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.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The matter before the Court is a Complaint to Establish a Codicil to a Will brought pursuant to VA Code § 64.2-445. Alternative relief was sought to establish the Holographic Codicil pursuant to VA Code § 64.2-404. This action was instituted subsequent to the qualification of Donal A. Irving as the Executor of the Estate of Declan Patrick Irving ("Decedent"), who was his brother. On February 23, 2015, Donal A. Irving ("Executor") appeared before the Probate Clerk of the Circuit Court for the City of Chesapeake to have Decedent's testamentary documents admitted to probate. Executor presented Decedent's attorney prepared Last Will and Testament as well as a Holographic Codicil to the Last Will and Testament for admission to probate. Two independent, wholly disinterested witnesses provided sworn statements that the hologrpahic codicil was written entirely by Decedent and that it bore Decedent's signature. The Probate Clerk admitted the attorney prepared Last Will and Testament to probate but rejected the Holographic Codicil by Order entered February 23, 2015. (Appendix, p. 51). On March 24, 2015, the Executor filed an appeal of the Probate Clerk's rejection Order with the Circuit Court for the City of Chesapeake pursuant to VA Code § 64.2-445. (Appendix, p. 1). In the alternative, the Executor prayed the Court admit the Holographic Codicil to probate pursuant to VA Code § 64.2-404 which was also timely filed.

The matter came on for trial without a jury on February 18 and 19, 2016, in Chesapeake Circuit Court. Five (5) disinterested witnesses testified that the Holographic Codicil was wholly in Decedent's handwriting and signed by him. No witnesses or evidence were presented to refute that the writing was entirely in Decedent's handwriting and signed by Decedent.

Seven (7) months after the conclusion of the trial, on September 2, 2016, the trial court issued a letter opinion in which it found that the Holographic Codicil was written entirely by Decedent and bore his "informal" signature but held nonetheless that the Holographic Codicil did not meet the requirements of VA Code § 64.2-403. (Appendix, p. 538). On October 19, 2016, the Final Order was entered which incorporated the trial court's letter opinion. (Appendix, p. 542).

STATEMENT OF FACTS

The facts of the case are clear and uncontested. Declan Patrick Irving ("Decedent") executed a Last Will and Testament on November 28, 2000 ("Will"). (Appendix, p. 10). The Will was prepared by legal counsel. On November 17, 2003, Decedent executed a holographic codicil to the Will written entirely in his own hand and he dated it and signed it ("Holographic Codicil"). The Holographic Codicil reads,

> 11/17/03
> "I wish to remove Patrick named as my son entirely from this Will – no benefits."
> [Signature of Decedent]

(Appendix, p. 400, 425).

The testamentary intent of the Holographic Codicil is clear on its face and requires no interpretation. The handwriting and signature were established by five (5) disinterested witnesses who knew and worked with Decedent for many years and testified that they were familiar both with his handwriting and signature. Four of the disinterested witnesses, Darlene Joyner French, Christine Mitchell, Shelly Joyner, and Terri Stawinsky, were former colleagues of the Decedent in the medical field. (Appendix, p. 150-212). The fifth disinterested witness, John Corley, was the Decedent's long time business consultant and tax preparer who also identified Decedent's handwriting and signature without any doubt in his mind. (Appendix, p. 178-182). The evidence of Decedent's handwriting and

signature is unrefuted, no witnesses were offered in challenge, and the Court found the Holographic Codicil to be in Decedent's handwriting and to bear his signature, albeit an informal form of his signature, in its Letter Opinion. (Appendix, p. 539)("Having determined that the evidence established that the decedent wrote what is offered by the petitioner as a codicil to decedent's will"); (Appendix, p. 540)("The evidence circumstantially establishes the date on which the writing in question (Pet.'s Ex. 2) was written and initialed by the decedent."). The Letter Opinion further concludes, "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 Co[r]ley, an accountant, and decedent's tax preparer and business consultant, also testified that the writing in question was the decedent's signature." (Appendix, p. 540-541). There was no testimony to the contrary. All five disinterested witnesses identified and confirmed the handwriting and signature to be that of the Decedent. Accordingly, all of the factual elements of VA Code § 64.2-403 are established, i.e. handwriting and signature established by at least two (2) disinterested witnesses. No additional evidence is required for admission of the Holographic Codicil to probate.

