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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*.**

Brief of Appellees

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

The appellees, Paul D. Georgiadis and Basil D. Georgiadis, by counsel, respectfully submit the following Brief of Appellees requesting that the Court affirm the decision of the trial court. This appeal is taken from the Circuit Court for the County of Henrico, the Hon. Lee A. Harris Jr. presiding.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

By letter dated May 28, 2013, Celia A. Rafalko ("the Trustee"), Trustee of the Dimitri B. Georgiadis Trust ("the Trust"), notified Dimitri B. Georgiadis' children, Paul D. Georgiadis ("Paul") and Basil D. Georgiadis ("Basil") (collectively, "the Beneficiaries"), that their beneficial interests in the $6.5 million Trust, as well as that of their children, was forfeit under the Trust's "No Contest Clause." Without seeking aid and guidance from any court, the Trustee asserted that two letters ("the Letters") relating to the Trust that Paul sent to third parties constituted an "attempt[ ] to interfere with the administration of th[e] trust according to its express terms," thereby triggering the No Contest Clause.

Having had no knowledge of the existence of the No Contest Clause at the time the Letters were sent, and believing the Trustee to have otherwise erred in her unprecedented interpretation of the No Contest

Clause, the Beneficiaries filed this action, seeking a judicial declaration that their interests were not revoked by operation of the "No Contest Clause" or otherwise. JA 1.[1] In their complaint, the Beneficiaries alleged that neither Paul nor Basil had taken any legal steps to challenge or contest the Trust, or to interfere with the Trust's administration, as required to trigger forfeiture. JA 9-13. The Beneficiaries also alleged that merely sending the Letters, without initiating legal action of any kind, could not and did not violate the No Contest Clause. *Id.* The Trustee's determination to the contrary, the Beneficiaries argued, was arbitrary and capricious, contrary to the Grantor's intent, and contrary to Virginia law and public policy. JA 9-13.[2]

The Trustee filed a demurrer, in which she argued that the complaint failed to state a claim for declaratory relief because it did not allege that the Trustee acted dishonestly, fraudulently, or in bad faith as purportedly required by the No Contest Clause. JA 65. The Beneficiaries responded that, under Virginia law, they were not required to establish bad faith and

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[1] Citations to "JA" are to the Joint Appendix.

[2] Margaret Georgiadis, a Trust beneficiary and stepmother to Paul and Basil Georgiadis, was also named as a party in this litigation, as was the Attorney General of Virginia on behalf of unidentified charitable contingent beneficiaries. Neither party took an active role in defending or litigating the case beyond the filing of an Answer.

that the trial court had the authority to review whether the Trustee had properly interpreted the Trust's terms. JA 71-74, 147-49. At a hearing on the Demurrer, the trial court agreed with the Beneficiaries and overruled the Trustee's Demurrer, holding that the Complaint's allegation that the Trustee failed to act in conformance with the Trust was sufficient to state a valid claim for declaratory relief. JA 99, 152.

At a bench trial, the trial court heard testimony from five witnesses, JA 169-237, received numerous documentary exhibits into the record, JA 265-325, and heard argument from counsel for both the Beneficiaries and the Trustee. JA 237-52. The trial court took the matter under advisement.

In a subsequent letter opinion (the "Letter Opinion"), the trial court held that the Trustee erred in her determination that the Letters triggered the No Contest Clause. The trial court found that the Beneficiaries were incapable of violating the No Contest Clause because the Letters "specifically addressed the August 27, 2012 trust and did not address the trust with the added provisions of September 21, 2012." JA 125. Although the trial court found that the Beneficiaries were unaware of the existence of

the September Amendment and the No Contest Clause, it stated that their lack of knowledge was "not dispositional." *Id.*[3]

On June 12, 2014, the Trustee timely filed a Motion for Reconsideration, arguing that the trial court's ruling was based on a misquotation of the No Contest Clause, and that the trial court had "substitute[d] its own judgment for that of the Trustee" by finding for the Beneficiaries without making a finding of bad faith. JA 126-28.

On June 27, 2014, the trial court heard argument on the Trustee's motion. At the hearing, the court acknowledged its single instance of misquotation in its Letter Opinion, but explained that the misquotation did not affect the court's ruling. JA 257. The court further clarified that it found the Trustee's decision to have been made in bad faith. JA 258.

The trial court entered its Final Order on July 22, 2014. JA 130.

STATEMENT OF FACTS

On December 3, 2012, Dimitri B. Georgiadis ("the Grantor") died testate, survived by his wife, Margaret Georgiadis ("Margaret"), his two sons from a prior marriage, Paul and Basil, and their children. JA 176. The Dimitri B. Georgiadis Trust was named the sole beneficiary under the Grantor's will. JA 278.

[3] The trial court also found that Basil was "bound by the letters," even though Paul authored them. JA 125. That holding is not before the Court.

At the time of his death, the Grantor had been married to Margaret for twenty-three years. JA 227. Paul and Basil had a “very amicable relationship” with Margaret and frequently spent time with both her and the Grantor. JA 178. As the Grantor aged and became “more sedentary,” Margaret relied on Paul and Basil in making decisions for his care. JA 178-79.

The Grantor first executed a trust in 1989 and named Paul and Basil as co-trustees. JA 15. In that trust, the Grantor stated that upon his death, his assets should be divided into two shares: The “Marital Trust” was to provide for Margaret during her lifetime, with the remaining principle to be distributed to Paul and Basil upon her death. JA 16. And the “Family Share” was payable to Paul, Basil and their heirs upon the death of the Grantor. JA 17. Independent of the trust’s terms, the Grantor and Margaret expressed their intention, both verbally and in writing, to pay for the education expenses of Paul and Basil’s children. JA 172-73, 277.

In early August 2012, Paul’s father told him that he was going to modify his estate plan. JA 175. On August 27, 2012, Paul was present for the execution of a new will and trust affecting the disposition of the Grantor’s estate (“the Trust”). JA 175-76. The Trust made radical changes to the 1989 trust. Specifically, the Grantor removed Paul and Basil as

trustees and replaced them with Celia Rafalko, a close friend of Margaret's. JA 204-05, 289. In addition, the Beneficiaries would no longer receive distributions of the "Family Trust" upon the Grantor's death. Instead, like the Marital Trust, the Family Trust was made payable to Margaret for her lifetime. JA 29.

The Beneficiaries were upset by these changes. Over the ensuing months, the Grantor and the Beneficiaries exchanged several emotional emails with their father expressing their dissatisfaction. JA 306-17. During this period, on September 21, 2012, and unbeknownst to either Paul or Basil, the Trust was amended (the "September Amendment") in three ways pertinent to this appeal. JA 46-49. First, the Grantor added a contingent charitable beneficiary. If there are no other beneficiaries designated to inherit at the time of Margaret's death, the Trustee is authorized to distribute any remaining assets to a charitable organization of the Trustee's choosing. JA 46. Second, under the heading "No Contest Clause and Release of Claims," the Grantor stated:

> I intend to eliminate the possibility that any beneficiary of mine will challenge the decisions I have made concerning the disposition of my assets during my lifetime or at my death, and my Trustee shall take all appropriate steps to carry out this intent. Accordingly, I direct the following:
>
> 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 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.

