IN THE

Supreme Court of Virginia

Record No. 141533

CELIA A. RAFALKO, as TRUSTEE of the
DIMITRI GEORGIADIS TRUST,

Appellant,

v.

PAUL D. GEORGIADIS, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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I. Argument.

A. The Remainder Beneficiaries' Complaint Was Not Sufficient to Allow a Finding of Bad Faith.

Paul D. Georgiadis ("Paul") and Basil D. Georgiadis ("Basil") (collectively, "the Remainder Beneficiaries") do not dispute that bad faith, as a species of fraud, must be pleaded with particularity and do not dispute that they failed to plead bad faith even in a conclusory fashion. Thus, the trial court's overruling of the demurrer of Celia A. Rafalko ("the Trustee"), and its finding at trial that the Trustee had acted in bad faith, were improper, as "no court can base its judgment or decree upon facts not alleged or upon a right which has not been pleaded and claimed." Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141, 277 S.E.2d 228, 229-30 (1981) (citing Potts v. Mathieson Alkali Works, 165 Va. 196, 207, 181 S.E. 521, 525 (1935)). "'Pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading.'" Id. (quoting Bank of Giles County v. Mason, 199 Va. 176, 180, 98 S.E.2d 905, 907 (1957)).

Nevertheless, the Remainder Beneficiaries argue that their conclusory allegations of arbitrary and capricious conduct were an adequate substitute for their failure to plead bad faith because they claim

the Trustee's decision was based on a "mistake of law." Appellees' Brief at 20. The Trustee, however, according to the memorandum prepared by her counsel and attached to the Complaint as an exhibit ("the Decision Memo"), relied on the plain wording of the Trust and the known facts. App. at 53-64. Not surprisingly, therefore, the Complaint does not identify any mistake of law attributable to the Trustee.

The Trustee's decision-making authority, as granted by the First Amendment, is akin to that of an arbitrator, whose award may not generally be vacated so long as the arbitrator did not exceed his powers and the award was not procured by "corruption, fraud or other undue means." Va. Code Ann. §8.01-581.010 (2007); see Signal Corp. v. Keane Fed. Sys., 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003) (finding plain language of statute does not allow vacation of award for manifest disregard of law). Virginia trustees are specifically empowered to submit to arbitration controversies concerning any matter in connection with which they are acting as trustees, so long as they do so in "good faith." Va. Code Ann. §8.01-581 (2007). The Trust's grant of authority to the Trustee was no greater than that which could be given to an arbitrator and was therefore enforceable.

B. The Trial Court Erred in Finding the Trustee's Decision was Made in Bad Faith.

The usual deference to a trial court's decision as a finder of fact does not apply absent material conflicts in the evidence. Thus, "a trial court's conclusion based on evidence that is 'not in material conflict' does not have this binding effect on appeal." Hankerson v. Moody, 229 Va. 270, 274, 329 S.E.2d 791, 794 (1985) (quoting Durrette v. Durrette, 223 Va. 328, 332, 288 S.E.2d 432, 434 (1982)). "A court may not base its findings on a suspicion which is contrary to the undisputed positive testimony." Id. (citing Cheatham v. Gregory, 227 Va. 1, 4, 313 S.E.2d 368, 370 (1984)); see Sturgis v. Stinson, 241 Va. 531, 536, 404 S.E.2d 56, 59 (1991) (substantial deference to trial court's factual determinations not applicable where court's conclusions were based on testator's will and on testimonial evidence and other documents not in material conflict).

The Remainder Beneficiaries refuse to acknowledge the trial court's rejection of extensive testimony showing the Trustee's good faith. Timothy H. Guare ("Guare"), who drafted the Trust, testified that the Trustee deliberately used all available information before making her decision and sought and received the advice of her attorneys. App. at 222. Moreover, the Decision Memo, written by the Trustee's trial counsel, concludes that the Trustee "has acted honestly and in good faith." App. at 336. Guare testified without contradiction or objection that he had reviewed the

Decision Memo and agreed with it (App. at 223), while Paul declined to testify that the Trustee's conduct amounted to bad faith. App. at 232.

The Remainder Beneficiaries do not dispute that bad faith must be proved by clear and convincing evidence. Their "evidence" however, amounts to nothing more than speculation. The Remainder Beneficiaries thus argue that the Trustee's bad faith should be inferred from the friendship of the Trustee and Margaret R. Georgiadis ("Maggie"). Appellees' Brief at 24. The Trustee, Maggie, and Guare, however, all testified that Maggie did not benefit from the Trustee's decision. App. at 211, 223, 228. There was no evidence of any animosity directed by Maggie toward the Remainder Beneficiaries. When asked if she ever indicated to the Trustee that she wanted Paul and Basil to be cut out of the Trust, Maggie replied, "Oh, no, of course not." App. at 227. This testimony unequivocally demonstrated that the Trustee's friendship with Maggie had no bearing on the Trustee's decision. Moreover, Dimitri B. Georgiadis ("Dimitri" or "the Decedent") was also friends with the Trustee and of course knew of the friendship between his wife and the Trustee when he appointed the Trustee. App. at 204-05.

