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IN THE

Supreme Court of Virginia

RECORD NO. 170071

DONAL A. IRVING, in his Capacity as
EXECUTOR of the ESTATE of
DECLAN PATRICK IRVING,

Appellant,

v.

CAROL DIVITO, *et al*.,

Appellees.

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal to reverse an order of the Chesapeake Circuit Court holding that fifteen words written in diagonal script on a numbered binder-divider-tab (the "Purported Codicil") did not qualify as a codicil to the Last Will and Testament of Declan Patrick Irving (the "Decedent"). Appellant Donal A. Irving, in his capacity as Executor of the Estate of Declan Patrick Irving (the "Executor"), filed a Complaint seeking to reverse a February 23, 2015 order of the Chesapeake Circuit Court Clerk refusing to accept for probate the Purported Codicil. The Executor named as respondents all beneficiaries under the Will except himself. The beneficiaries are Carol Divito, Bernadette Irving, Colm Irving, and Appellee Patrick D. Irving a/k/a Patrick D. Cahill ("Cahill"). Carol, Bernadette and Colm are Decedent's siblings. The Executor is also a sibling of the Decedent and a beneficiary. Cahill is identified in the Will as Decedent's son.

If accepted for probate, the Purported Codicil, by eliminating Cahill as a beneficiary, would increase the share of the estate that the other beneficiaries, including the Executor, would receive. On February 18 and 19, 2015, the case was tried to the court without a jury. After hearing the evidence and argument of counsel, the circuit court took the matter under

advisement. On September 2, 2016, the court issued a letter opinion ruling against the Executor. On October 19, 2016, the trial court entered an order denying the Executor's complaint, entering judgment on behalf Cahill, and affirming the Clerk's February 23, 2015 order refusing to accept the Purported Codicil for probate. The Executor filed this appeal in his capacity as Executor only. No beneficiary has filed a notice of appeal.

The trial court correctly held after weighing the evidence that the Purported Codicil did not satisfy the requirements of either Virginia Code § 64.2-403 or § 64.2-404, and that the Purported Codicil was precatory and tentative in nature. The trial court's ruling is supported by the record and should not be disturbed.

B. STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

On November 28, 2000, the Decedent executed his Last Will and Testament. In the document, he named Patrick D. Irving (a/k/a Cahill) as "my child." (J.A. 10.) After several traumatic life events, including being named as a defendant in a medical malpractice lawsuit, the Decedent in 2003 quit the practice of medicine. (J.A. 540.) He then left the United States and began living in his native Ireland. (J.A. 540.)

Before leaving the United States, the Decedent sold his house. (J.A. 251, 540.) After the sale, the Decedent sent a fax to Shelly Joyner, a

former employee, asking if she would remove the Decedent's personal things from the home. (J.A. 186, 191.) Joyner had less than 24 hours to remove the Decedent's belongings because the house was scheduled for demolition the next day. (J.A. 191.) Joyner contacted a moving company and a few friends, and they hastily boxed up the Decedent's personal property and took it to a storage unit. (J.A. 191–92.) Joyner gave the Decedent the key to the storage unit when he returned to the United States in 2008. (J.A. 540.)

In 2012, the Decedent was diagnosed with colon cancer. (J.A. 254.) He received treatment at the Riverside Hospital in Newport News, (J.A. 254), and stayed in a hotel while he received treatment, (J.A. 256). The Decedent died on March 30, 2014. (J.A. 256.)

After the Decedent's death, his brothers, Donal A. Irving—the Executor—and Colm Irving, went to clean out the Decedent's hotel room. (J.A. 256.) They found in the Decedent's wallet two handwritten notes on advertisements for Oast & Hook, P.C., the law firm that prepared the Decedent's will. (J.A. 258, 540.) The first note read, "Brother Donal Montreal" and stated Donal's phone number. On the reverse side of the first note was written, "For my Brother Donal. This is where my will is kept. Declan." (J.A. 540.) It was signed, "Declan." On the second note, which

was also an advertisement for Oast & Hook, was written, “Donal my will is at [Oast & Hook].” (J.A. 540.) On the reverse side of the second note was the writing, “Call Donal Irving – Brother.” The second note also gave Donal’s Montreal address and phone number. (J.A. 540.) The Decedent’s brothers then attempted to contact Oast & Hook, and they were told that the law firm no longer existed. (J.A. 258.) But they did learn that the Decedent had a will with the firm, but that it was being kept by a successor firm, the Hook Law Center. (J.A. 540.) The brothers contacted the successor firm and learned that the firm had only an electronic copy of the will on file, and they would need to locate the original. (J.A. 540.)