JA 47. Third, the Grantor required his beneficiaries to execute a release of all claims against the Trustee regarding her financial conduct and the distribution of assets under the Trust. JA 47-48. The September Amendment concluded by stating that the Trust was otherwise "ratified and confirmed." JA 48.

At his father's deathbed, Margaret gave Paul a ring from his father's hand, which was a family heirloom. JA 181. Two weeks later, the Trustee called Paul and demanded the return of the ring. *Id.* When Paul asked the Trustee to produce her credentials as executor, the Trustee responded: "[Y]ou were present at the signing." *Id.* The Trustee made no mention of the September Amendment during these conversations and did not in fact qualify as executor until March 2013. JA 181-82.

Paul questioned his father's testamentary capacity to execute the August 27, 2012 Trust. JA 177-78. On January 3, 2013, Paul sent a

document preservation letter to attorney Timothy H. Guare, Esq. ("Mr. Guare"), who had prepared the August testamentary documents, asserting that "the testamentary documents purportedly executed in your office on or about August 27, 2012 . . . will be subject to a contest." JA 42. The next day, January 4, 2013, Paul sent a letter to Margaret seeking her cooperation with Paul and Basil in setting aside the "Trust of August 27, 2012" pursuant to Code § 64.2-709, which Paul stated could "be done if all beneficiaries agree."[4] JA 43.

On January 7, 2013, after Paul had sent both letters, Paul received a letter from the Trustee, along with a copy of the Grantor's testamentary documents. JA 296-97. Paul's letter was sent to an incorrect and nonexistent address. JA 180. Included with the letter was a copy of the September Amendment; this was the first time Paul and Basil had ever seen or heard of the amendment. JA 180-81. The same day, Basil sent Margaret a letter "dissociat[ing]" himself from Paul's January 4, 2013, letter. JA 302.

On January 31, 2013, the Trustee notified Paul and Basil that she was in the process of "determining whether your actions (and those of

[4] At the time he wrote the letter, Paul had no knowledge that the contingent charitable beneficiary existed and that his stated goal, therefore, was an impossibility. JA 181.

others) since your father's death violate" the No Contest Clause. JA 318, 324. On May 28, 2013, the Trustee sent a letter to Paul and Basil stating that she had concluded that both had violated the No Contest Clause. JA 325. The Trustee enclosed with her letter a memorandum ("Decision Memorandum") summarizing her legal analysis. *Id.* Although the memorandum was written by the Trustee's counsel, the Trustee ratified its contents without exception. JA 215.[5]

In the Decision Memorandum, the Trustee dedicated over three pages to recounting the familial disagreements between Paul, Basil and the Grantor in the months prior to the Grantor's death. JA 326-29. The Trustee accused Paul and Basil of "complaining" that the Trust was "unfair," alleged that they "left angry messages" on the Grantor's voicemail, and charged Paul and Basil with "express[ing] anger at the Grantor's choice to favor the financial support of Margaret during her lifetime over Paul and Basil's immediate enjoyment of their father's assets." JA 327. The Trustee then implied that the Beneficiaries' ignorance of the No Contest Clause was the result of their lack of contact with the Grantor after the August trust execution. JA 328. The Trustee concluded that both Paul and Basil, by sending the Letters, had violated the No Contest Clause by "directly or

[5] The Beneficiaries, therefore, will discuss the memorandum's analysis as that of the Trustee herself.

indirectly, by legal proceedings or otherwise . . .attempt[ing] in any way to interfere with the administration of th[e] trust according to its express terms." JA 331. According to the Trustee, the Beneficiaries' lack of knowledge about the No Contest Clause was immaterial. JA 335.

At trial, the Trustee conceded that the Beneficiaries had no knowledge of the September Amendment at the time they sent the Letters, but stated that their lack of knowledge was "not relevant" to her decision. JA 212, 214. The Trustee testified that the contents of the Letters were the only facts she relied upon in reaching her decision, but could not explain why the Decision Memorandum included facts related to the disagreements between the Grantor and his sons. JA 212-13. Both Paul and Basil testified that although they did not think they had violated the No Contest Clause, they would not have sent the Letters if they had known of the existence of the No Contest Clause. JA 182, 194-95.

The trial court ruled that the Trustee erred in determining that the Beneficiaries had violated the No Contest Clause by sending the Letters, and that her decision in this regard was made in bad faith. JA 131. This appeal followed.

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.

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.

3. The trial court erred in finding that the Remainder Beneficiaries' conduct of writing threatening letters to the Trustee's lawyers 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.

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.

ASSIGNMENTS OF CROSS-ERROR

1. The trial court erred as a matter of law in holding that a "No Contest Clause" in a trust may be triggered, consistent with Virginia law, by actions short of the institution of a legal action whose object is to challenge, contest, or interfere with the administration of the trust. (JA 7-9, 103-04, 106-08, 133.)

2. The trial court erred as a matter of law in interpreting the Trust as being governed by the standard of decision described in Article VII.L.I of the Dimitri B. Georgiadis Trust, as amended on September 21, 2012, i.e.

that the trustee's decision "shall be final" absent proof of "fraud, dishonesty or bad faith," instead of the mandatory trust terms provided by Virginia Code Ann. §§ 64.2-703(B) and -777. (JA 70-74, 105-06, 133.)

SUMMARY OF ARGUMENT

The Trustee claims that the Beneficiaries forfeited their substantial vested interests in their father's estate by sending two letters to third parties. This decision is unprecedented in its scope, violates Virginia law and public policy, and is contrary to the intent of the Grantor as expressed in the Trust's No Contest Clause.

In addition, the Trustee claims an expansive power to make this determination free from judicial scrutiny. She contends that, even if her determination was arbitrary and capricious or violated the terms of the Trust, her decision is unassailable absent a finding of fraud, dishonesty or bad faith. Here too, the Trustee claims unprecedented discretion that violates Virginia law and public policy. For the following reasons, the Trustee's position should be rejected.

AUTHORITIES AND ARGUMENT

This appeal raises issues related to two subjects of inquiry. First, did the trial court err in its analysis and application of the decision standard that governs the actions of the Trustee? The Trustee's first and second assignments of error, and the Beneficiaries' second assignment of cross-

error relate to this issue. Second, did the trial court err in determining whether the Beneficiaries engaged in conduct that triggered the Trust's No Contest Clause? The Trustee's third assignment of error and the Beneficiaries' first assignment of cross-error relate to this issue. The Beneficiaries will address the issues in that order.