The Remainder Beneficiaries next contend that the Trustee's bad faith ought to be inferred because the Trust directs that if no other

beneficiaries survived Maggie, the trust corpus would go to unnamed charities of the Trustee's choosing. Appellees' Brief at 24. If the Trustee's duty with respect to the charities was proof of bad faith, it would ultimately invalidate any decision by her that the beneficiaries had violated the September 21, 2012 amendment to the Trust ("the First Amendment"). Moreover, the Remainder Beneficiaries presented no evidence that the Trustee gave any consideration to her eventual duty to designate the charities. Likewise, they did not attempt to challenge Guare's testimony, or that of the Trustee, that the Trustee did not benefit from her decision. See App. at 211-12, 223.

The Remainder Beneficiaries also argue that the Trustee's bad faith ought to be inferred from the Decision Memo's discussion of their dissatisfaction and anger directed toward the Decedent. Appellees' Brief at 24. The Trustee testified, however, that she did not know the reason a discussion of the Remainder Beneficiaries' treatment of Dimitri leading up to execution of the First Amendment had been included in the Decision Memo, which was written by her trial counsel. App. at 213, 215.

That reason was demonstrated by the trial court, which held relevant and admitted (over the objection of the Remainder Beneficiaries) substantive evidence of Paul's and Basil's angry outbursts toward their

father. See App. at 306, 309, 316, 317. According to the trial court, such evidence was "material to show the reason that they allegedly were contesting the trust." App. at 196. The trial court also allowed hearsay statements by the Decedent into evidence to show the Decedent's and the Remainder Beneficiaries' states of mind. App. at 198. Because the trial court found such evidence relevant and admissible, it cannot have been evidence of the Trustee's bad faith for her counsel to have included it in a detailed memorandum analyzing the issues.

Next, the Remainder Beneficiaries contend that the Trustee's bad faith should be inferred from her allegedly having "repeatedly withheld relevant information from" them. Appellees' Brief at 24. In support of this contention, the Remainder Beneficiaries misleadingly claim that "[d]espite her knowledge of the [First] Amendment, the Trustee never informed Paul or Basil of the amendment until almost four months later". Appellees' Brief at 24-25 (citing App. at 181, 212).

The trial court, however, during the hearing on the Trustee's Motion to Reconsider, acknowledged that the Trustee did not know about the terms of the First Amendment until after Dimitri died and that there was no attempt to hide anything from the Remainder Beneficiaries. See App. at 261-62. The trial court was correct. The Trustee testified that she did not

know the contents of the First Amendment until after Dimitri's death, when she saw it for the first time on December 12, 2012. App. at 212. Prior to that time, she was "aware that Dimitri had done something, I think, in October, but I didn't know." App. at 212. Nothing in the record contradicts this testimony. Moreover, the Trustee did not assume her duties until after Dimitri's death. App. at 38. Prior to that time, Dimitri himself was the Trustee, but did not inform Paul and Basil about the First Amendment. App. at 27. Consequently, during more than three of the "about four months" during which the Remainder Beneficiaries now claim the Trustee failed to advise them of the contents of the First Amendment, she was not the Trustee and did not know the substance of the amendment.

A Trustee is not under a duty to provide beneficiaries with a copy of the trust agreement unless they request it. See Va. Code Ann. §64.2-775(B)(1) (2012). According to Paul's testimony, he requested the Trustee's "qualifications" on December 18 or 20, 2012. App. at 181-82. Within three weeks of that request, which occurred less than a week before Christmas, the Trustee provided all of the beneficiaries with copies of the Decedent's will and the Trust documents, which she mailed on January 3, 2013, along with the timely notice required by Virginia Code section 64.2-775(B). App. at 207, 296-97. This sequence of events does not present

any evidence, much less clear and convincing evidence, of bad faith by the Trustee in making her decision, in May 2013, that the Remainder Beneficiaries' admitted actions violated the unambiguous prohibitions of the Trust.

Finally, the Remainder Beneficiaries argue that the Trustee's bad faith was demonstrated because she did not overlook their conduct and supply them with "an appropriate admonition . . . when the [Remainder] Beneficiaries had knowledge of the [First] Amendment." Appellees' Brief at 25. Their real complaint is that the Trustee followed the literal wording of the Trust. See Appellees' Brief at 25 ("despite knowing that the [Remainder] Beneficiaries were unaware of the No Contest Clause, she ousted the Grantor's children and grandchildren from the Trust and plunged the parties into this needless litigation").[1]

The trial court's finding was not supported by any evidence in the record, and the Remainder Beneficiaries did not even attempt to argue that the evidence proved bad faith. For the trial court to find that the Trustee's decision was made in bad faith was not simply an error, but a needless blemish on the character of a Trustee who went to great lengths to gather information, consult two attorneys, and weigh and follow their advice.