The contextual backstory only became clear through the discovery process. Decedent was a proud physician and a very private individual. He was single and he did not speak about his personal life or affairs. (Appendix, p. 250-251).

Pursuant to the terms of his Will, Decedent left his estate, "to those of the following persons who are living on the date of my death, in equal shares: my parents, my brothers, my sisters, and my children." (Appendix, p. 376). Decedent's parents predeceased him and his four siblings, two brothers and two sisters, survived him. (Appendix, p. 248). Also, in the Will, Patrick D. Irving was listed as Decedent's only child. (Appendix, p. 376).

The language of the Holographic Codicil is curious in that it states a clear intent to remove Patrick ***named as my son*** entirely from this Will – no benefits. (Emphasis added). (Appendix, p. 400). Over the course of discovery, this language was placed in context. Patrick D. Irving is not the biological child of Decedent nor was he adopted by him and, other than very briefly after his birth when Patrick's mother and Decedent were briefly married, Decedent and Patrick Irving, whose true name is Patrick Cahill, never had a relationship. (Appendix, p. 74, 76-77). In that context, the "named as my son" language becomes clear. In all other respects, the intent of the codicil is clear and it requires no explanation beyond its four corners.

ASSIGNMENTS OF ERROR

I. The trial court erred in holding that the holographic writing at issue did not meet the requirements of Virginia Code § 64.2-403 in that the evidence is clear and uncontroverted that the writing is entirely in the decedent's handwriting and signed by the decedent per the testimony of more than two wholly disinterested witnesses. (Final Order, Appendix, p. 542, 545).

II. The trial court erred in holding that a formal style of signature is required for a holographic writing to be valid under Virginia Code § 64.2-403. (Final Order, Appendix, p. 542, 545).

III. The trial court erred in holding that the burden of proof is clear and convincing evidence rather than preponderance of the evidence with regard to the establishment of a holographic writing. (Final Order, Appendix, p. 542, 545).

IV. The trial court erred in holding that the holographic writing was a "thought or a plan" to make a change to his will rather than giving it effect and holding that it speaks as of the time of death. (Final Order, Appendix, p. 542, 545).

V. The trial court erred in holding that decedent's testamentary intent was not clear and manifest on the face of the holographic writing. (Final Order, Appendix, p. 542, 545).

VI. Alternatively, the trial court erred in holding that the requirements of Virginia Code § 64.2-404 were not established by clear and convincing evidence. (Final Order, Appendix, p. 542, 545).

STANDARD OF REVIEW AND STANDING

The matter before the Court is a question of law, and like all questions of law, it is reviewed de novo. See Kiddell v. Labowitz, 284 Va. 611, 733 S.E.2d 622 (2012). The facts are established and uncontroverted that the Holographic Codicil is written entirely by the Decedent and bears the signature of the Decedent. The de novo standard applies to all Assignments of Error.

The Appellant in this matter is Donal A. Irving, in his capacity as Executor of the Estate of Declan P. Irving ("Executor"), and the Executor has standing to bring this suit. The Executor filed this action in circuit court as an appeal of the probate clerk's order to refuse to admit the Holographic Codicil to probate pursuant to Virginia Code § 64.2-445. No issue was raised below with regard to the Executor's standing to file the circuit court appeal. The issues and parties remain unchanged on appeal to this Court.

The Executor stands in the shoes of the Decedent and it is his foremost duty to see that the Decedent's testamentary documents are admitted to probate and honored. This Court has a long and well established history of hearing appeals by an Appellant Executor or Appellant Administrator where a testamentary document was not admitted to probate. 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). That is exactly the situation in the instant matter. This is neither a declaratory judgment action nor an action for aid and direction and any authority regarding standing of executors in such matters is irrelevant and inapplicable. An interpretation of the Holographic Codicil is not sought. The Executor stands in the shoes of the Decedent who is aggrieved that his testamentary document, the Holographic Codicil, has been denied admission to probate in contravention of the applicable statutes and binding precedent of this Court.

