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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.

OPENING BRIEF OF APPELLANT

David D. Hopper, Esq. (VSB 30038)
COOK, HEYWARD, LEE,
HOPPER & FEEHAN, P.C.
4551 Cox Road, Suite 210
Post Office Box 3059
Glen Allen, VA 23058-3059
(804) 747-4500
(804) 762-9608 Facsimile
ddhopper@chlhf.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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I. STATEMENT OF THE CASE

A. Material Proceedings Below.

This case involves an attempt by Paul Georgiadis ("Paul") and Basil Georgiadis ("Basil") (collectively, "the Remainder Beneficiaries") to interfere in the administration of the Dimitri B. Georgiadis Trust dated August 27, 2012, as amended September 21, 2012, ("the Trust") by threatening their stepmother, Margaret R. Georgiadis ("Maggie" or "the Income Beneficiary") with litigation if she did not acquiesce in their plan to terminate the Trust and distribute its assets in contravention of the Trust's express terms. Celia A. Rafalko ("the Trustee"), as she was required to do by the terms of the Trust, determined that the Remainder Beneficiaries' conduct was prohibited and that therefore, as the Trust directs, they were disqualified as beneficiaries of the Trust.

Upon being notified by the Trustee of her decision, Paul and Basil sued the Trustee, both individually and in her capacity as Trustee[1], and asked the trial court to reverse that decision. Paul and Basil's Complaint for Declaratory Relief ("Complaint") did not allege that the Trustee had

[1] The trial court dismissed the Complaint against the Trustee in her individual capacity on the Trustee's demurrer because the Trustee individually had no interest in the Trust and Paul and Basil admitted they had no claim against her individually.

acted fraudulently, dishonestly, or in bad faith, as required by the express terms of the Trust to invalidate the Trustee's otherwise final decision, and did not plead facts that would have supported any such conclusory allegation. The Trustee therefore demurred to the Complaint, but the trial court overruled the demurrer by Order entered November 18, 2013.

The Trustee then answered the Complaint[2] and the matter was tried to the court, without a jury, on May 1, 2014. Paul and Basil presented no evidence that the Trustee had acted fraudulently, dishonestly, or in bad faith, and instead argued that the trial court should ignore the Trust's grant of discretion to the Trustee and determine whether the Trustee had made the "right" decision. Joint Appendix ("App.") at 202-03. Because they were not aware of the Decedent's September 21, 2012 amendment to the Trust ("the First Amendment") when they engaged in the conduct upon which the Trustee's decision was based, they argued that the "right" decision was that they could not be held responsible for engaging in that conduct, even though the Trust did not require that they knowingly violate its terms. App. at 203, 237. Additionally, Paul and Basil argued, despite the unambiguous language of the Trust, that the First Amendment was unenforceable to the

[2] The Attorney General of Virginia and Margaret R. Georgiadis were also named parties defendant. Each filed responsive pleadings but took no active part in the case, except that Margaret R. Georgiadis was called to testify at trial.

extent it required their disinheritance for conduct that stopped short of actually filing a suit to challenge the validity of the Trust. App. at 239.

In a letter opinion dated May 7, 2014, ("the Letter Opinion") the trial court found in favor of the Remainder Beneficiaries and determined that the Trustee's decision should be set aside.

On June 12, 2014, the Trustee filed a Motion to Reconsider because the trial court had based its reasoning on a misquotation of the operative language of the Trust and because the trial court had not found that the Trustee had acted fraudulently, dishonestly, or in bad faith, as required by the express language of the Trust before her decision could be overturned.

On June 27, 2014, the trial court heard oral argument on the Trustee's Motion to Reconsider, upheld its earlier ruling despite its reliance on its misquotation of the Trust's language, stated that because the Trustee had reached the wrong conclusion, her decision was made in bad faith, and, pursuant to Va. Code Ann. §64.2-795, awarded the Remainder Beneficiaries attorney's fees and costs, payable from the Trust. A Final Order embodying the trial court's ruling was entered on July 22, 2014. This appeal followed.

B. Facts.

Dimitri B. Georgiadis ("Dimitri" or "the Decedent") amended and restated his 1989 revocable trust on August 27, 2012 to make his friend and financial advisor, Celia Rafalko, trustee upon his death. The amended and restated trust agreement increased the income to be provided to his wife, Maggie, after his death, made a larger portion of the trust corpus available to her in times of need, and left the remainder of the trust assets at Maggie's death to Dimitri's descendants. App. at 204-205, 265-76, 278-92. Dimitri's son Paul was present at the execution of the new trust document and raised no objection that his father was incompetent or was being unduly influenced. App. at 188.

