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, BERNADETTE IRVING, COLM IRVING, AND PATRICK D. IRVING, a/k/a Patrick D. Cahill,

Appellees.

REPLY BRIEF OF APPELLANT

John F. Sawyer (VSB No. 65902)
WOLCOTT RIVERS GATES
Convergence Center V
200 Bendix Road, Suite 300
Virginia Beach, Virginia 23452
(757) 497-6633 (Telephone)
(757) 687-3678 (Facsimile)
sawyer@wolriv.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

SCV: Submitted on 08-18-2017 15:02:16 EDT for filing on 08-18-2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Executor has standing to admit the codicil to probate 1

II. Cahill's effort to create an issue of fact where none exists is to no avail 3

III. The trial court rejected the holograph based upon formality, not the legitimacy of the testator's signature 6

IV. The fact that the trial court found the holograph to be a "thought or plan of the decedent to make a change to his will" establishes testamentary intent 7

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITES

Page(s)

CASES

Bailey v. Kerns,
246 Va. 158 (1993) 4

Clare v. Grasty,
213 Va. 165, 191 S.E.2d 184 (1972) 1

Ferguson v Ferguson,
187 Va. 581 (1948) 4

Grady v. Fauls,
189 Va. 565 (1949) 8

In re Bentley's Will,
175 Va. 456, 9 S.E.2d 308 (1940) 2

In Redford's Adm'r v. Peggy,
27 Va. 316, 1828 Va. LEXIS 20,
6 Rand. 316 (1828) 2

Pilcher v. Pilcher,
117 Va. 356 (1915) 4

Savage v. Bowen,
103 Va. 540 (1905) 6

Savage v. Nute,
180 Va. 394, 23 S.E.2d 133 (1942) 2

Wileman v. Commonwealth,
24 Va. App. 642 (1997) 4, 6

STATUTES

Va. Code § 64.2-403 ..... 4, 7, 8, 9

Va. Code § 64.2-404 8

Va. Code § 64.2-445 2

Va. Code § 8.01-670 1

ARGUMENT

I. The Executor has standing to admit the codicil to probate.

It is an executor's foremost duty to admit the testator's entire will to probate and carry out the testator's intent. Nothing could be more fundamental. As the Court has held, "But as an executor entrusted by his testator with only the Virginia assets of the estate, [executor's] primary and pervading duty was to the testator and the legal directions in his will. Whether [executor] had law which might support his position is not material, since it is the executor's duty to make every effort to carry out the testator's intention." Clare v. Grasty, 213 Va. 165, 191 S.E.2d 184 (1972)(Internal quotations omitted). The notion that an executor is divested of and prohibited from the performance of this fundamental duty upon appeal to this Court is anathema to the law. The Court's narrow standing exception based upon Virginia Code § 8.01-670 is based upon the nature of an "aid and direction" suit. In such an action, the executor affirmatively asserts that the testamentary instrument is ambiguous and moves the court for an interpretation. In other words, the executor comes before the court stating that the testator's intent is unclear and requests aid and direction. The executor takes no position in such an action, he simply lays the matter before the court for its direction. That is not the situation here. The executor did not file an aid and direction suit. The executor performed his core function before the probate clerk to have the will admitted to probate and a

portion of it was rejected. The executor noted an appeal pursuant to Virginia Code § 64.2-445 to the circuit court to admit the omitted portion of the will to probate. That same appeal is now on appeal to this Court. It is in furtherance of the executor's primary duty. Indeed, this signed and dated holographic writing is crystal clear, "I wish to remove Patrick named as my son entirely from this Will – no benefits" [Signature of Testator]. The creation of a prohibition against an executor from probating a will would be a massive extension of the limited "aid and direction" exception, contrary to this Court's decisions, and place into question the fundamental reason why a testator nominates a trusted person to serve as their executor. See See In Redford's Adm'r v. Peggy, 27 Va. 316, 1828 Va. LEXIS 20; 6 Rand. 316 (1828)(Administrator of estate appeals judgment of the trial court regarding admission of a will to probate); In re Bentley's Will, 175 Va. 456, 9 S.E.2d 308 (1940)(Appellant Executor of a purported subsequent will challenged a decree of the Chancery Court which refused to consider the probate of the subsequent will); Savage v. Nute, 180 Va. 394, 23 S.E.2d 133 (1942) (Appellant Executor challenged the decision of the circuit court which approved the jury verdict in favor of appellee finding that the writing admitted to probate was not the true last will and testament of the testatrix). The only right that a testator has is to have his testamentary instruments admitted to probate. If those instruments are ambiguous, then it is the role of the judiciary to interpret them, but it is the role of

the executor to admit the will to probate and the estate, through its executor, is aggrieved when a will is denied probate. The standing argument is a mere effort at deflection from the issue presented; there is a valid holographic writing that has been denied admission to probate.