I. Bad Faith

a. The trial court erred in ruling that the Trust was governed by the bad faith standard of the No Contest Clause (Second Assignment of Cross-Error)

i. Standard of Review

Whether the bad faith standard governs the actions of the Trustee is a question of law this Court reviews de novo. *See Wilson v. Holyfield*, 227 Va. 184, 187-88, 313 S.E.2d 396, 398 (1984); *Alcoy v. Valley Nursing Homes, Inc.*, 272 Va. 37, 41, 630 S.E.2d 301, 303 (2006).

ii. A bad faith decision standard is contrary to Virginia law

The No Contest Clause states 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." JA 47. In her demurrer, the Trustee argued that, pursuant to that provision, the trial court could not "second-guess the Trustee's conclusion" that the Beneficiaries

had triggered the No Contest Clause absent allegations that she acted with "fraud, dishonesty, or bad faith." JA 67. At a hearing on the demurrer, responding to the Beneficiaries' allegations that the Trustee had acted arbitrarily and capriciously, the Trustee argued that any arbitrary and capricious action taken "in perfect good faith, just with a misunderstanding of what [her] obligation was," is nevertheless insulated from court review. JA 145. The Trustee contended that this conclusion holds even in the hypothetical case where the Trustee mistakenly believes that the Beneficiaries wrote the letters at issue when they in fact had not. JA 150. Because the Beneficiaries did not allege bad faith, she argued, her decision was not subject to the trial court's review. JA 68, 151.

The Beneficiaries, in addition to noting their allegation of arbitrary and capricious conduct, argued that they did not have to allege bad faith. JA 71-74, 149. According to the Beneficiaries, the trial court had the authority to review the Trustee's discretion to determine if she had erred. JA 148-49. Although the trial court overruled the demurrer, the trial court ultimately applied the bad faith standard and found that the Trustee had acted in bad faith when she determined that the Beneficiaries had violated the No Contest Clauses. JA 131, 258.

Insulating a trustee's actions from court review as the No Contest Clause purports to do is contrary to Virginia law. Virginia has "an interest of considerable magnitude" in the "just and orderly disposition of property at death." *Lalli v. Lalli*, 439 U.S. 259, 268 (1978). To provide for this interest, Virginia requires the implementation of an "appropriate legal framework" that recognizes the various interests at issue: the settlor's, the beneficiaries', and the Commonwealth's. *See King v. Commonwealth*, 221 Va. 251, 254, 269 S.E.2d 793, 795 (1980) (internal quotation marks omitted). For this reason, courts have always exercised supervisory authority over the proper administration of trusts in the Commonwealth.

Though trustees generally enjoy broad discretion, Virginia courts possess the authority at common law to review a trustee's actions for an abuse or arbitrary exercise of that discretion. *NationsBank of Va. v. Estate*, 248 Va. 557, 561, 450 S.E.2d 140, 143 (1994); *see also Emmert v. Old Nat'l Bank of Charlottesville*, 246 S.E.2d 236, 242 (W.V. 1978) ("[T]he discretion of the trustee is not without limits. When the trustee acts outside the bounds of reasonable judgment the court will intervene."). As the Court has recognized, the authority of a trustee "to undertake a specific action and the proper exercise of that authority are distinct considerations." *Ward v. NationsBank of Va.*, 256 Va. 427, 436, 507 S.E.2d 616, 621 (1998).

The discretion of a trustee "may . . . be likened to that of judges. It is not an arbitrary discretion [and] does not include the unrestrained power to do what the trustee pleases." *Trout v. Pratt*, 106 Va. 431, 443, 56 S.E. 165, 169 (1907). Rather,

> where the trustees are acting in bad faith in the exercise of their discretion, <u>or</u> they are plainly abusing their discretion, <u>or</u> exercising it in such an arbitrary manner, as, in effect, to make it a means of destroying the trust which it was intended to aid and maintain, a court . . . will intervene and compel the trustees to administer the trust in a proper manner, and at the proper time.

Rinker's Adm'r v. Simpson, 159 Va. 612, 621-22, 166 S.E. 546, 549 (1932) (emphasis added); *see also Hoffman v. First Va. Bank of Tidewater*, 220 Va. 834, 842, 263 S.E.2d 402, 408 (1980) (holding that a trustee may be liable if the trustee acted "dishonestly or in bad faith, <u>or</u> abused the discretion vested in it") (emphasis added). A trustee must not only exercise good faith, then, but must also exercise her discretion with "'reasonable judgment to promote the trust's purpose.'" *Ward*, 256 Va. at 436, 507 S.E.2d at 621 (quoting *NationsBank*, 248 Va. at 561, 450 S.E.2d at 143). When a trustee abuses her discretion or acts "arbitrarily in such a way as to destroy the trust he is to maintain," a court is authorized to intervene and compel the proper administration of the trust. *NationsBank*, 248 Va. at 562, 450 S.E.2d at 143; *see also Rinker's Adm'r*, 159 Va. at 622, 166 S.E. at 550 ("A court . . . will not permit the plain ends and purposes of a

discretionary trust to be defeated by the arbitrary exercise of their discretion by trustees, even though to prevent it the court must substitute its discretion for that of the trustees."); *Trout*, 106 Va. at 442, 56 S.E. at 169 (holding that a court may "relieve the parties from the consequences of an improper exercise of the [trustee's] discretion").

Virginia's Uniform Trust Code (the "UTC") reflects these common law principles and establishes that a court's authority to review the actions of a trustee cannot be limited only to reviewing the trustee's bad faith. *See* Code § 64.2-704 ("The common law of trusts and principles of equity supplement this chapter."); Code § 64.2-710 ("The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law."). Code § 64.2-777(B) states that a trustee's power is "subject to the fiduciary duties prescribed by" the UTC. Included in these duties is the trustee's duty to "administer the trust solely in the interest of the beneficiaries." Code § 64.2-764(A). In addition, Code § 64.2-703(B) provides that "[t]he terms of a trust prevail over any provision of this chapter except" a list of eleven mandatory trust terms. Included are the following:

> (2) The duty of a trustee to act in good faith <u>and</u> in accordance with the terms and purposes of the trust <u>and</u> the interests of the beneficiaries;

. . . .

> (11) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

Code § 64.2-703(B) (emphasis added). These statutory provisions manifest the authority of a court "to supervise and enforce any and all trusts." *See Moore v. Downham*, 166 Va. 77, 81, 184 S.E. 199, 201 (1936).

The Trustee's position, however, would render these statutes meaningless and would strip Virginia's courts of their important function of ensuring that the distribution of assets in the Commonwealth is performed properly in light of the many interests at stake. According to the Trustee, the No Contest Clause imposes on her only three duties: the duties of good faith, honesty, and forthrightness. If these were her only duties, however, the Trustee could abuse her discretion, act arbitrarily, or breach her fiduciary duties, so long as such conduct was done innocently and in good faith. Allowing a settlor to grant a trustee broader discretion than allowed by Virginia law would allow "the [T]rustee[] . . . to violate the law and the public policy of the State with impunity and deprive the beneficiaries of their property without due process of law." *In re Estate of John E. Andrus*, 281 N.Y.S. 831, 858 (Surr. Ct. N.Y. 1935); *see also* 2 Scott and Ascher on Trusts § 9.3.14 at 518-19 (5th ed. 2006) (stating that a no contest clause is

unenforceable "to the extent [it] purport[s] to relieve the trustee" of the duty to comply with the trust or account for its administration).