Instead, Paul and his brother, Basil, who were Dimitri's only children, almost immediately began to complain to Dimitri that the changes he made would effectively deprive them of their inheritance until they were too old to enjoy it. App. at 188-90, 195-98, 306-17. They sent their father e-mails containing statements such as, "Maggie will have won the lottery when you pass" (App. at 316), and "So much for loyalty to your own blood and fair play from Step-Mum" (App. at 306), and "you cannot insist that we happily accept this and get along. I do not and will not" (App. at 309), and "to pretend that we are happy with your actions or that we are one big happy

family would be a falsehood." App. at 317. Although clearly displeased with Dimitri's estate plan, neither Basil nor Paul raised with their father any concern that he was not competent to make decisions concerning his estate or that he was being improperly influenced. Appt. at 188, 199. Instead, they made plain that they were angry at his decision, but that it was his decision to make. App. at 306-09, 315-17.[3]

Dimitri was upset by his children's complaints (App. at 206) and amended his Trust on September 21, 2012 to add Article VII(L)(1), which provides:

> 1. Absent proof of fraud, dishonesty, or bad faith on the part of my Trustee, if any beneficiary or potential beneficiary under this trust agreement shall directly or indirectly, by legal proceedings or otherwise, challenge or contest this trust agreement or any of its provisions, or shall attempt in any way to interfere with the administration of this trust according to its express terms, any provision I have made in this trust agreement for the benefit of such beneficiary shall be revoked and the property that is the subject of such provision shall be disposed of as if that contesting beneficiary and all of his or her descendants had predeceased me. Absent proof of

[3] Although the language of the Trust is clear, the Remainder Beneficiaries argued at trial that their father could not have intended the harsh result of their disinheritance. App. at 240. To the extent the Decedent's intentions, apart from the plain language of the Trust, have any relevance, Basil and Paul's complaints to their father and their father's reaction to those complaints demonstrate that the Decedent clearly could have intended that Paul and Basil would be disinherited if they attempted to interfere with his plans.

> fraud, dishonesty, or bad faith on the part of my Trustee, the decision of my Trustee that a beneficiary or potential beneficiary is not qualified to take a share of the trust assets under this provision shall be final.

App. at 299 (emphasis added).

The First Amendment also provides that if no other person is qualified to take the remainder of the Trust assets on Maggie's death, those assets will be distributed outright to charities chosen by the Trustee. App. at 298. In all other respects, the First Amendment "ratified and confirmed" all provisions of the August 27, 2012 Trust agreement. App. at 300. The Trustee did not receive a copy of the First Amendment until after Dimitri's death. App. at 206-07.

Dimitri died December 3, 2012. App. at 176. In January 2013, barely one month later, and immediately prior to their receipt from the Trustee of copies of the Trust documents, Paul and Basil launched a plan to attempt to intimidate Maggie into agreeing with them to cause the Trust to be terminated and its assets distributed outright, with one-third of the total assets going to each of them. Such outright distributions would be contrary to the dispositive plan set forth in Article II(B) of the August 27, 2012 Trust agreement, which was "ratified and confirmed" by the First Amendment. See App. at 279-281, 300.

In furtherance of their plan, Paul sent a letter on January 3, 2013 ("the January 3 Letter") to Timothy H. Guare ("Guare"), the Trustee's counsel, informing him that the estate planning documents prepared by Guare and "purportedly" executed on or about August 27, 2012 (with Paul in attendance) "will be the subject of a contest" and demanding that documents from Guare's file be "kept from spoliation of any kind." App. at 293.

Also in furtherance of their plan to terminate the Trust, on January 4, 2013, Paul sent a letter ("the January 4 Letter") to Maggie on behalf of himself and Basil. Despite the failure of either Paul or Basil to raise their father's competence or Maggie's alleged undue influence over him while he was alive, and despite Paul's participation in the document signing in Guare's office on August 27, 2012, the January 4 Letter, after first attempting to persuade Maggie she would be better off if the Trust were terminated, threatened Maggie with litigation over Dimitri's competence and her influence over him unless she agreed to termination of the Trust and the outright distribution of its assets. App. at 294-95. The January 4 Letter informed Maggie that she should agree quickly if she wanted to avoid "needless legal expenses" associated with such a suit. App. at 295.

The Trustee, upon being informed of the January 3 Letter and the January 4 Letter, began to evaluate how to defend against the impending legal contest announced in the January 3 Letter and to consider whether Paul and Basil might have violated the terms of the Trust. App. at 208. The threatening letters therefore caused the Trustee to incur legal fees for the advice she sought about the impending contest threatened in the January 3 Letter. App. at 208.

In order to consider carefully whether Paul and Basil, or either of them, had violated the terms of the Trust, she wrote to them, advised them that she was considering whether their recent conduct was prohibited by the First Amendment, and asked them to provide her with any information they wished her to consider in reaching her decision. App. at 209-10.

In response, Basil stated that he did not know about the First Amendment or review the January 4 Letter before it was sent. App. at 303. On January 7 Basil, after he received a copy of the First Amendment, wrote a letter to Maggie attempting to disassociate himself from the January 4 Letter because he was "fearful and . . . didn't want to jeopardize my future access to the trust . . . . " App. at 194, 302. In the January 4 Letter, however, Paul purports to speak on Basil's behalf, and Basil testified that

Paul was authorized to speak on his behalf in the January 4 Letter. App. at 234, 294-95.