[1] Of course, it was the Remainder Beneficiaries who sued the Trustee, in fulfillment of their counsel's threat that, if the Trustee decided they were disqualified, she would be "'in for a dogfight.'" App. at 330.

C. This Court Should Not Restrict the Rights of Settlors to Dispose of Their Property As They See Fit.

The Remainder Beneficiaries acknowledge that so-called "no contest" provisions in trusts are "generally valid and enforceable." Appellees' Brief at 26 (citing Keener v. Keener, 278 Va. 435, 442, 682 S.E.2d 545, 548 (2009)). They contend, however, that for "public policy" reasons, the settlor of a trust and the maker of a will should be judicially forbidden from disqualifying a beneficiary for any reason except filing suit to invalidate the governing instrument. Appellees' Brief at 27-28.

This Court, however, has already recognized the inherent ability of the settlor of a trust to disqualify beneficiaries for conduct other than suing to overturn the trust. In Keener, the Court found that opening an intestate estate, which would cause assets to bypass a trust and thwart the decedent's intent, did not violate a provision that disinherited anyone who "objects to or contests any provision of this trust . . . . " 278 Va. at 439, 682 S.E.2d at 546. As the Court explained, "The testator could, if he so desired, have included, either in his will or in the trust, language broad enough to include the acts complained of . . . but did not choose to do so." Id. at 443, 682 S.E.2d at 549 (emphasis added). Keener thus recognizes that it is in the public interest to protect "a testator's right to dispose of his property as he sees fit . . . . " Id. at 442, 682 S.E.2d at 548.

The Remainder Beneficiaries also argue that because their threats directed to Maggie in an attempt to terminate the Trust could have taken place "at a cocktail party" or "at the grocery store," it would be somehow unseemly for a Virginia court to decide whether their conduct violated the unambiguous language of the Trust. Appellees' Brief at 31. In support of their argument, the Remainder Beneficiaries incorrectly contend that "[e]very jurisdiction interpreting forfeiture provisions has drawn the line at the courthouse door . . . . " Appellees' Brief at 32. See Doyle v. Paul, 119 Ind. App. 632, 640-41, 86 N.E.2d 98, 101 (1949), (upholding provision specifying forfeiture for any beneficiary expressing "dissatisfaction" with terms of will, even though state statute invalidated "no contest" clauses that applied to formal legal challenges); Marion v. Davis, 106 S.W.3d 860, 863 (Tex. Ct. App. 2003) (enforcing will provision providing for forfeiture if any beneficiary "should attempt to place my wife in a nursing facility and defeat my plan to continue home care for my wife before all of the Trust has been used for her care").

The Remainder Beneficiaries contend that if this Court enforces the Trust as written, "Virginia Courts would be forced to referee all sorts of behavior not previously subject to judicial scrutiny." Appellee's Brief at 31. If the goal is to decrease litigation by denying testators and settlors the

ability to dispose of their property as they choose, then by all means, this Court should re-write the Trust and tell the citizens of this Commonwealth that, despite the fact that they may unambiguously express their intentions, their clear instructions will not be followed because disgruntled beneficiaries may bring suit. The Remainder Beneficiaries' argument is circular and allows the threat of litigation to justify refusing to honor the clearly expressed wishes of a settlor or testator solely as a matter of judicial convenience.

D. The Plain Wording of the Trust Bars Conduct in Addition to Filing Suit to Invalidate the Trust.

The Remainder Beneficiaries next claim that the unambiguous wording of Article VII(L)(1) of the Trust does not actually prohibit any conduct it specifies, other than filing suit. To justify this claim, the Remainder Beneficiaries ask the Court to "construe" the operative Trust language in light of the Decedent's recital, "I intend to eliminate the possibility that any beneficiary of mine will challenge the decisions that I have made concerning the disposition of my assets during my lifetime or at my death. . . . " Appellees' Brief at 33 (quoting App. at 47) (emphasis added).