For these reasons, the No Contest Clause violates Virginia law and public policy and its bad faith standard should not apply. Pursuant to the Beneficiaries' request, the court should have rejected the bad faith standard and applied the UTC's mandatory trust terms and prevailing Virginia law.

b. The trial court did not err in overruling the Trustee's Demurrer (First Assignment of Error)

As required by Virginia law, the Beneficiaries pled that the Trustee's decision was arbitrary and capricious and contrary to Virginia law and public policy.

i. Standard of Review

A trial court's overruling of a demurrer presents a pure question of law that this Court reviews de novo. *Glazebrook v. Bd. of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). In reviewing a demurrer, the court accepts "as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts." *Id.* "To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal

basis for its judgment." *Eagle Harbor, LLC v. Isle of Wight Cnty.*, 271 Va. 603, 611, 628 S.E.2d 298, 302 (2006) (internal quotation marks omitted).

ii. The Beneficiaries sufficiently pled their declaratory judgment action

The Beneficiaries adequately pled their declaratory judgment action. As the Court has repeatedly held, reviewing for abuse of discretion includes reviewing whether the decision was "influenced by any mistake of law." *See Landrum v. Chippenham & Johnston-Willis Hospitals, Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (internal quotation marks omitted). When a trustee commits "a clear error of judgment," an abuse of discretion has occurred. *See id.*; *Trout*, 106 Va. at 443, 56 S.E. at 169 (holding that the discretion of a trustee "may . . . be likened to that of judges."). The abuse of discretion standard "includes review to determine that the discretion was not guided by erroneous legal conclusions." *Shebelskie v. Brown*, 287 Va. 18, 26, 752 S.E.2d 877, 882 (2014) (internal quotation marks omitted). In addition, arbitrary and capricious decisions necessarily constitute an abuse of discretion. *See Bd. of Zoning Appeals v. O'Malley*, 229 Va. 605, 608, 331 S.E.2d 481, 483 (1985); *Trout*, 106 Va. at 443, 56 S.E. at 169 (stating that the discretion of a trustee "is not an arbitrary discretion [and] does not include the unrestrained power to do what the trustee pleases.").

In their complaint, the Beneficiaries alleged that the Trustee's determination that the Beneficiaries had violated the No Contest Clause was "arbitrary and capricious, contrary to law, contrary to the clearly expressed intent of the Grantor," and "in violation of the public policy of the Commonwealth of Virginia." JA 9, 10. The Beneficiaries, therefore, charged the Trustee with making an arbitrary and capricious determination that was contrary to law. Under the common law and the UTC, this was sufficient. The Beneficiaries had the right to obtain judicial review of the Trustee's conduct, and pled their case with "sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Eagle Harbor*, 271 Va. at 611, 628 S.E.2d at 302.

c. Even if the bad faith standard applied, the trial court's finding of bad faith is supported by the evidence (Second Assignment of Error)

Even if the Court reaches the question, however, there are sufficient facts in the record to support the trial court's conclusion that the Trustee's decision was the product of bad faith.[6]

[6] The Trustee's second assignment of error also asserts that there was no evidence that the Trustee abused her discretion. As explained *infra*, Part II, the Trustee abused her discretion by deciding, contrary to law, that the Beneficiaries had triggered the No Contest Clause.

i. Standard of Review

The Trustee incorrectly contends that a de novo standard of review applies to the trial court's finding of bad faith. Opening Br. at 15. As the Trustee's citation to Black's Law Dictionary makes clear, however, the question of bad faith is inherently factual. *See* Opening Br. at 12 (defining "bad faith" as "the conscious doing of a wrong because of dishonest purpose").

Bad faith is "[d]ishonesty of belief or purpose." *Black's Law Dictionary* 149 (8th ed. 2004). A determination of whether someone is guilty of conscious wrongdoing or acted with a dishonest purpose is inherently a factual inquiry. *See, e.g., Logan v. Commonwealth*, 279 Va. 288, 292-93, 688 S.E.2d 275, 278 (2010) (stating that a "bad faith" analysis in Fourth Amendment cases turns on "improper motive" and "conscious intent to circumvent the law" and is reviewed for plain error); *Lovitt v. Warden*, 266 Va. 216, 241, 585 S.E.2d 801, 815 (2003) ("[T]he circuit court's determination that there was an absence of bad faith" in the context of the destruction of exculpatory evidence "was a finding of fact."); *Gilmore v. Finn*, 259 Va. 448, 466, 527 S.E.2d 426, 435 (2000) (holding that finding of whether a pleading is filed in good faith is reviewed for abuse of discretion); *State Farm Mut. Auto Ins. Co. v. Floyd*, 235 Va. 136, 144, 366 S.E.2d 93,

96 (1988) (holding that in the context of a bad faith claim against an insurer, the insured was required to show the insurer "acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured").

The Trustee bases her argument for a de novo review of the bad faith determination on her contention that there were no material facts in dispute. *See* Opening Br. at 15. This is false. Although the underlying facts were not, whether those facts constituted bad faith was disputed. The parties disagreed as to whether the underlying facts showed the Trustee's dishonest purpose. After receiving the evidence, observing the demeanor of the witnesses, and listening to live testimony, the trial court resolved that question in favor of the Beneficiaries. JA 131. It is that factual finding that is at issue on appeal. The trial court's factual finding of bad faith cannot be discarded for a de novo review simply because it was based on undisputed underlying facts.[7]

Because the question of whether the Trustee acted in bad faith in determining that the Beneficiaries had violated the terms of the Trust is a

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[7] Contrary to the Trustee's argument, Opening Br. at 15, that finding was not an arbitrary rejection of undisputed facts. *Cf. Phelps v. State Farm Mut. Auto Ins. Co.*, 245 Va. 1, 10, 426 S.E.2d 484, 489 (1993) (reversing trial court's decision to arbitrarily reject undisputed testimony from only witnesses in the case).

question of fact, this Court will not disturb that finding unless it was plainly wrong or without evidence to support it. *Perel v. Brannan*, 267 Va. 691, 698, 594 S.E.2d 899, 903 (2004).

ii. The trial court's finding of bad faith was not plainly wrong

The facts indicate that the Trustee harbored improper motives in making her determination. The Trustee is Margaret's close friend. JA 205. If Paul and Basil are disqualified, the Trust assets will go to a charitable organization of the Trustee's choosing upon Margaret's death. JA 214-15.