In Paul's response to the Trustee's request for information, Paul's counsel informed the Trustee that Paul had no knowledge of the First Amendment when he sent the January 3 and January 4 Letters and that, had he been aware of the First Amendment, "would not have engaged in any activity that could be questioned " by the Trustee. App. at 304. Paul's counsel characterized the January 3 Letter to Guare as a "threat". App. at 305. Paul testified that he agreed with his attorney's characterization and explained that the "threat" was directed toward Maggie in an attempt to persuade her to agree to terminate the Trust and cause its assets to be distributed outright, as outlined in the January 4 Letter. App. at 184-85, 294-95.

After gathering available information and consulting with Guare and a second attorney, the Trustee deliberated for several months before reaching her decision. App. at 210, 211, 222. She did not rush to make a decision but acted in a deliberate manner. App. at 221-22. Neither the Trustee nor Maggie benefited from that decision. App. at 211, 223. The Trustee requested that her counsel prepare a memo addressing the situation ("the Decision Memo"). Guare, who had drafted the Trust,

including the First Amendment, agreed with her decision. App. at 210-11, 222-23, 325-36.

The Trustee notified Paul and Basil that she had concluded their conduct violated the terms of the Trust and provided them with a copy of the Decision Memo. App. at 325. Paul and Basil then sued the Trustee.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in overruling the Trustee's demurrer because the Remainder Beneficiaries' Complaint failed to allege that the Trustee acted fraudulently, dishonestly, or in bad faith when she determined that the Remainder Beneficiaries were disqualified as Trust beneficiaries.

Error preserved: App. at 65-68, 134, 141-152.

2. The trial court erred in finding that the Trustee's decision disqualifying the Remainder Beneficiaries was made in bad faith, where the Remainder Beneficiaries failed to adduce any evidence that the Trustee acted fraudulently, dishonestly, or in bad faith or abused her discretion in any way and the evidence was uncontroverted that the Trustee acted in good faith.

Error preserved: App. at 113-116, 134, 162-64, 167-68, 202-03, 250.

3. The trial court erred in finding that the Remainder Beneficiaries' conduct of writing threatening letters to the Trustee's lawyer and the Trust's Income Beneficiary, for the admitted purpose of convincing the Income Beneficiary to agree with them to terminate the Trust and distribute its assets in contravention of the Trust's dispositive plan, was not an "attempt to interfere with the administration of this trust according to its express terms" that disqualified the Remainder Beneficiaries from any interest in the Trust.

Error preserved: App. at 116-22, 134, 164-66.

4. Because the Remainder Beneficiaries had violated the provisions of the Trust and were properly disqualified by the Trustee, the trial court erred in awarding the Remainder Beneficiaries their attorney's fees and costs.

Error preserved: App. at 134, 259-262.

III. ARGUMENT

A. The trial court erred in overruling the Trustee's demurrer because the Remainder Beneficiaries' Complaint failed to allege that the Trustee acted fraudulently, dishonestly, or in bad faith when she determined that the Remainder Beneficiaries were disqualified as Trust beneficiaries.

1. Standard of Review.

The trial court's decision overruling the Trustee's demurrer is considered de novo as a question of law on appeal. Ayers v. Shaffer, 286 Va. 212, 217, 748 S.E.2d 83, 86 (2013).

2. The Complaint fails to allege facts to show fraud, dishonesty, or bad faith.

The First Amendment to the Trust, attached to the Complaint as Exhibit I, provides that "absent proof of fraud, dishonesty, or bad faith," the Trustee's decision as to whether a beneficiary has engaged in conduct disqualifying him from participation in the Trust is "final." App. at 47. Because the Complaint failed to allege any facts demonstrating fraud, dishonesty, or bad faith, and failed even to allege fraud, dishonesty, or bad

faith in a conclusory fashion, the Trustee filed a demurrer to the Complaint. Despite the Trust's clear standard for overturning the Trustee's decision, at oral argument on the demurrer, counsel for the Remainder Beneficiaries maintained, "Well, I don't think we - - I don't think it's a bad faith standard. I think did she make a mistake, was she wrong, for whatever reason. I don't think it has to be bad faith." App. at 147-48. According to the Remainder Beneficiaries, the relevant inquiry was, "Did the trustee make a mistake? We don't have to establish bad faith. We don't have to establish fraud, dishonesty." App. at 149. The Remainder Beneficiaries' position was contrary to the plain wording of the Trust.

"Bad faith" is "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." Black's Law Dictionary (5th ed. 1997) at 127. The term generally involves "actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Id.