The brothers searched the Decedent’s hotel room and were unable to find the will, but they did find the key to the storage unit. They went to the storage unit where they found a box containing a notebook binder of estate-planning documents from Oast & Hook, including a copy of the will. (J.A. 403–89, 540.) The binder had six numbered tabs corresponding to the following table of contents:

1. Estate Planning Reminders;
2. Last Will and Testament of Declan P. Irving;
3. Declan P. Irving General Durable Power of Attorney;
4. Declan P. Irving Special Power of Attorney;

5. Declan P. Irving Advanced Medical Directive; and

6. Virginia Code Section 64.1-57.

(J.A. 424.)

The brothers later returned to the storage unit, looked in another box, and found a brief case that contained the original of Decedent's will. The will was the briefcase's sole content. (J.A. 424.)

At some point, the brothers discovered the Purported Codicil which was written on the front binder-divider-tab numbered 1 (Estate Planning Reminders) in the earlier found binder. (J.A. 425.) It stated:

> 11/17/03
>
> I wish to remove Patrick named as my son entirely from this will — no benefits.

The Purported Codicil also contained illegible writing that appeared to be the Decedent's initials: DPI. (J.A. 540.) In the binder, behind the divider tab numbered 1—the section of the binder identified in the table of contents as "Estate Planning Reminders"—was a multipage document entitled "Elder Law." (J.A. 277, 426.) On page two of the document was a bolded bullet point that stated: "Is it Safe for you to Change your Documents by Making Changes Between the Lines or in the Margins?" (J.A. 278, 428.) The document went on to say:

> No. Such changes will usually not be effective. We executed your documents using witnesses and a notary public who were present while you were signing the documents and present[] while each of them signed the documents in your presence. I recommend that you call us if you wish to make a change.

(J.A. 428–29.) No evidence was presented that Decedent contacted anyone about making a change to his will. Unlike binder-divider-tab numbered 1, binder-divider-tab numbered 2, the one in front of the copy of the will, contained no writing.

The Executor then qualified to administer the Decedent's estate on March 4, 2015. He appeared before the probate clerk of the Circuit Court for the City of Chesapeake to have the Decedent's testamentary documents recorded. The clerk admitted the Decedent's will, but rejected the Purported Codicil. (J.A. 51, 538.) The Executor then filed a complaint with the circuit court to establish that the Purported Codicil was part of the will.[1] (J.A. 1–51, 538.)

On January 12, 2016, Cahill moved to appoint a curator to prevent the Executor's use of Estate assets to advance his and his siblings' financial interest in removing Cahill as a beneficiary through this litigation.

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[1] At some point prior to qualifying, the Executor e-mailed his sister and co-beneficiary discussing, among other things, various options for excluding Cahill as a beneficiary under the will. (J.A. 280–93; Supp. App. 82–83.) The Executor also engaged counsel to determine whether he was even obligated to give notice of probate to Cahill. (J.A. 294–95, 304–08; Supp. App. 84, 85–87.)

(J.A. 6–10.) On February 5, 2016, the circuit court denied Cahill's motion to appoint a curator. (J.A. 230.)

After hearing evidence over the course of two days, the circuit court found that there was conflicting evidence over whether the Decedent used his initials as his "signature." Several medical professionals and an accountant testified that the initials were the Decedent's signature. (J.A. 540–41.) But other evidence showed that the Decedent used his full name "Declan P. Irving" as a signature on formal documents, such as the original will and the "Stipulation and Property Settlement Agreement" from his divorce. (J.A. 541.) And other evidence showed that he used a different signature "D.P. Irving" on checks. (J.A. 541.) From this, the court found that "the evidence establishes that the decedent used his full name as a signature on formal documents, such as the will." (J.A. 541.)