Moreover, the Decision Memorandum, which was ratified by the Trustee at trial without exception, devotes several pages to recounting the familial disagreements between Paul, Basil and the Grantor concerning the disposition of his estate. JA 54-57. The clear import of this recitation is that Paul and Basil deserve to be ousted from the Trust, or that their father would have wanted such a result, as retribution for their behavior and treatment of their father during his lifetime; or, as the Trustee's counsel put it at trial, because "they're horrible." JA 248. This factual recitation is irrelevant to the legal determination at hand and it was improper for the Trustee to consider these facts in rendering her decision.

In addition, the Trustee repeatedly withheld relevant information from the Beneficiaries. Despite her own knowledge of the September

Amendment, the Trustee never informed Paul or Basil of the amendment until almost four months later. JA 181, 212. By that time, however, Paul had already sent the Letters. Moreover, six days after learning of the September Amendment, the Trustee called Paul and demanded that he return his father's ring that Margaret had given him. JA 181, 207. When Paul requested that the Trustee produce her credentials as executor, the Trustee refused, saying only that he was "present at the signing." JA 181. Despite Paul's obvious concern with her actions, the Trustee did not notify Paul of the September Amendment and the existence of the No Contest Clause, and did not produce her qualifications.[8]

From these facts, the trial court was entitled to conclude that the Trustee's decision to terminate the beneficial interest of Paul and Basil in the Trust was made in bad faith and with a dishonest purpose. This case could have, and should have, been resolved by an appropriate admonition from the Trustee at a time when the Beneficiaries had knowledge of the September Amendment. Instead, despite knowing that the 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. Giving due deference to the trial court's resolution of the conflicts

[8] The Trustee did not in fact qualify as executrix until March 2013. JA 181-82.

in the evidence and the credibility of the witnesses, it cannot be said that the trial court's factual determination that the Trustee acted in bad faith was plainly wrong or without evidence to support it.

II. No Contest

The remaining issues in this case revolve around whether the Beneficiaries violated the No Contest Clause. For the reasons that follow, the Court should affirm the trial court's ruling.

a. Actions short of a "resort to the means provided by law" cannot trigger the No Contest Clause (First Assignment of Cross-Error)

i. Standard of Review

No contest provisions appearing in a testamentary trust are generally valid and enforceable. *Keener v. Keener*, 278 Va. 435, 442, 682 S.E.2d 545, 548 (2009) (citing *Womble v. Gunter*, 198 Va. 522, 525, 95 S.E.2d 213, 216 (1956)). "The normal freedom of an 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." *Womble*, 198 Va. at 532, 95 S.E.2d at 220. Whether the No Contest Clause is consistent with Virginia law and public policy is a question of law this Court reviews de novo. *See Bd. of Supervisors v. Sampson*, 235 Va. 516, 520, 369 S.E.2d 178, 180 (1988).

ii. Argument

1. For public policy reasons, the Court should restrict no contest provisions to actions constituting "a resort to the means provided by law"

Although it ultimately found that the Beneficiaries did not violate the No Contest Clause, the trial court appears to have ruled that the Beneficiaries' action in sending the Letters was the type of conduct prohibited by the No Contest Clause. JA 125 (finding that "the aforesaid letters were as enumerated in the 'no contest' provision"). According to the Trustee, the No Contest Clause divests the Beneficiaries of their interests in the Trust for taking actions wholly outside the context of a legal action or proceeding, such as sending letters.

Neither this Court, nor any other in the United States, has validated or enforced a forfeiture provision of this breadth. *See* Claudia G. Catalano, *Annotation, What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary*, 3 A.L.R. 5th 590 § 2a (1992) (collecting cases). This Court should not be the first. Instead, to serve the public policy interests of no contest provisions and to provide predictability and clarity to those with an interest in the proper administration of trusts, the Court should limit the applicability of the No

Contest Clause to actions constituting "a resort to the means provided by law." *Womble*, 198 Va. at 525, 95 S.E.2d at 216.

Virginia's "considerable . . . . interest" in the "just and orderly disposition of property at death," *see Lalli*, 439 U.S. at 268, requires an "appropriate legal framework." *See King*, 221 Va. at 254, 269 S.E.2d at 795 (internal quotation marks omitted). Part of that framework is a judicially manageable standard for determining when a trust beneficiary has forfeited his or her interests in the trust. *See Redman-Tafoya v. Armijo*, 126 P.3d 1200, 1212 (N.M. Ct. App. 2005) (stating, in context of interpreting permissible scope of no contest clauses, "The broader the reach, the less the predictability. Predictability and clarity of intent are important goals that inform our approach.").

In *Womble*, this Court first approved the validity and enforceability of "condition[s] against contesting a will or attempting to set it aside." 198 Va. at 525, 95 S.E.2d at 216. Subsequently, the Court adopted the same rule with respect to no contest clauses appearing in a trust. *Keener*, 278 Va. at 442, 682 S.E.2d at 548. The Court has recognized two principal reasons for enforcing no contest clauses. First, "'no contest' clauses effectuate the testator's legitimate interest in preventing attempts to thwart his intent." *Va. Found. of Indep. Colleges v. Goodrich*, 246 Va. 435, 438, 436 S.E.2d 418,

420 (1993). Enforcing no contest clauses, therefore, protects "a testator's right to dispose of his property as he sees fit." *Keener*, 278 Va. at 442, 682 S.E.2d at 548. In addition, no contest clauses promote the "societal benefit of deterring the bitter family disputes that will contests frequently engender." *Id.*; *see also Womble*, 198 Va. at 527, 95 S.E.2d at 217 (noting the public policy benefits of deterring disputes among the testator's family). No contest clauses, therefore, serve the important public policy goal of disposing of assets, free from litigation, in an orderly and efficient manner. *See Lalli*, 439 U.S. at 268.

While valid and enforceable, however, no contest clauses are not favored. *See* V *Page on Wills* § 44.29 at 568 (2005) ("Even where they are held valid, conditions against contest are so unpopular with the courts that they are construed very strictly.") (citing cases). As a condition subsequent which effect a forfeiture of a vested interest, no contest clauses "are not favored in the law generally and will not be enforced except according to their clear terms." *Keener*, 278 Va. at 443, 682 S.E.2d 548-49 (citing *Trailsend Land Co. v. Va. Holding Corp.*, 228 Va. 319, 323-24, 321 S.E.2d 667, 669 (1984)); *see Clark v. Bentley*, 76 N.E.2d 438 (Ill. 1947) (noting the "well established rule that equity does not favor forfeitures," and that "in construing conditions[ ] subsequent, a reasonable construction must be

given in favor of the beneficiary") (citing *Page on Wills*). "[C]ourts of law and courts of equity are strict in requiring the *very event*, or the act to be done, with all its particulars, which is to defeat the interest previously vested." *Lewis v. Henry's Ex'rs*, 69 Va. (28 Gratt.) 192, 203 (1877); *see also Trailsend*, 228 Va. at 324, 321 S.E.2d at 669.