As a species of fraud, bad faith must be pled with specificity and proved by clear and convincing evidence. See Virginia-Carolina Chem. Co. v. Carpenter & Co., 99 Va. 292, 293, 38 S.E. 143, 144 (1901) ("To act in bad faith is to act fraudulently, and . . . a charge of fraud or bad faith must be clearly and distinctly proven"); Ciarochi v. Ciarochi, 194 Va. 313, 315, 73 S.E.2d 402, 403 (1952) ("since [fraud] must be clearly proved it must be distinctly stated") (quoting Alsop v. Catlett, 97 Va. 364, 370, 34 S.E. 48, 50 (1899)).

3. The facts alleged show that the Trustee acted in good faith.

The Complaint repeatedly makes the conclusory allegation that the Trustee's decision was "arbitrary and capricious," (see App. at 9, 10, 11, 12-13), but that allegation is contradicted by the facts set forth in the Complaint, which make clear that the Trustee's decision disqualifying the Remainder Beneficiaries was rendered in a good faith exercise of her discretion under the Trust. Thus, the Complaint itself acknowledges that Virginia strictly enforces so-called "no contest" clauses "so long as such provisions are not contrary to law or against public policy." App. at 7 (citing Keener v. Keener. 278 Va. 435, 443, 682 S.E.2d 545, 548-49 (2009)). Likewise, the Complaint acknowledges that "what conduct, specifically, triggers a 'no contest' clause 'depends upon the wording of the 'no contest'

provision and the facts and circumstances of each particular case." App. at 8 (citing Womble v. Gunter, 198 Va. 522, 529, 95 S.E.2d 213, 219 (1956)). The Complaint, however, fails utterly to articulate any Virginia law or public policy allegedly violated by the Trustee's decision.

The Complaint also makes clear that the Trustee sought Paul and Basil's input prior to reaching her decision and sought legal advice to analyze the known facts, relevant Virginia law, and the express language of the Trust. App. at 6, 52. The Trustee then provided Paul and Basil with the eleven-page Decision Memo (attached to the Complaint as Exhibit I) summarizing that analysis. App. at 6, 53-64. The Decision Memo analyzes the wording of the Trust and the Remainder Beneficiaries' conduct, and takes into account their responses to the Trustee's request for information.

Despite the lack of any allegations of fraud, dishonesty, or bad faith, and despite allegations and documents attached to the Complaint that demonstrated the Trustee's good faith, the trial court overruled the demurrer, stating that the Complaint was "sufficient for the Court to make a ruling of whether [the Trustee] acted . . . in conformance with the trust agreement." App. at 152. The trial court's refusal to sustain the demurrer allowed the Remainder Beneficiaries to pursue a case premised on ignoring the express wording of the Trust and was reversible error.

B. The trial court erred in finding that the Trustee's decision disqualifying the Remainder Beneficiaries was made in bad faith, where the Remainder Beneficiaries failed to adduce any evidence that the Trustee acted fraudulently, dishonestly, or in bad faith or abused her discretion in any way and the evidence was uncontroverted that the Trustee acted in good faith.

1. Standard of Review.

The trial court's application of the language of a written document to undisputed facts is treated as a pure question of law and reviewed de novo on appeal. See Keener v. Keener, 278 Va. 435, 442, 682 S.E.2d 545, 548 (2009) (reviewing application of "no contest" clause in a trust). While a trial court's findings of fact are ordinarily accorded great weight, "[A] trial court's conclusion based on evidence that is 'not in material conflict' does not have . . . binding effect on appeal." Phelps v. State Farm Mutual Auto Ins. Co., 245 Va. 1, 10, 426 S.E.2d 484, 489 (1993) (quoting Durrette v. Durrette, 223 Va. 328, 332, 288 S.E.2d 432, 434 (1982)). A trial court, as trier of fact, "'may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with facts in the record.'" Id. (quoting Cheatham v. Gregory, 227 Va. 1, 4, 313 S.E.2d 368, 370 (1984)).

2. The Remainder Beneficiaries failed to present any evidence of misconduct or abuse of discretion by the Trustee.

The Trust's First Amendment states unequivocally that "[a]bsent proof of fraud, dishonesty, or bad faith on the part of my Trustee, the decision of my Trustee that a beneficiary or potential beneficiary is not qualified to take a share of the trust assets under this provision shall be final." App. at 299 (inserting new Article VII(L)(1) into Trust). The Trust thereby makes clear that the Trustee's decision, if made in good faith, is not subject to attack. Having argued successfully that they did not need to plead bad faith, however, the Remainder Beneficiaries presented no evidence of bad faith at trial. Indeed, Paul testified that he was unaware of whether the Trustee's decision was made in bad faith. See App. at 232.