The court also found:

- there was no "alteration or destruction" of the copy of the will located in the binder found in the storage unit, or to the original will located in the storage unit in a briefcase;
- the decedent had access to the storage unit from the time he returned from Ireland in 2008 until his death in 2014;
- located in the binder immediately behind the Purported Codicil was a document that advised the Decedent not to make changes on the face of any documents and to call his counsel if he wished to make any changes to his will; and

- the Decedent's wallet found in the bedside table of the hotel where Decedent was staying had two separate pieces of paper, both with his attorneys' names, and both with notes to the Executor stating that his will was being kept by his attorneys, and the notes did not indicate at all that there was a codicil or any other writing expressing his testamentary intent except the will.

(J.A. 541.)

Based on these findings of fact, the trial court affirmed the clerk's order and found that the Purported Codicil "does not comply with statutory requirements set forth in Code § 64.2-403, in that it is not manifest that the name on the document in question was intended as the decedent's signature." (J.A. 541.) With respect to § 64.2-404, the court found that "the writing at issue establishes a thought or plan of the decedent to make a change to his will, and is precatory and tentative in nature. Thus, testamentary intent to create a codicil has not been established by clear and convincing evidence." (J.A. 541.)

STANDARD OF REVIEW

It is well established that an appellate court considers "the evidence and all reasonable inferences therefrom in the light most favorable . . . to the prevailing party in the circuit court." *Moorman v. Blackstock*, 276 Va. 64, 73–74 (2008). The Court must accept the trial court's findings of fact as correct unless they have no support in the record. *Arlington Cnty. v. Mutual Broadcasting Sys., Inc.*, 260 Va. 434, 440 (2000). What is more, "[a]bsent

clear evidence to the contrary in the record, the judgment of a trial court comes to an appellate court with a presumption that the law was correctly applied to the facts." *Bottoms v. Bottoms*, 249 Va. 410, 414 (1995).

ARGUMENT

A. The Appeal should be dismissed for lack of standing because the Executor is not an Aggrieved Party under Virginia Code § 8.01-670(A).

Only an aggrieved person may appeal a judgment in a controversy concerning the probate of a will. Va. Code § 8.01-670(A)(c). The Executor in this case is not an aggrieved party because the trial court's ruling did not adversely affect the estate or his status as Executor. Moreover, the Executor is prohibited from litigating the claims of his group of beneficiaries against Cahill.

"When used in a statute, the term [aggrieved] contemplates a denial of some personal or property right, legal or equitable." *Vulcan Materials Co. v. Bd. of Sup'rs of Chesterfield Cty.*, 248 Va. 18, 24 (1994) (quotation marks and citation omitted). The Executor noted this appeal solely in his capacity as Executor and not as a beneficiary. The trial court's ruling did not affect the estate or his status as Executor thus he lacks standing to bring this appeal.

Unlike the present appeal, in each of the three cases cited by the Executor, the appellant executor was aggrieved because those rulings affected either the estate or the executor's status as executor. Two affected his status as executor. *See Savage v. Nute*, 180 Va. 394, 396 (1942) (appeal of order finding that the writing at issue, which named appellant as executor, was not the true last testament of decedent); *In re Bentley's Will*, 175 Va. 456, 459 (1940) (same). The third affected the value of the estate. *See Redford's Adm'r v. Peggy*, 27 Va. 316, 318 (1828) (appeal of order admitting to probate a will which diminished the value of the estate by granting freedom to testator's slaves). In all three, the executor was an aggrieved party.