II. Cahill's effort to create an issue of fact where none exists is to no avail.

Cahill attempts to create a factual issue where none exists throughout his brief. Indeed, he fails to even acknowledge the *de novo* standard of review. The issue presented is a matter of law. Cahill did not present any witnesses. The relevant facts were established by the trial court.

"The Court finds that the decedent also wrote the document dated November 27, 2003, admitted at the hearing on February 18, 2016 as petitioner's exhibit 2." (Appendix, p. 547).

"The evidence circumstantially establishes the date on which the writing in question (Pet.'s Ex. 2) was written and initialed by the decedent." (Appendix, p. 547).

"Most of the testimony came from medical professionals, who testified that the initials were the decedent's signature that they had seen him use. Also, John Conley (sp), an accountant, and decedent's tax preparer and business consultant, also testified that the writing in question was the decedent's signature." (Appendix, p. 548-549).

Accordingly, it is established that the holographic writing is entirely in decedent's handwriting and bears his initials which five disinterested witnesses identified as his signature. The fact that decedent had different forms of his signature is irrelevant as no form of signature is required. The conclusion is inescapable that

this is a valid holograph under Virginia Code § 64.2-403. However, the trial court improperly inserted a formality requirement and disallowed it. Ironically, the trial court cited Bailey v. Kerns, 246 Va. 158 (1993), where the holographic will that was admitted to probate was written on the back of a hardware store receipt, was untitled, and found seven months after the decedent's death in another person's records.[1] As a matter of law, this Court held in Pilcher v. Pilcher, 117 Va. 356 (1915) that initials are sufficient, which is exactly the situation here, and in Ferguson v Ferguson, 187 Va. 581 (1948), that a "simple mark" is sufficient and that "signature" is not restricted to a written name. Five (5) entirely disinterested witnesses all testified that the holographic writing was entirely in testator's hand and bore his signature. While there was testimony that testator had more than one form of signature, all five witnesses were rock solid in their testimony that the holograph bore his signature. (See Brief of Appellant, p. 9-11). Furthermore, the trial court found that the holograph was entirely in testator's handwriting and bore his initials. There is no relevant, material factual dispute presented.

Cahill relies on Wileman v. Commonwealth, 24 Va. App. 642, 647 (1997) in a failed effort to discredit the testimony of a wholly disinterested lay witness. It is entirely misplaced and misrepresents the nature of their testimony. Wileman dealt

[1] The instant holograph was found in the estate planning binder associated with the will.

with expert testimony by persons who were not otherwise familiar with the handwriting at issue. All five witnesses in this matter testified that they were familiar with testator's handwriting based upon years of experience in working with him in the medical field, or in the case of John Corley, serving as his accountant. Indeed, no expert witnesses were presented and the trial judge clarified the situation on the record with regard to Mr. Corley's testimony;

MR SAWYER: I am not putting him forth as an expert, Judge.

THE COURT: Right. I thought he said - - my understanding of what the witness said was he looked at that when it was sent by Mr. Sawyer, recognized it as the decedent's signature, but just to be sure he went back and looked at the decedent's signature in his office to make sure his recollection was correct. So I don't know that he compared it, he just wanted to make sure that his opinion was right about what he is being shown. Am I misstating what you said?

THE WITNESS: That's correct.

(Appendix, p. 180-181).

John Corley went on to identify the signature just as the four other disinterested witnesses did,

Q. And whose signature is it?

A. That's Declan Irving's signature.

Q. Any doubt in your mind?

A. No.

(Appendix, p. 181-182).

The Wileman case is completely inapplicable and its citation inexplicable. This was lay testimony, not expert testimony, and the samples were not provided by counsel but were records held by the lay witness himself which he used to confirm his recollection. The trial court found that the holographic instrument bears testator's initials and all five witnesses identified those initials as his signature. There is no factual dispute here, only a misapplication of the law.

III. The trial court rejected the holograph based upon formality, not the legitimacy of the testator's signature.

The law is clear that no form of signature is required, a mere mark or initials are sufficient. Yet the trial court found, "The Court finds that the evidence establishes that the decedent used his full name as a signature on formal documents, such as a will." (Appendix, p. 549). Holographs by their very nature are informal. This is a classic instance of form over substance and in direct contravention of the law, the fundamental purpose of which is to honor the testator's intent. It is a supplement of the statutory requirements that increases the difficulty of the transaction to such an extent as to "practically destroy the right of the uninformed layman to dispose of his property by will." Savage v. Bowen, 103 Va. 540 (1905)(See also Brief of Appellant at p. 12-13). The evidence is clear and uncontroverted that the holograph is signed and dated by the testator. No other formality is required.