Even if the trial court were entitled to review the Trustee's decision absent "proof of fraud, dishonesty, or bad faith," the Trust's language makes clear that the Trustee's decision ought to be afforded the broadest possible discretion. "A trustee's exercise of discretion should not be overruled by a court unless the trustee has clearly abused the discretion granted [her] under the trust instrument or acted arbitrarily in such a way as to destroy the trust [she] is to maintain." NationsBank of Virginia, N.A. v. Estate of Grandy, 248 Va. 557, 561-62, 450 S.E.2d 140, 143 (1994). "Generally, a trustee's discretion is broadly construed, but [her] actions

must be an exercise of good faith and reasonable judgment to promote the trust's purpose." Id. at 561, 450 S.E.2d at 143.

Not surprisingly, since the Remainder Beneficiaries steadfastly maintained that the trial court should ignore the plain wording of the Trust, they presented no evidence to show fraud, dishonesty, or bad faith, or even an abuse of discretion by the Trustee. As their counsel explained, the Remainder Beneficiaries wanted the trial court to decide, not whether the Trustee acted in bad faith, but, "Did she get it right?" App. at 202-03.

3. The Trustee's evidence of her good faith was undisputed.

Despite the Remainder Beneficiaries' failure to adduce any evidence whatsoever of the Trustee's bad faith or even of any abuse of discretion, the Trustee presented evidence that her actions were a good faith exercise of her discretion throughout her decision-making process. Once she became aware of the January 3 Letter to Guare and the January 4 Letter to Maggie, she consulted Guare, who drafted the Trust, and a second attorney who was not involved in the drafting process. App. at 210, 220. She also notified Paul and Basil that she was looking into the issue of whether their conduct had violated the terms of the Trust and offered them the opportunity to provide her with any information that might bear on her decision. App. at 209-10, 318, 324. At that time, the Trustee also advised

Paul and Basil that they should consult their own counsel "to determine the appropriate course of action for you individually" and provided them with the name and telephone number of her counsel should they or their attorneys wish to discuss the matter. App. at 318, 324. The Trustee, although a personal friend of both Maggie and the Decedent, did not consult Maggie about what her decision should be. App. at 210.

After gathering the available information, including written responses from Basil and from Paul's attorney (App. at 303, 304-05), the Trustee spent months considering the matter and weighing her decision. App. at 211. Once she reached her decision, she notified Paul and Basil and provided them with her counsel's eleven-page analysis of the issue. App. at 210-11, 325-36.

Guare, who has been an estate planning attorney in Richmond for over 20 years, and who drafted the Trust, including the First Amendment, testified without contradiction that he was involved in the Trustee's decision-making process and did not observe her to make up her mind before she had considered all of the available facts. App. at 217-18, 221. "In fact," Guare testified, "I thought she was exceedingly deliberate in the whole matter . . . . " App. at 221. In considering the matter carefully, the Trustee followed Guare's advice "to be very deliberate." App. at 222.

Guare also testified that in reaching her decision, the Trustee sought and received the advice of her attorneys. App. at 222. Guare reviewed the Decision Memo and agreed with it. App. at 222-23. Guare further testified, again without contradiction, that the Trustee never expressed any desire to benefit from her decision and that neither the Trustee nor Maggie in fact benefited from that decision. App. at 223.

Maggie also confirmed that she has not benefited in any way from the Trustee's decision. App. at 228. Maggie has never asked the Trustee to make a discretionary distribution of principal from the Trust and has no present need for any principal distributions. App. at 228. Paul and Basil did not even attempt to cross-examine Maggie concerning her testimony. App. at 228.

Paul testified that although he knew the Trustee had a long-standing personal relationship with Maggie and was her investment counselor, he was "not prepared to say bad faith until I know more about the facts of the basis for her decision making." App. at 232.

Based on this evidence, there was no basis upon which the trial court could conclude that the Trustee's decision was motivated by bad faith or even that her decision constituted an abuse of discretion. The Court's belated finding of bad faith, rendered as an afterthought to justify its

decision to override the Trustee's judgment, was not supported by any "proof" as required by the Trust. Although the trial court acknowledged that it "certainly is possible to set up a situation where the trustee has the discretion here," the trial court, because it had concluded the Trustee's decision was incorrect, equated incorrectness with bad faith and stated that the Trustee's decision "was not a correct decision, and I think it was bad faith to conclude that it was." App. at 258.

Thus, according to the trial court's own explanation of its conclusion, its finding of bad faith was based solely on its belief that the Trustee was incorrect. As discussed below, however, the Trustee's decision was based on the plain language of the Trust, the undisputed evidence, and the admissions by the Remainder Beneficiaries concerning their conduct. Because the Trustee's conclusion was compelled by applying the plain wording of the Trust to the known facts, the Trustee's decision was clearly not the product of bad faith.

Moreover, Paul's admission that he "would not have engaged in any activity that could be questioned" if he had known of the terms of the First Amendment when he sent the January 3 and January 4 Letters (App. at 304) and Basil's acknowledgement that he attempted to disassociate himself from the January 4 Letter because he was "fearful and . . .didn't

want to jeopardize my future access to the trust" (App. at 194), demonstrate that the Remainder Beneficiaries themselves believed their conduct would be seen as violating the First Amendment. Thus, the Trustee's exercise of her discretion to find such a violation was not unreasonable.