The present appeal is like *Caine v. Freier*, 264 Va. 251 (2002), in which this Court dismissed the personal representative as a party appellant because it was not aggrieved. *Id*. at 257. The dispute in *Caine* was between the decedent's widow and his surviving children from a prior marriage. *Id*. at 254. The personal representative, Bank of America N.A., filed a suit styled as one for "aid and direction" but argued for the trial court to enter rulings adverse to the widow's interests. For example, "the Bank argued that the widow through her conduct had waived her statutory rights or that she was estopped from asserting those rights." *Id*. at 256. The

personal representative even sought sanctions against the widow based on her alleged conduct in separate litigation. *Id*. at 256. After the trial court ruled for the widow, the personal representative and decedent's children filed a joint petition for appeal. *Id*. at 256–57. In dismissing the personal representative as a party appellant, this Court found that the "rulings [appealed from] in no way adversely affected the estate represented by the" personal representative. *Id*. at 257.

This Court has ruled the same in other cases. *See*, *e.g.*, *Schmidt v*. *Wachovia Bank*, 271 Va. 20, 24 (2006) (dismissing trustee as an appellee for lack of standing); *Shocket v*. *Silberman*, 209 Va. 490, 492 (1969) (same). Pertinent to this appeal, the *Caine* Court also stated that, "the personal representative 'has no right, at the expense of the estate, to seek [rulings] favorable to these legatees.'" *Id*. (*citing Shocket* 209 Va. at 492).

This appeal is the same. The Executor is not aggrieved and has no right, at the expense of the estate, to seek a ruling favorable to the beneficiaries other than Cahill.[2]

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[2] The logical inference that the Executor's beneficiary status drove him (with the support of his co-beneficiaries) to initiate this litigation is supported by evidence from two e-mails, (Supp. App. 84, 85–87), plus the Executor's equivocal testimony concerning those e-mails showing that the Executor considered various ways to exclude Cahill as a beneficiary, (J.A. 294–95, 304–08).

The Will named Cahill as a beneficiary and the trial court's ruling affirmed Cahill's status as a beneficiary. The Executor seeks reversal of the trial court and removal of Cahill—a party to whom he owes fiduciary duties—as a beneficiary. The Executor cannot litigate a claim against a party to whom he owes fiduciary duties. *See Schmidt*, 271 Va. at 24 (2006) ("[A] trustee cannot litigate the claims of one set of legatees against the others.").

The Executor's lack of standing does not hinge on whether the underlying action was one for aid and direction, one to establish a codicil, or one for declaratory judgment. It depends upon the institutional role of the office of executor and whether the Executor is aggrieved by the ruling from which he appeals. Here the Executor is not aggrieved, cannot favor one set of beneficiaries over another, and does not have standing. This appeal should accordingly be dismissed.

B. The Trial Court did not err in finding that the Purported Codicil did not meet the requirements of § 64.2-403. (Assignment of Error I).

At issue is whether a numbered binder-divider-tab on which the decedent wrote dated and initialed fifteen words in diagonal script, about which he told no one, and which he left buried in a box in a storage facility to be fortuitously discovered 12 years later reflects the requisite

testamentary intent to qualify as a valid codicil. The trial court correctly found it did not.

The Executor's First Assignment of Error is premised on an abridged and incorrect reading of Virginia Code § 64.2-403. The Executor focuses on Section B of the statute and ignores Section A. Moreover, the Executor disregards the unfavorable evidence concerning whether the initials on the Purported Codicil constitute a signature under Section A.

As explained *infra*, in response to the Executor's Second Assignment of Error, the mere fact that a testator writes his name or initials is insufficient: "No will shall be valid unless it is in writing and signed by the testator . . . ***in such a manner*** as to make it manifest that the name is intended as a signature." *Id*. § 64.2-403(A) (emphasis added).

The Executor presented five witnesses to testify on the issue of whether the handwriting on the Purported Codicil was Decedent's and whether the initials on the Purported Codicil were his signature. But, as trial court found, the evidence was conflicting on this point, and it found that the Decedent signed his full name to formal documents and did not merely use his initials. (J.A. 540.) It is beyond dispute that an appellate court cannot disturb a trial court's resolution of a dispute in the evidence. *See Arlington Cnty*. 260 Va. at 440; *Abdullah v*. *Comm*., 53 Va. App. 750, 755 (2009)

(finding appellate court must defer to the factfinder's responsibility "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"). The Executor simply cannot overcome this legal standard.