In accordance with these principles, this Court has repeatedly narrowed the permissible application of no contest clauses. In *Womble*, the Court stated that although "what activity . . . constitutes a contest" depended on the wording of the provision and "the facts and circumstances of each particular case," the "general rule" was that a contest was "'a resort to the means provided by law for attacking the validity of a will.'" 198 Va. at 529, 95 S.E.2d at 219 (quoting *Page on Wills*). In *Virginia Foundation*, the Court held that a declaratory judgment action seeking the interpretation of a will was not a "contest" because the action sought to vindicate, rather than thwart, the testator's intent: "a request for interpretation does not challenge the intent of the testator or the validity of the will." *Va. Found.*, 246 Va. at 438, 436 S.E.2d at 420. Similarly, the Court construed the no contest clause in *Keener* narrowly, finding that a beneficiary's "act in opening intestate administration of her father's estate" did not "contest" any provision of the trust. 278 Va. at 442-43, 682 S.E.2d at 548-49.

The policies that support enforcing a no contest clause do not support validating and enforcing a “no attempt-to-interfere” clause. A ruling that a beneficiary can be divested for merely stating one’s desire or intent to file a legal challenge would undermine, rather than promote, the public policy interests served by the limited judicial sanctioning of “no contest” clauses in Virginia. Rather than deterring or preventing the litigation of familial disputes, *see Keener*, 278 Va. at 442, 682 S.E.2d at 548, Virginia courts would be forced to referee all sorts of behavior not previously subject to judicial scrutiny. *See Redman-Tafoya*, 126 P.3d at 1213 (“[T]he expansive nature of a broad and relatively unlimited standard creates an evaluative parade ground open for unending factual allegations of conduct and actions that allegedly thwart something set out in the testator’s will.”).

The Trustee attaches great significance to Paul’s expression of an intention to file a will contest in the preservation letter sent to Mr. Guare, and Paul’s suggestion that Margaret engage her stepsons on the prospect of an alternative disposition of trust assets. However, these communications could just as easily have occurred at a cocktail party, in a chance meeting at the grocery store, or in myriad other ways. Virginia courts should not become entangled in such commonplace affairs. *See Lavine v. Shapiro*, 257 F.2d 14, 17-18 (7th Cir. 1958) (“Plaintiff . . . had a

right to express her feeling of hostility as well as her opinion of defendant in any way, at any place, at any time she saw fit, without being vulnerable to the charge that she directly or indirectly aided in the contest of the will.”).

Every jurisdiction interpreting forfeiture provisions has drawn a line at the courthouse door: some form of legal action constitutes the minimum conduct necessary to trigger a “no contest” clause. *See, e.g., Sheffield v. Scott*, 662 S.W.2d 674, 677 (Tex. App. 1983) (collecting cases). The filing of a legal action is not a talismanic act in this regard; there are important public policy reasons for limiting the scope of “no contest” clauses to “legal proceedings” or otherwise resorting to legal action. Unlike the informal and often impulsive act of writing a letter, sending an email or text message, or communicating orally, the formal act of filing a legal action is ordinarily only undertaken upon careful consideration of the rights of the parties to the dispute, and often with the aid of counsel. The Court should similarly limit the permissible scope of no contest provisions in Virginia.

2. The wording of the No Contest provision itself is limited to actions constituting “a resort to the means provided by law”

Moreover, the Trustee’s overbroad interpretation is contrary to the No Contest Clause itself. Under the heading “No Contest Clause,” the September Amendment states the Grantor’s purpose in adding a no

contest clause: “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, and my Trustee shall take all appropriate steps to carry out this intent.” JA 47. The No Contest Clause then states:

> [I]f 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.

JA 47.

The Court should construe this provision consistently with Virginia law regarding the permissible scope of no contest clauses. *See McGehee v. Edwards*, 268 Va. 15, 20, 597 S.E.2d 99, 102 (2004) (holding that “[c]onsistent with the rule of construction of wills,” a trust “should be construed according to the law in effect at the time the trust is executed.”). Moreover, the Court must interpret the No Contest Clause in its full context, and not by isolating phrases. *See Young v. Commonwealth*, 273 Va. 528, 533, 643 S.E.2d 491, 493 (2007) (holding that the Court considers disputed language in its full context, not in isolation).

As the introductory clause makes clear, the Grantor intended the No Contest Clause to prevent "challenge[s]" to his decisions. JA 47. *Cf. Scott v. Albemarle Horse Show Ass'n*, 128 Va. 517, 526, 104 S.E. 842, 846 (1920) (holding that the recitals of a contract "are often helpful in the construction of contracts and throw light on the meaning and intent of the parties."). The No Contest Clause encompasses two categories of conduct: "challeng[ing] or contest[ing]" and "attempt[ing] to interfere with the administration of th[e] trust." JA 47. As the Trustee recognized in her Decision Memorandum, however, each phrase is limited by the prior clause "by legal proceedings or otherwise." JA 47, 59. *See Philips v. Ferguson*, 85 Va. 509, 8 S.E. 241 (1888) (holding that words of "flexible meaning . . . must be construed according to the context of the will.").

The Trustee interpreted the phrase "legal proceedings or otherwise" to encompass both legal and non-legal conduct. JA 59. This reading fails to construe the forfeiture provision narrowly as required. It also renders "legal proceedings" meaningless. If "or otherwise" includes a limitless universe of conduct, the Grantor would not have needed to use the term "legal proceedings." Moreover, the Trustee's interpretation of the phrase ignores the fact that many jurisdictions have interpreted "legal proceedings" as requiring more than the mere filing of an action. *See, e.g.*, *Drennen v.*

Heard, 198 F. 414, 430 (N.D. Ga. 1912) (holding that the phrase "taking legal steps" requires "some persistency by the caveator contesting the will" that was not present with her quick withdrawal of the action); *In re Hamill*, 866 S.W.2d 339, 345 (Tex. App. 1993) (filing of a contest is not sufficient if the contest "is later dismissed prior to any legal proceedings"). "[O]r otherwise," therefore, serves the purpose of expanding the scope of prohibited conduct to include actions that, although legal in nature, nevertheless fall short of "legal proceedings."

So limited, the No Contest Clause first prohibits legal actions that contest or challenge the trust or any of its provisions. In this context, "contest" and "challenge" are synonyms. *See Black's Law Dictionary* 244 (8th ed. 2004) (defining "challenge" as "[a]n act . . . of formally questioning the legality or legal qualifications of a person, action, or thing"); *Id.* at 337 (defining "contest" as "[t]o litigate or call into question; challenge").[9] At most, these terms prohibit the Beneficiaries from calling into question, through legal action, the validity or legality of the Trust or one of its provisions. *But cf. Womble*, 198 Va. at 525 (noting jurisdictions that recognize a good faith and probable cause exception); *In re Hamill*, 866

[9] The preamble to the No Contest Clause uses only the word "challenge," suggesting that the Grantor himself believed that these words were interchangeable.