The trial court's finding that the Trustee acted in bad faith was not supported by clear and convincing evidence, or any evidence whatsoever, could not provide the basis for setting aside the Trustee's decision, and should lead to reversal of the trial court's decision.

C. The trial court erred in finding that the Remainder Beneficiaries' conduct of writing threatening letters to the Trustee's lawyer and the Trust's Income Beneficiary, for the admitted purpose of convincing the Income Beneficiary to agree with them to terminate the Trust and distribute its assets in contravention of the Trust's dispositive plan, was not an "attempt to interfere with the administration of this trust according to its express terms" that disqualified the Remainder Beneficiaries from any interest in the Trust.

1. Standard of Review.

The trial court's application of the language of a written document to undisputed facts is treated as a pure question of law and reviewed de novo on appeal. Keener, 278 Va. at 442, 682 S.E.2d at 548.

2. The undisputed facts show that the Remainder Beneficiaries attempted to interfere in the Trust's administration.

In the present case, the trial court did not defer in any way to the Trustee's discretion, but substituted its judgment for hers. Even if the trial court had been free to do so, application of the undisputed facts to the plain wording of the Trust demonstrates that Paul and Basil engaged in conduct that the Trust specified would result in their disqualification as beneficiaries. The Trust prohibits any "attempt in any to way interfere with the administration of this trust according to its express terms . . . . " App. at 299. The facts are clear that Paul and Basil made just such an attempt. The Trust directs that if any beneficiary engages in the conduct specified, any Trust provision for that beneficiary "shall be revoked . . . . " App. at 299. (emphasis added).

The January 3 Letter announced that the Trust "will be the subject of a contest." App. at 293. Paul's counsel, responding to the Trustee's request for Paul's input into her decision as to whether any conduct prohibited by the First Amendment had occurred, characterized this letter as a "threat," but sought to excuse the threat as "empty," since no suit to have the Trust declared invalid was filed. App. at 304-05. Paul testified he agreed with his counsel's characterization and explained that the "threat" contained in the January 3 Letter was directed toward influencing Maggie

to agree to terminate the Trust, as outlined in the January 4 Letter. App. at 185-87.

The day after making the "threat" in the January 3 Letter, Paul sent the January 4 Letter to Maggie. Basil admitted that Paul was authorized to speak on his behalf in the January 4 Letter (App. at 234), and the January 4 Letter itself makes clear that Paul, a licensed Virginia attorney (App. at 170), is in fact speaking on his brother's behalf. See App. at 294 ("Basil and I propose that the trust be set aside and dissolved . . . . ").

Basil, in his letter to the Trustee in response to her inquiry, characterized the January 4 Letter as "an attempt to engage a fellow beneficiary as to outcomes under the will and trust." App. at 303 (emphasis added). The January 4 Letter makes clear that the particular "outcome" Paul and Basil were attempting to achieve was the termination of the Trust and the outright distribution of the entire Trust corpus in equal shares to Paul, Basil, and Maggie. App. at 294 ("Each of us would receive outright a one-third share of the trust assets . . . . "). After proposing the termination of the trust, the January 4 Letter then threatens Maggie, the Decedent's widow, with expensive litigation over her late husband's competence and her alleged influence over him if she does not agree to Paul and Basil's proposal. App. at 295.

Administration of a trust encompasses execution of the trust "in accordance with its terms." Va. Code Ann. §64.2-763 (2012). There can be no dispute that Paul and Basil were trying to bring about the termination of the Trust so that they could receive funds now rather than after Maggie's death as the Trust specifies. Any such termination and early distribution would directly have contravened the Trust's express terms and therefore was an attempt to interfere with the administration of the Trust.

3. The trial court's conclusion that the Remainder Beneficiaries' conduct did not result in their disqualification was based on a misreading of the Trust's plain language.

The trial court concluded that the January 3 Letter and the January 4 Letter "were as enumerated in the 'no contest' provision" of the First Amendment but refused to find that Paul and Basil's conduct resulted in their disqualification. App. at 125. The trial court's decision was based on a misquotation of the First Amendment. The Letter Opinion states that the First Amendment prohibited "interference with 'this trust *agreement* . . . . " App. at 125 (underlining in Letter Opinion; italics added for emphasis). The actual language of the First Amendment, however, bars any attempt "to interfere in any way with the administration of this trust according to its express terms. . . . " App. at 299. The trial court inserted the word "agreement" where it does not appear in the First Amendment.

The trial court therefore wrongly concluded that Paul and Basil's failure to reference the First Amendment insulated their actions from scrutiny. See App. at 125 ("Mr. Georgiadis intended to require forfeiture if any of the acts described were aimed at this trust agreement, dated September 21, 2012." (emphasis in original)). Because the January 3 and January 4 Letters did not reference the September 21, 2012 First Amendment, the trial court concluded that "no acts were done that would allow the trustee to enforce the provisions of this trust as amended . . . . " App. at 195.