The Executor first called Darlene French, but her testimony was internally conflicting. While she identified the initials on the purported codicil as the Decedent's signature on direct examination, on cross-examination she stated that those initials were his "abbreviated signature," (J.A. 156), that he would sometime write "D with the Irving," (J.A. 156), that she "had seen him write a more fuller signature," (J.A. 157), that "she was more familiar with his signature on medical documents," (J.A. 162), and that she had never seen his signature on any "legal document" other than medical records which she erroneously considered legal documents, and that she had never seen his signature on a will, loan document, or contract, (J.A. 163). She testified on direct that he would use that abbreviated signature "when he would write a quick order, not postop notes . . ." (J.A. 153.) When pressed on cross about whether the purported signature on Purported Codicil was a signature or simply initials, she started out strong, but fell apart: "I would say it's more a signature, because it is more flowy, it's not like two separate – I don't know. I'm not a handwriting expert, I am a – you

know, I am a nurse." (J.A. 156.) Her testimony was also unreliable. Apart from glancing at a 1990's Christmas card one year before she testified (and being shown the Purported Codicil by Executor's counsel in preparation for trial), at the time of trial she had not seen the Decedent's handwriting or signature in over a decade.[3] (J.A. 160–61.)

Christine Mitchell's testimony was also internally inconsistent. She testified that Decedent would use his initials on medical records and other paperwork, but that his signature was a little bit longer on checks and letters. (J.A. 175.) At the time of trial, other than being shown the Purported Codicil by Executor's counsel in preparation for trial, Ms. Mitchell had not seen the Decedent's handwriting or signature in over a decade. (J.A. 176–77.)

John Corley could not testify on how the Decedent signed formal documents.[4] He testified that the Decedent signed things in different ways,

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[3] She did not even recall how the decedent had signed that Christmas card. (J.A. 161.)

[4] Corley's testimony was not based solely on his familiarity with Decedent's handwriting and signature the he acquired prior to the litigation. Instead, he impermissibly reviewed samples of the Decedent's handwriting and signature after being contacted by the Estate's counsel. (J.A. 179–80.) A lay witness who is not familiar with a particular person's handwriting cannot be provided a sample of that person's writing for purposes of familiarizing himself or herself with it, before comparing an alleged sample to a genuine sample. *Wileman v. Com.*, 24 Va. App. 642, 647 (1997).

that Decedent's instructions to him were usually signed with initials, that personal notes were usually signed "Declan," but he did not recall how Decedent signed more formal documents such as his tax returns. (J.A. 182–83.)

Shelley Joyner could not identify the initials on the Purported Codicil as Decedent's signature when she was deposed one month prior to trial. (J.A. 193–94.) In that deposition, she was presented a copy of the Purported Codicil and asked to draw a circle around the signature that she did not recognize. (J.A. 194.) She did so. The copy of the Purported Codicil with the circle indicating that she did not recognize the initials as the Decedent's was admitted as Defendant's Exhibit 1. (Supp. App. 69.) After the deposition and prior to trial, "she went back through [two] file cabinets" and saw "dozens – of documents" from the Decedent's medical practice. (J.A. 187, 188.) Like Corley, she was not able to identify the purported signature on the Purported Codicil from her familiarity with the Decedent's signature acquired outside of this litigation. She testified that it was common for the Decedent to sign his name with his first two initials and then his last name, (J.A. 194–95), and that he only used initials on bank documents or medical records, (J.A. 195).

Terri Stawinski testified that it was Decedent's habit to sign his name "D.P. Irving," that he signed "Declan" on cards, and that he used initials on office notes and hospital records. (J.A. 212–13.) Ms. Stawinski further testified that despite having previously executed a "Deposition of Witness to Prove Holographic Will" to attest that the handwriting on the Purported Codicil was Decedent's, she did not recognize having previously seen the Purported Codicil when it was presented to her at her deposition a month before trial. (J.A. 213–14.)

Notably, the Decedent's will, and the Stipulation and Property Settlement Agreement were signed "Declan P. Irving." (J.A. 541.) The binder that was admitted as Plaintiff's Exhibit 6 contained copies and originals of Decedent's General Power of Attorney, Special Durable Power of Attorney, and Advance Medical Directive, which were all signed "Declan P. Irving."