S.W.2d at 345 (forfeiture avoided if contest quickly withdrawn). These terms, standing alone, do not prohibit the institution or prosecution of legal actions whose purpose is other than to contest the validity of the trust. *See, e.g.*, *Va. Found.*, 246 Va. at 438, 436 S.E.2d at 420 (holding that a "request for interpretation" of a will is not a contest); V *Page on Wills* § 44.29 at 571-72 (listing various legal actions that states have found not to be a contest).

To encompass a category of such legal actions, the Grantor added the second prohibition: a beneficiary or potential beneficiary forfeits his or her interest if, through legal proceedings or otherwise, he or she "attempt[s] in any way to interfere with the administration of th[e] trust according to its express terms." JA 47. Rather than covering non-legal actions like writing letters as the Trustee contends, this clause merely prohibits the Beneficiaries from using legal action to challenge the Trustee's administration of the Trust. *Cf., e.g., Jackson v. Braden*, 717 S.W.2d 206, 208 (Ark. 1986) (holding that "questioning the actions of the executor for not complying with the probate code" was not a contest of the will); *Estate of Miller*, 230 Cal. App. 2d 888, 902-03 (Cal. Ct. App. 1964) (holding that the beneficiary's action challenging the "the manner in which [the executor] carried on the estate's affairs" was not a contest); *Saier v. Saier*, 115 N.W.2d 279, 282 (Mich. 1962) (holding that the beneficiary's litigious and

annoying conduct would have triggered the no contest clause if the provision had prohibited "interfer[ing] with or imped[ing] the administration of [the] estate").

Placed in its proper context, therefore, and considering the policy interests behind strictly construing no contest provisions, the trial court erred in construing the No Contest Clause. Rather than interpreting the provision to prohibit non-legal conduct such as expressing an intent or desire to take some action, the Court should, consistent with Virginia law and policy, interpret the No Contest Clause as encompassing only those actions that constitute "a resort to the means provided by law." *Womble*, 198 Va. at 525, 95 S.E.2d at 216. Because the Beneficiaries did not "resort to the means provided by law" by sending the Letters, the Court should reverse the trial court's determination that the Letters were "as enumerated in the 'no contest' provision." JA 125.

b. The Beneficiaries did not "attempt to interfere with the administration of th[e] trust" (Third Assignment of Error)

Even if the Court affirms the trial court's determination that the No Contest Clause encompasses non-legal actions, however, the outcome should nevertheless be the same. The Beneficiaries did not "attempt in any way to interfere with the administration of th[e] trust according to its express terms." JA 47.

i. Standard of Review

"The question whether a no-contest clause in a [trust] has been triggered presents, on appellate review, a mixed question of law and fact." *Keener*, 278 Va. at 441, 682 S.E.2d at 548. Whether particular conduct "constitutes a contest or attempt to defeat a will depends on the wording of the 'no contest' provision and the facts and circumstances of each particular case." *Womble*, 198 Va. at 529, 95 S.E.2d at 219. "Accordingly, [this Court] accord[s] deference to the circuit court's findings of historical fact, but reviews questions of law de novo." *Keener*, 278 Va. at 440, 682 S.E.2d at 557.

ii. Argument

1. Sending letters is not an "attempt to interfere with the administration of th[e] trust"

The Trustee maintains that the Beneficiaries attempted to interfere with the administration of the Trust when they sent the Letters to Margaret and Mr. Guare. According to the Trustee, the Letters evidenced the Beneficiaries' clear intent "to bring about the termination of the Trust," which would have "directly contravened the Trust's express terms." Opening Br. at 24. Therefore, the letters constituted an attempt to interfere with the Trust's administration. *Id.*

The No Contest Clause, however, does not prohibit discourse related to proposed conduct, even if actually undertaking that conduct would be prohibited. Construed narrowly, the provision only prohibits actual attempts to interfere with the Trust's administration. Proposing actions whose goal, if accomplished, may interfere with the administration of the Trust, is not prohibited. Evidence that the Beneficiaries "cherished a desire" to terminate the Trust is not "sufficient to bring them under the ban of this clause." *See Puller v. Ramsey*, 200 S.W. 83, 87 (Mo. Ct. App. 1918).

The Trustee is charged with the administration of the Trust and her responsibilities of administration are set forth in the Trust. They include: dividing the Grantor's assets into the Marital and Family Trusts, JA 30-31; distributing income, JA 28-31; paying debts, JA 32; making productive use of the decedent's property, JA 33; allocating assets in the best interests of the beneficiaries, JA 34; and dividing property into equal shares for distribution to the decedent's descendants. JA 36. The decedent also incorporated by reference the numerous powers set forth in Code § 64.2-105.[10] These are the "express terms" of the Trust regarding its administration that the Grantor wanted free from interference. JA 47.

[10] The Trust identifies Code § 64.1-57, the predecessor to Code § 64.2-105.

The Beneficiaries took no action that can be characterized as an attempt to interfere with the administration of the Trust. Neither letter sent by the Beneficiaries implicate any of the Trustee's powers of administration or affect her ability to exercise those powers. First, as the Beneficiaries alleged in their Complaint, neither letter was sent to the Trustee herself. One was sent to a fellow beneficiary, Margaret, and the other was sent to the Grantor's former counsel who prepared the Trust documents. The Trustee fails to explain how words said to third parties could interfere with her administration of the Trust.

Moreover, neither letter necessitated any action by the Trustee, affected the Trust's administration, or even attempted to do so. In their letter to their step-mother, the Beneficiaries expressed their discontent with the Trust's terms and indicated their interest in a non-judicial settlement pursuant to Code § 64.2-709. Regardless of whether the ultimate realization of their proposal could ever interfere with the administration of the Trust, the Beneficiaries did not pursue this matter further.[11]

In the letter to Mr. Guare, the Beneficiaries merely instructed him to retain relevant documents because a legal contest was likely. JA 42. Again,

[11] Moreover, because the September Amendment added a charitable contingent beneficiary, the letter's stated goal was an impossibility, as the Trustee noted in her Decision Memorandum, at JA 60 n.1. *See* Code § 64.2-709.

this action had no effect whatsoever on the Trustee's administration of the Trust "according to its express terms." JA 47. Telling the Grantor's former lawyer to retain documents did not interfere, or attempt to interfere, with any of the Trustee's powers of administration as set forth in the Trust and Code § 64.2-105. The letter accomplished nothing more than the preservation of evidence at a time when the Beneficiaries were evaluating their rights and remedies respecting their father's estate. When the Beneficiaries learned of the No Contest Clause, the provision had its intended prophylactic effect and the Beneficiaries committed no further action in preparation of a contest. *See Lavine*, 257 F.2d at 17-18 ("Plaintiff . . . had a right to express her feeling of hostility as well as her opinion of defendant in any way, at any place, at any time she saw fit, without being vulnerable to the charge that she directly or indirectly aided in the contest of the will."); *Brooks v. Woitel*, 418 N.E.2d 418 (Ill. App. Ct. 1981) (allowing a legatee a "right to express a feeling of hostility toward and an opinion of the executor [as] he sees fit" without forfeiting his interests).