Attempted interference with the Trust agreement, as it existed on August 27, 2012 or as it existed on September 21, 2012, however, was not the issue. The First Amendment prohibits any attempted interference with administration of the Trust itself. While it might be impossible to "challenge" an "agreement" without knowledge of its existence, lack of knowledge of all of a trust's terms does not mean that a beneficiary cannot attempt to interfere with that trust's administration.

The Trust was amended and restated in its entirety on August 27, 2012 and further amended September 21, 2012 to add the provisions prohibiting contests, challenges, and attempts to "interfere with the administration of this trust according to its express terms." App. at 299.

The September 21, 2012 First Amendment provided that "[i]n all respects not hereinabove altered, the Trust Agreement is hereby ratified and confirmed." App. at 300. When the Remainder Beneficiaries attempted to bring about the termination of the Trust in its entirety, and the distribution of its assets in a manner contrary to the dispositive provisions set forth in Trust Article II(B), they were not merely challenging the August 27, 2012 Trust "agreement," but were attempting to do away with the Trust in its entirety. There could have been no greater interference in the Trust's administration than the expressed goal of their attempt.

The January 3 Letter references documents "executed . . . on or about August 27, 2012" but does not specifically mention the Trust. App. at 293. Nevertheless, Paul's testimony confirmed that the "threat" set forth in that letter was designed to persuade Maggie to cooperate in Paul and Basil's attempt to terminate the Trust and divide up its assets. App. at 187. The January 4 Letter references "the Trust of August 27, 2012" and speaks directly to the termination of that Trust, which, although it was amended September 21, 2012, was still the only trust at issue. App. at 294. Indeed, the Trust agreement executed on August 27, 2012 provides that "[t]his trust may be referred to as 'The Dimitri B. Georgiadis Trust Dated August 27, 2012,' but <u>any other designation of this trust using terms that reasonably</u>

identify this trust shall be respected." App. at 278 (emphasis added). When Paul wrote the January 4 Letter, there was no doubt about what trust he and Basil were attempting to terminate.

The trial court therefore wrongly concluded that because the January 3 Letter and January 4 Letter "specifically addressed the August 27, 2012 trust and did not address the trust with the added provisions of September 21, 2012," Paul and Basil committed "no acts . . . that would allow the trustee to enforce the provisions of this trust as amended with the added article on September 21, 2012." App. at 125.

Upon consideration of the Trustee's Motion for Reconsideration, the trial court acknowledged that its Letter Opinion misquoted the operative language, but stated that regardless of whether the First Amendment prohibited interference with "this trust agreement" or "this trust," the January 3 Letter and the January 4 Letter "referred to the August 17, not the September 21st," and therefore "not only did [the Remainder Beneficiaries] not have any knowledge that there was a no contest provision, they never, in my mind, did anything to attack what was in place on September 21, 2012." App. at 257. Because Paul and Basil clearly attempted to terminate the entire Trust and distribute its assets in violation of its express terms, the trial court's conclusion was incorrect.

4. The trial court incorrectly found that the Remainder Beneficiaries could not have violated the First Amendment's prohibitions because they lacked knowledge of the First Amendment when they attempted to interfere with the Trust's Administration.

Despite its finding that the Remainder Beneficiaries' lack of knowledge of the First Amendment was "not dispositional," the trial court's reasoning imposed a knowledge requirement not found in the express language of the First Amendment. App. at 125. The trial court confirmed its reasoning during oral argument concerning the court's award of attorney's fees, when counsel for the Trustee pointed out that Paul and Basil never made the argument that was the basis of the trial court's decision as expressed in the Letter Opinion. App. at 260. The trial court responded, "Well, they certainly made the argument throughout that the beneficiaries did not contest - - that they didn't even have any knowledge that the no contest provision was there. They certainly made that argument." Id.

The plain wording of the First Amendment does not provide for an exception to its operation if actions otherwise within its ambit are taken without knowledge of their consequences. It would have been a simple matter for the Decedent, had it been his intent, to have inserted the qualifier, "with knowledge of the provisions of this Article VII(L)" before the

verbs used to describe the conduct that would trigger a beneficiary's disqualification. See Womble v. Gunter, 198 Va. 522, 532, 95 S.E.2d 213, 220 (1956) ("If the testator had desired to except his infant beneficiaries from the 'no contest' provision he could have very easily used appropriate language to that end."). Instead, the First Amendment sets forth certain types of conduct that, if engaged in by a beneficiary, "shall" result in that beneficiary's disqualification from any share in the Trust. App. at 299.