IV. The fact that the trial court found the holograph to be a "thought or plan of the decedent to make a change to his will" establishes testamentary intent.

Testamentary intent is established and clear on the face of the instrument. The trial court held, "there is some evidence of testamentary intent on the face of the document, in that, the document mentions the decedent's will." (Appendix, p. 548).[2] But the document is clear on its face and the trial court acknowledged as much. The trial court's finding that the decedent had a "thought or plan to make a change to his will" is a finding that testamentary intent is present. His "thought or plan" is established, yet the trial court did not honor it because, "testamentary intent to create a codicil has not been established by clear and convincing evidence." (Appendix, p. 549). This is circular reasoning and defeats the purpose of a holographic instrument. In essence, the holding below is that it is clear what the testator wanted to do, it just is not established under a clear and convincing standard that he intended to do it in this instrument. But we need only break down the elements, all of which are present; (1) The technical requirements of VA Code § 64.2-403 are established as the writing is entirely in decedent's handwriting and bears his signature; (2) The will is established and is referenced in the holographic codicil; (3) The express language of the codicil provides for a partial revocation or

[2] As an aside, this finding alone is enough to overturn the probate clerk's stated reason for rejecting the holographic codicil, that it was not clear whether the codicil modified this particular will.

amendment of the will as drafted; (4) The expressed intent in the holographic codicil is inconsistent with the disposition of property under the will. Finally, as a general rule, people do not write down mere thoughts or plans let alone sign and date them. Under the "thought or plan" theory, any valid holograph can be undermined and the testator's intent cast aside. That is not the test and not the law.

The "precatory in nature" position is equally unjustifiable. The basis of this argument is the use of the word "wish" as opposed to use of the word "hereby". No one other than lawyers uses "hereby" and holographic instruments by definition are not lawyer prepared instruments. Furthermore, we need only look at the face of the will to find the word "wishes". (Appendix, p. 376). Right on the first page, the first paragraph of any size is entitled, "Memorandum of Wishes." Id. The testator's intent is clear and it must be followed.

Finally, the clear and convincing standard is referenced in the trial court's letter opinion in conjunction with VA Code § 64.2-403 and testamentary intent and the trial court cited a circuit court decision in support of that standard from 1980, long before the enactment of VA Code § 64.2-404 which is the only section that carries a clear and convincing standard. The appropriate standard for Section 64.2-403 and its accompanying testamentary intent is by a preponderance of evidence. Grady v. Fauls, 189 Va. 565 (1949). The evidence is one-sided and overwhelming that the holographic codicil was handwritten, signed and dated by the testator. It

clearly references the will and alters a disposition contained therein. The only relevant extrinsic evidence had to do with the "named as my son" language as the remainder of the codicil requires no interpretation. Cahill is not the testator's son though he had been named as such in the will.

CONCLUSION

The testator did not have to hire a lawyer to modify his will. He had to meet the requirements of VA Code § 64.2-403 which he did. He expressed his wishes clearly and concisely and signed the instrument. He did so shortly before he left this country and returned to his native Ireland for a protracted period of time. This is not some reminder note to himself to see a lawyer upon his return. He stated his wish clearly and put his affairs in order, then he flew to Ireland. It is not ours to second guess his intentions, only to honor them.

CERTIFICATE OF SERVICE

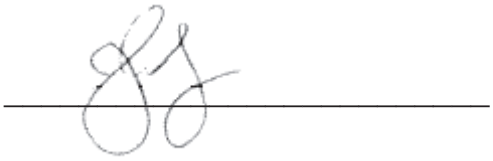
Pursuant to Rule 5A:19(f), I certify that, on August 18th, 2017, an electronic copy of the Reply Brief of Appellant was filed, via VACES, and three paper copies of the same were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email upon:

George Bowles, Esquire
Joseph R. Pope
Williams Mullen
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462-3035
gbowles@williamsmullen.com
jpope@williamsmullen.com

Counsel for Appellee

Carol Divito
12 Lambourne Wood
Brennanstown Road
Cabinteely
Dublin 18
IRELAND
cirving31@yahoo.com

Bernadette Irving
The Meadows
Feighcullen
Rathangan
Co. Kildare
Ireland
bernadetteirving@yahoo.com

Colm Irving
27 Ormond Ave
Hampton, Middlesex TW12 2RY
Great Britain
colmjfi@gmail.com

This Reply Brief of Appellant contains 2,216 words, which complies with the word limitation. Counsel for the Appellant respectfully requests oral argument.