard, Esq.