Although the Remainder Beneficiaries argued that it was unfair to hold them accountable absent knowledge of the First Amendment (App. at 214, 241), the Trustee and the trial court were bound to apply the plain language of the Trust as written. Indeed, courts routinely uphold the enforceability of will and trust provisions that result in the disinheritance of beneficiaries that have engaged in no prohibited conduct whatsoever. Thus, in Alper v. Alper, 2 N.J. 105, 109, 65 A.2d 737, 738 (1949) (cited in Womble v. Gunter, 198 Va. at 531, 95 S.E.2d at 220 (1956)), the Court approved enforcement of a will provision requiring that if any of the testator's children or grandchildren instituted a legal proceeding to attack the validity of the will, then all devises and bequests to the children and grandchildren were to be cancelled "'regardless of whether or not they have in any way participated in said contest . . . .'" This provision was found

enforceable even though the child who brought the will contest in Alper was not a beneficiary under the will and the only effect of her action was to cause the disinheritance of her innocent siblings. Id. at 111-112, 65 A.2d at 739-740.

Other courts have reached the same result. See Perry v. Rogers, 52 Tex. Civ. App. 594, 595-598, 114 S.W. 897, 898-899 (1908) (Court upheld provision that barred all testator's children by former marriage from taking if any of them "'should attempt or should proceed in changing or breaking my aforesaid will" even though one of the children thereby disinherited was a minor); Commerce Trust Co. v. Weed, 318 S.W.2d 289, 302 (Mo. 1958) (son's unsuccessful challenge to father's will held to cause the son's children who did not contest to be barred from taking under the will); Tunstall v. Wells, 144 Cal. App 4th 554, 570, 50 Cal. Rptr. 3d 468, 479 (2d Dist. 2006) (upholding provision that revoked gifts to all three of a settlor's daughters if any one of them contested the trust's provisions).

Such decisions are based on the premise that the intentions of the drafter, expressed in plain language, must prevail over any complaints of perceived unfairness or harshness. The same holds true under Virginia law. "The normal freedom of the owner to dispose of his property as he sees fit should not be curtailed unless the disposition violates some rule of

law or is against public policy. Where the language is clear and unambiguous, it is the duty of this court to give force and effect to that intention expressed by the testator and carry out the objects desired by him in disposing of his property." Womble, 198 Va. at 532, 95 S.E.2d at 220-21 (upholding "no-contest" clause that operated to disinherit testator's entire family, including infants).

Cases upholding the disinheritance of persons who themselves engaged in no prohibited conduct demonstrate the impropriety of imposing a knowledge requirement not set forth within the four corners of the Trust. If a settlor may disinherit a child or grandchild based solely on the conduct of a third person, it is meaningless to consider the perceived "unfairness" to a person who, without knowledge of the provision at issue, engages in conduct admittedly prohibited by the Trust.

The trial court therefore erred by finding that the Remainder Beneficiaries' admitted conduct did not result in their disqualification under the plain language of the Trust.

D. Because the Remainder Beneficiaries had violated the provisions of the Trust and were properly disqualified by the Trustee, the trial court erred in awarding the Remainder Beneficiaries their attorney's fees and costs.

1. Standard of Review.

The trial court's award of attorney's fees and costs is reviewable for abuse of discretion. See Va. Code Ann. §64.2-795 (2012) (providing that court "may" award fees and costs "as justice and equity may require.").

2. The trial court's award of fees was based on its erroneous conclusion that the Remainder Beneficiaries had not violated the terms of the Trust.

Although the trial court has discretion under Virginia's Uniform Trust Code to award fees and costs to any party, the trial court's decision in this case was based on its incorrect determination that Paul and Basil should prevail in setting aside the Trustee's determination that their conduct disqualified them from participating as remainder beneficiaries of the Trust. App. at 259. Because the trial court erred in making that determination, its award of fees and costs was founded on a faulty premise and should therefore be reversed.

IV. CONCLUSION

For the foregoing reasons, the Trustee prays that the decision of the trial court be reversed, and that final judgment be entered in favor of the Trustee.

Respectfully submitted,

CELIA A. RAFALKO, as Trustee of the
Dimitri B. Georgiadis Trust

By: _____
Of counsel

David D. Hopper, Esquire (VSB #30038)
Cook, Heyward, Lee, Hopper & Feehan, P.C.
4551 Cox Road, Suite 210
P.O. Box 3059
Glen Allen, Virginia 23058-3059
Telephone: (804) 747-4500
Facsimile: (804) 762-9608
E-mail: ddhopper@chlhf.com

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 Opening 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 26th day of May, 2015 to the following:

Hugh T. Antrim, Esquire
Thompson & McMullan, PC
100 Shockoe Slip
Richmond, Virginia 23219
e-mail: HTAntrim@t-mlaw.com
Counsel for Paul D. Georgiadis and Basil D. Georgiadis

Donald R. Ferguson, Esquire
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
e-mail: DFerguson@oag.state.va.us
Counsel for Attorney General of Virginia

Robert W. Partin, Esquire
McCandlish Holton, PC
P.O. Box 796
Richmond, Virginia 23218-0796
e-mail: rpartin@lawmh.com
Counsel for Margaret R. Georgiadis

David D. Hopper