AUTHORITIES AND ARGUMENT

I. The trial court erred in holding that the holographic writing at issue did not meet the requirements of Virginia Code § 64.2-403 in that the evidence is clear and uncontroverted that the writing is entirely in Decedent's handwriting and signed by Decedent per the testimony of more than two disinterested witnesses. (Final Order, Appendix, p. 542, 545).

The testimony and evidence presented at trial far exceeded the requirements to establish a valid holographic writing. The relevant provision of VA Code § 64.2-403 provides,

> B. A will wholly in the Decedent's handwriting is valid ***without further requirements***, provided that the fact that a will is wholly in the Decedent's handwriting and signed by the Decedent is proved by at least two disinterested witnesses.

VA Code § 64.2-403 (Emphasis added).

Five (5) disinterested witnesses testified at trial that the Holographic Codicil was wholly in the Decedent's handwriting and that it was signed by Decedent. Darlene French Joyner testified that as a nurse she worked with Decedent for many years at Chesapeake General Hospital and she was hired by Decedent to work part time in his office (Appendix, p. 150-151). She testified that she worked with him in a time before computers or electronic medical records (EMR's) so she saw his handwriting every day. (Appendix, p. 151-152). She testified that she had seen his handwriting "thousands of times" and that she was "extremely familiar" with it. (Appendix, p. 152). When presented with the Holographic Codicil, she identified

that it was entirely in his handwriting and that it bore his signature. (Appendix, p. 152-154). On cross-examination, she further identified and confirmed Decedent's signature. (Appendix, p. 156-157). She further testified of the importance of this style of his signature on medical documents he signed and that it was "legally required" in the medical field. (Appendix, p. 163-164). Christine Mitchell testified that she worked for Decedent from 1992 through 2002 as a medical secretary. (Appendix, p. 172). She testified that she saw his handwriting every day and saw his signature multiple times every day and that she was quite familiar with both. (Appendix, p. 172-173). She identified both his handwriting and signature on the Holographic Codicil and testified that the signature was a "pretty typical" signature for Decedent. (Appendix, p. 173-174). She testified that there was no doubt in her mind that the Holographic Codicil was in Decedent's handwriting and bore his signature. (Appendix, p.173-174, 177-178). Those two witnesses alone are sufficient to satisfy the requirements of Section 64.2-403 with regard to handwriting and signature of the Decedent. However, the Executor presented three (3) additional disinterested witnesses who all similarly verified both Decedent's handwriting and signature on the Holographic Codicil. John Corley, Decedent's accountant since the 1980's, identified Decedent's handwriting and signature on the Holographic Codicil without any doubt or reservation. (Appendix, p. 181-182). Shelly Joyner, who also worked with Decedent in the

medical field where she became very familiar with his handwriting and signature over the years, identified both his handwriting and signature on the Holographic Codicil. (Appendix, p.190-191). Finally, Terri Stawinski, who also worked with Decedent in the medical field as a medical biller and medical courier, testified that she saw his handwriting daily and that she saw his signature "thousands of times" and identified the Holographic Codicil as being entirely in Decedent's handwriting and bearing his signature. (Appendix, p. 207-211). This testimony is unrebutted, no witnesses or evidence having been presented to the contrary. Accordingly, the evidence is clear and uncontroverted that the Holographic Codicil is written entirely by Decedent and signed by Decedent. The trial court's finding that the requirements of Section 64.2-403 were not met is clear error.

II. The trial court erred in holding that a formal style of signature is required for a holographic writing to be valid under Virginia Code § 64.2-403. (Final Order, Appendix, p. 542, 545).

The trial court erred in holding that a particular form of signature is required for a holographic writing to be a valid instrument per Section 64.2-403. The trial court's holding is in direct conflict with this Court's precedent that no particular form of signature is required. As long as it is identified as the Decedent's signature, a simple mark is sufficient. Ferguson v. Ferguson, 187 Va. 581 (1948)("The meaning of "signature" is not restricted to a written name"). The trial court found that the holographic writing was "initialed by the decedent."