Defendants Exhibits 2, 3, 4, and 5 were admitted as exemplars of varying forms of Decedent's signature ("Declan Patrick Irving" on a will, "D. P. Irving" on checks, "Declan" on Christmas cards and notes to his brother) (J.A. 196–203; Supp. App. 70–73, 74, 75–76, 77–80.)

The trial court's finding that the evidence established that "the Decedent used his full name as a signature on formal documents, such as the will" was not plainly wrong and should not be disturbed.

C. The Trial Court did not find that a formal style of signature is required for a holographic writing to be valid under Virginia Code § 64.2-403, and, therefore, did not err. (Assignment of Error II).

Contrary to the Executor's claim, the trial court did not find that a formal style of signature was required under Virginia Code § 64.2-403. Instead, the trial court found that, under the circumstances of this case, the informality of the initials on the Purported Codicil failed to establish that the initials were intended as a signature.

A testator's signing his name without more is not enough. The statute is explicit, "[n]o will shall be valid unless it is . . . signed by the testator . . . ***in such a manner as to make it manifest*** that the name is intended as a signature." *Id*. § 64.2-403 (emphasis added). Something that is manifest is "capable of being easily understood or recognized at once by the mind: not obscure: obvious." *Webster's Third New Int'l Dictionary* 1375 (1993).

With regard to whether the Purported Codicil was signed by the Decedent in such a manner as to make it manifest that the name was intended as a signature, the trial court made the following findings:

- the Decedent "wrote the document,"

- "the evidence circumstantially establishe[d] the date on which the writing in question was written and initialed by the decedent,"

- "there was some evidence of testamentary intent on the face of the document, in that, it mentions the Decedent's will,"

- "the illegible writing . . . appears to be decedent's initials,"

- "there was conflicting evidence concerning whether or not the decedent used his initials as his 'signature,'"

- "most of the testimony came from medical professionals, who testified that the initials were the decedent's signature that they had seen him use,"

- "an accountant, and decedent's tax preparer testified that the writing in question was the decedent's signature,"

- "that there was also evidence that decedent used his full name "Declan P. Irving" as a signature on formal documents, such as the original will and the 'Stipulation and Property Settlement Agreement' from his divorce,"

- the decedent "used a different signature "D.P. Irving" on checks," and,

- "the evidence establishes that the decedent used his full name as a signature on formal documents, such as the will."

(J.A. 540–41.)

These findings are not without evidentiary support and provide an ample basis for the trial court to reject the Executor's claim under § 64.2-403.

D. The Trial Court applied the correct standards of proof to the Executor's alternative claims. (Assignment of Error III).

The Executor's argument that the trial court erroneously applied the clear and convincing standard to his claim under § 64.2-403 is mistaken. The trial court accurately applied the clear and convincing standard to only the Executor's claim under § 64.2-404:

> Having determined that the evidence established that the decedent wrote what is offered by the petitioner as a codicil to the decedent's will, the issue becomes whether or not the writing meets the requirements of law to be a codicil of that will and, ***if not executed in strict compliance with Code 64.2-403, whether it should nevertheless, be found by clear and convincing evidence that the decedent creed the document with testamentary intent pursuant to Code 64.2-404***.

(J.A. 539) (emphasis added). Assignment of Error III should be summarily rejected.

E. The Trial Court did not err in finding the Purported Codicil established only a thought or plan and was precatory and tentative in nature. (Assignment of Error IV).

The trial court's finding that the purported codicil "establishes a thought or plan of the decedent to make a change to his will, and is precatory and tentative in nature" has evidentiary support and therefore cannot be overturned on appeal.

The Purported Codicil uses the words "I wish to remove Patrick named as my son entirely from this will – no benefits." (J.A. 540.) It says "I

wish to remove." It does not say "I hereby remove," or use some similar language expressing more than a thought or plan.