The Remainder Beneficiaries thus confuse a statement of the Decedent's goal (which could in reality never be entirely accomplished)

with his unambiguous directions for what he determined was the best way to implement that goal. The Decedent here may well have concluded that any "attempted interference" with the Trust's administration would be such a red flag that it would justify the disinheritance of the interfering beneficiary as a prophylactic measure. In any event, "A testator knows best the character and disposition of those upon whom he bestows his bounty and understands better than anyone else what pains and penalties will be effective to prevent litigation over his will." Alper v. Alper, 142 N.J. Eq. 547, 553, 60 A.2d 880, 884, (1948), aff'd, 2 N.J. 105, 65 A.2d 737 (1949); see Harbour v. SunTrust Bank, 278 Va. 514, 529, 685 S.E.2d 838, 841 (2009) (if language grantor used "is clear and unambiguous, we will not resort to rules of construction, and we will not consider the grantor's apparent reasoning or motivation in choosing the particular language employed" (emphasis added)); Virginia Found. of Indep. Colleges v. Goodrich, 246 Va. 435, 439, 436 S.E.2d 418, 420 (1993) (if forfeiture provision is unambiguous, no further evidence is needed to determine its meaning).

The Remainder Beneficiaries next argue that the First Amendment's prohibition on attempting to interfere with the administration of the Trust "by legal proceeding or otherwise" must be construed "narrowly" to forbid only legal proceedings. Their proposed "construction" re-writes the First

Amendment to say, "If any beneficiary or potential beneficiary contests this trust agreement by the means provided by law, any provision I have made for the benefit of such beneficiary shall be revoked." The plain meaning of the words actually used by the Decedent, however, bars attempted interference with administration of the Trust by means not "otherwise" encompassed by the term "legal proceedings," which include "'*all proceedings* authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.'" Wood v. Bd. Of Supervisors, 236 Va. 104, 111, 372 S.E.2d 611, 616 (1988) (italics in opinion) (quoting Black's Law Dictionary 807 (5th ed. 1979)). It is telling that it took the Remainder Beneficiaries five pages of their Brief to attempt to cobble together any explanation for why language they themselves admit is unambiguous does not mean exactly what it says.

E. The Remainder Beneficiaries' Admitted Conduct Was an Attempt to Interfere With the Administration of the Trust According to its Express Terms.

The Remainder Beneficiaries argue that sending letters to the Trustee's counsel and Maggie in an attempt to bully Maggie into agreeing with them to terminate the Trust and distribute its assets contrary to its express terms was "discourse" and not "conduct". Appellees' Brief at 39. Nevertheless, Paul admitted at trial that the letter to Guare was a "threat"

directed at Maggie to persuade her to agree to terminate the Trust. App. at 184-87, 304-05. Likewise, Basil characterized the January 4 letter to Maggie as an "attempt," which the letter makes plain is an attempt to convince her to help them in their scheme to terminate the Trust. App. at 303, 294-95.

The Remainder Beneficiaries' problem is not that they "'cherished a desire'" to see their father's estate plan thwarted. See Appellees' Brief at 39 (quoting Puller v. Ramsey, 200 S.W. 83, 87 (Mo. Ct. App. 1918)). Their problem is that they tried to achieve that desire. Their actions not only upset the Decedent's widow, as they were designed to do (App. at 227), but also caused the Trustee to incur legal fees in assessing how to defend against the impending challenge threatened by Paul in his letter to Guare. See App. at 208.

The Remainder Beneficiaries also ask this Court to adopt the fiction that there were two separate trusts at issue - - one created on August 27, 2012 and a separate trust created on September 21, 2012. See Appellees' Brief at 41-45. There was, however, only one Trust at issue. That Trust has existed since 1989, as reflected in the recitations of each Trust instrument. See App. at 265, 278, 298. The Trust was created, not by signing a trust agreement, but by transferring funds to the original trustees

in 1989. See App. at 265 (Article I, "Creation of Trust"). That transfer created a trust corpus to which the settlor could add from time to time. It was not the agreement that created the Trust, but the transfer of property. See Va. Code Ann. §64.2-719(1)(2012) (recognizing that trust is created by transfer of property).

The Remainder Beneficiaries' "attempt" was admittedly to terminate the Trust and distribute the Trust corpus outright in equal shares to themselves and Maggie in derogation of its express terms. Nevertheless, the Remainder Beneficiaries now argue that the First Amendment should be "construed" so as to find that the Decedent intended to prohibit only attempts to interfere with the trust agreement as amended and ratified by the September 21, 2012 First Amendment. Appellees' Brief at 42-43. The First Amendment, however, uses the term "this trust agreement" to forbid contests, while its prohibition on attempted interference forbids attempts to interfere with the administration of "this trust." The Decedent's language recognizes the distinction between the Trust agreement and the Trust. The Remainder Beneficiaries' "construction" of the First Amendment does not.

II. CONCLUSION

The decision of the trial court should be reversed and final judgment entered in favor of the Trustee.

Respectfully submitted,

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Dimitri B. Georgiadis Trust

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CERTIFICATE

I hereby certify that Rule 5:26 of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Reply Brief of Appellant, and one electronic copy (via e-mail or CD) have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy, have been mailed postage prepaid and/or hand delivered this 2nd day of July, 2015 to the following:

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