2. To the extent the Letters could "attempt to interfere with the administration of th[e] trust," the Letters were directed at the August Trust

It is undisputed that the Beneficiaries were unaware of the September Amendment and the No Contest Clause at the time the Letters were

mailed. JA 166, 212. In fact, the Letters were expressly directed at the August document. JA 42-43. Because the September Amendment prohibited actions directed at the Trust as ratified by the September Amendment, the Beneficiaries' actions directed at the August document could not have triggered the No Contest Clause.

The September Amendment contains three relevant provisions. First, the Grantor added a beneficiary by stating that, if at the time of Margaret's passing there was "no living beneficiary designated to take assets held in the trust," the Trustee should distribute the remaining assets to a charitable organization of the Trustee's choosing. JA 46. Second, the Grantor added the No Contest Clause. The Grantor prohibited the Beneficiaries from "challeng[ing] or contest[ing] this trust agreement" or "attempt[ing] to interfere with the administration of this trust." JA 47 (emphasis added). Finally, the Grantor stated that the August Trust was otherwise "ratified and confirmed." JA 48.

As the trial court rightly held, the Grantor expressly intended that forfeiture could only arise with conduct directed at this Trust, i.e., the Trust as amended and ratified by the September Amendment. JA 124-25. *See Keener*, 278 Va. at 443, 682 S.E.2d at 548-49 (holding that no contest clauses are strictly construed against forfeiture). By ratifying the August

trust and expressly alluding to "this trust," the Grantor manifested his intent to prohibit only actions directed at the Trust as modified. *See Hayes v. St. Louis Union Trust Co.*, 280 S.W.2d 649, 655 (Mo. 1955) ("[A] will speaks from the time a codicil, which has been made a part of the will, is executed. Especially is this true where a testator has . . . reaffirmed the provisions of his will."); *Ryder v. Myers*, 167 A. 22, 25 (N.J. Ch. 1933) ("By the making of said codicil the will and codicil were made to speak as of the time and place of the publication of the codicil."); IV *Page on Wills* § 30.26 at 207 ("If [a codicil] ratifies the will, it is said to speak as of the time of the execution of the codicil."). Without knowing of the September Amendment, the Beneficiaries were incapable of doing so. Actions directed at the Trust as it existed on August 27, 2012, were directed at an incomplete document with different terms and different beneficiaries and were not prohibited by the Grantor.

The Trustee relies extensively on the trial court's erroneous insertion of the word "agreement" after the word "trust" in one instance in the Letter Opinion. Opening Br. at 24-27. The Trustee filed her Motion for Reconsideration on these same grounds, and the trial court acknowledged its mistake. JA 257. The trial court reiterated, however, that its ruling that no forfeiture had occurred was based on the fact that the "no contest

provision . . . sought to eliminate any contest to the trust . . . as it was on September 21, 2012." JA 257. Not only did the Beneficiaries not have any knowledge of the No Contest Clause, but as the court stated, "they never . . . did anything to attack what was in place on September 21, 2012." JA 257. The trial court's misquotation, therefore, had no effect on its ruling.

The Trustee also argues that the trial court "imposed a knowledge requirement not found in the [Trust]." Opening Br. at 28. But the trial court expressly held that the Beneficiaries' lack of notice was "not dispositional." JA 125. Rather, the trial court ruled that the Beneficiaries had not "attempted to interfere with the administration of th[e] Trust" because their letters were directed at the Trust as it existed on August 27, 2012, and the No Contest Clause prohibited interfering with "<u>this</u> trust," i.e., as it existed after the September Amendment. JA 47; 125. As the trial court stated, "[t]here was no prohibition against challenging any prior agreement or the trust agreement as written [on] August 27, 2012." JA 125.

The No Contest Clause should not be construed as a trap for the unwary. Rather, forfeiture should occur only with "conscious and intentional acts" undertaken "with full knowledge of the consequences" of such actions. *In re Estate of Rohrbaugh*, 80 Va. Cir. 253, 265-66 (Fairfax Cnty. Cir. Ct. 2010); *see Barr v. Dawson*, 158 P.3d 1073, 1076 (Okla. Civ. App.

2007) (holding that forfeiture did not occur when the plaintiffs were unaware of the trust's terms and withdrew their action when they learned of the no contest provision). Paul and Basil cannot be charged with forfeiting their vested interests when they were ignorant of the Trust's terms and when their actions were directed solely at an outdated trust document that did not prohibit their conduct.[12]

III. The trial court properly awarded attorneys' fees (Fourth Assignment of Error)

The "reasonableness" of the Beneficiaries' attorney's fees was not disputed in the trial court and is not disputed in this appeal. *See* Code § 64.2-795. Because the trial court correctly determined that the Trustee erred when she concluded that the Beneficiaries forfeited their interests under the Trust, the court did not abuse its discretion in awarding the Beneficiaries attorneys' fees. *See* Code § 64.2-795. The Court should affirm the trial court in this regard.

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[12] The cases on which the Trustee relies are inapposite. *See* Opening Br. at 29-30. In *Alper v. Alper*, 65 A.2d 737 (N.J. 1949), for example, there was no contention that the individual who violated the no contest provision was ignorant of its existence. Rather, the issue was whether the individual's affirmative actions to challenge the will had the effect of disinheriting all of the beneficiaries, whether they had participated in the contest or not. *Id.* at 738-41. That principle has no application here. None of the cases cited by the Trustee support the proposition that an individual can violate a no contest provision without knowledge of the provision's existence.

CONCLUSION

The Trustee asks this Court to sanction a forfeiture clause so broad that non-legal actions like writing a letter or email to third parties, who are removed from the administration of a trust, can forfeit vested interests in a family estate. The Trustee then seeks to minimize the well-established authority of a court to review a trustee's discretion by asking the Court to sanction a decision standard so broad that a trustee can abuse her discretion or act arbitrarily in administering a trust so long as it is in good faith. The Court should reject the Trustee's claim to this unprecedented power.

For the foregoing reasons, the Beneficiaries ask the Court to affirm the trial court's determination that they have not forfeited their interests in the Trust.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 5:26

I, John P. O'Herron, hereby certify that on June 18, 2015, fifteen printed copies of the foregoing Appellee Brief, along with a CD containing an electronic version in .pdf format, was hand delivered to the Clerk of the Supreme Court of Virginia. Finally, I certify that three printed copies, along with a CD containing an electronic version in .pdf format, of the foregoing Appellee Brief was mailed, via first class mail, postage prepaid, to counsel for all parties:

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