Moreover, the Purported Codicil was not written on a unique sheet of paper, but rather on a numbered binder-divider-tab that he did not remove from the binder. The numbered binder-divider-tab was also not signed in the way the Decedent signed his will or other formal legal documents. Only the Decedent's initials were used. The Purported Codicil was also written over a decade before his death, but the Decedent showed it to no one and told no one about it.[5] And in two more recent writings found in Decedent's wallet after his death, Decedent told the Executor where to find the will, but did not tell the Executor where to find the Purported Codicil.

F. The Trial Court did not err in failing to find decedent's testamentary intent to create a codicil was not clear and manifest on the face of the Purported Codicil. (Assignment of Error V).

The trial court's failure to find testamentary intent on the face of the Purported Codicil is also supported by the record. The trial court found that "there was some evidence of testamentary intent on the face of the document in that it mentions the decedent's will." Having made that finding,

[5] The Executor testified that the Purported Codicil had been found by chance, that the Decedent had told no one about it, that the Decedent had left him no instruction on where to find it, and that the Decedent had left no reference to it in his papers, e-mails, or computer documents. (J.A. 275, 289–90.)

the trial court was permitted to "consider extrinsic evidence to establish or refute the testamentary nature of the instrument." *See Bailey v. Kerns*, 246 Va. 158, 164 (1993) ("[W]hen the face of the instrument contains some evidence of testamentary intent, extrinsic evidence may be admitted to determine whether the instrument is testamentary in nature"). After considering extrinsic evidence for the limited purpose of refuting or establishing testamentary intent, the trial court correctly concluded that testamentary intent had not been established. (*See* J.A. 540–41.)

In addition, *Wolfe v. Wolfe*, 248 Va. 359 (1994), did not create a new test as the Executor claims. Instead, *Wolfe* reaffirmed established law, stating:

> To qualify a writing as a valid codicil to a will, the proponent of the writing must show more than an expression of how a testator wants his property distributed. The proponent of the proposed codicil must show that the writing itself was executed by the testator with the intent that it have testamentary effect

Id. at 360 (citing *McCutchan v. Heizer*, 217 Va. 938, 941 (1977)).

Even though this Court in *Wolfe* found that the writing in question "expresses [the testator's] ***intention*** that his property be equally divided among his three daughters," and that it was signed by the testator, this Court rejected the writing because it did not "reflect [the testator's] intent that it take effect as a testamentary document." *Id*. at 361 (emphasis

added). This Court found that the writing did not "contain any evidence that he intended that letter to operate as his last will or as a codicil to his will." *Id*. at 362. He "did not refer to the letter as a codicil or will, or indicate in any affirmative way that the letter was to be given testamentary effect." *Id*. at 361. This Court ruled similarly in *Smith v. Smith*, 112 Va. 205, (1911) (rejecting the following writing on front page of a book, "'Dec. 24, 1900 Every thing is Lous [testator's widow] G. T. Smith, 314 South Patrick St. Ax Va.'").

Similarly, the trial court here found that the Purported Codicil was not executed by the decedent with the intent that it have testamentary effect. Instead it found that the Purported Codicil only "establishes a thought or plan of the decedent to make a change to his will, and is precatory and tentative in nature." (J.A. 541.)

G. The Trial Court did not err in failing to find that the Executor proved by clear and convincing evidence that the decedent intended the Purported Codicil to constitute either partial revocation of the will or alteration of the will under § 64.2-404. (Assignment of Error VI).

The trial court's finding that the Executor failed to prove testamentary intent to create a codicil under Virginia Code § 64.2-404 by clear and convincing evidence was not without evidentiary support.

The clear and convincing evidence standard is a level of proof greater than a preponderance of the evidence. *See Ballagh v. Fauber Enterprises, Inc.*, 290 Va. 120, 126 (2015). As explained *supra*, the evidence adduced by the Executor was equivocal, conflicting, and unreliable, and fell far below the exacting clear and convincing standard. The trial court did not err in rejecting the Executor's § 64.2-404 claim.

CONCLUSION

The trial court correctly applied settled law to the facts presented in this case and correctly rejected the Executor's claims. There is no error in the trial court's ruling and this case presents no issue of importance that this Court should resolve. The trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on August 7, 2017, the correct number of true and accurate copies of this Brief of Appellee were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format was served upon counsel for the appellant:

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