(Appendix, p. 540). The trial court confirmed that the testimony of the medical professionals and John Corley, Decedent's accountant, was that, "the initials were the decedent's signature that they had seen him use." (Appendix, p. 540-541). In Pilcher v. Pilcher, 117 Va. 356, 84 S.E. 667 (1915), this Court held that a holographic will to which the Decedent affixes the initials of his name at the end of the writing is sufficiently signed under this section. The law is clear. Nevertheless, the trial court rejected Decedent's signature based upon the further requirement that Decedent used a more formal signature on formal documents, such as a will. (Appendix, p. 541). In doing so, the trial judge inserted a ***further requirement*** that directly conflicts with the clear language of Section 64.2-403 and is contrary to this Court's precedent.

> The purpose of the statutory requirements with respect to the execution of wills was to throw every safeguard deemed necessary around a Decedent while in the performance of this important act, and to prevent the probate of a fraudulent and supposititious will instead of the real one. To effectually accomplish this, the statute must be strictly followed. ***It is, however, quite as important that these statutory requirements should not be supplemented by the courts with others that might tend to increase 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.***
> As said by Judge Moncure, in the case of *Parramore v. Taylor*, 11 Gratt. 220: "The law of wills should be plainly written, and no room should be left for doubt or implication. It is a law of almost universal application, and must often be acted on by unlearned persons in a situation which precludes the possibility of obtaining professional aid. The most important family settlements which are often postponed to the last day or hour of life, may depend upon an observance of its requisitions. ***How important, then, that it should impose no needless***

> ***requisition; none that is not productive of some substantial good***; and that it should plainly express what it means."

Savage v. Bowen, 103 Va. 540, 49 S.E. 668 (1905)(Emphasis added).

The signature on the Holographic Codicil was identified as that the Decedent by five (5) disinterested witnesses. While it is true that Decedent used different signatures; that is irrelevant. All that is required is that the signature be that of the Decedent as verified by at least two disinterested witnesses. Further, there is no allegation of fraud or undue influence in this case. The Holographic Codicil clearly meets the statutory requirements of Section 64.2-403 and the trial court erred when it inserted a further requirement into the statute and imposed a ***needless requisition*** that a more formal signature is required.

III. The trial court erred in holding that the clear and convincing evidence standard rather than the preponderance of the evidence standard applied with regard to the establishment of a holographic writing. (Final Order, Appendix, p. 542, 545).

The burden of proof to establish a holographic writing under VA Code § 64.2-403 including the establishment of testamentary intent is by a preponderance of the evidence. The trial court's use of the clear and convincing standard is clear error. This Court has held that the applicable standard of proof on a proponent to establish the validity of a will is a preponderance of the evidence. Grady v. Fauls, 189 Va. 565, 569, 53 S.E.2d 832 (1949); see also 3 Page on Wills § 29.16, at 521 (2004 & Supp. 2016)("The burden of proof which rests upon the

proponent to establish the valid execution of the will, is satisfied if the essential facts are established by a preponderance of the evidence."). The clear and convincing standard is only applicable to Section 64.2-404 as set forth in that section. The trial court committed clear error in its application of the higher evidentiary standard to the requirements of Section 64.2-403.

IV. The trial court erred in holding that the holographic writing was a "thought or a plan" to make a change to his will rather than giving it effect and holding that it speaks as of the time of death. (Final Order, Appendix, p. 542, 545).

The law is clear that wills speak as of the time of death. Pursuant to VA Code § 64.2-414, "A will shall be construed . . . to speak and take effect as if it had been executed immediately before the death of the Decedent. . . . . Every will reexecuted or republished, or revived by any codicil, shall be deemed to have been made at the time it was reexecuted, republished, or revived." The Court held in Schilling v. Schilling, 280 Va. 146, 695 S.E.2d 181 (2010), that

> "[a] will is an ambulatory instrument, not intended or allowed to take effect until the death of the maker. . . . While he lives his written will has no life or force, and is not operative or effective for any purpose." *Timberlake v. State-Planters Bank of Commerce & Trusts*, 201 Va. 950, 957, 115 S.E.2d 39, 44 (1960). "The death of the maker for the first time establishes the character of the instrument." *Spinks v. Rice*, 187 Va. 730, 740, 47 S.E.2d 424, 429 (1948) (quotation marks omitted).

A will speaks at the time of death. The trial court plainly erred when it held 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." (Appendix, p. 541)(Emphasis added). If a writing meets all the requirements of Section 64.2-403, as it does here, then it is a valid holograph that speaks as of the time of death. The whole point of holographs is to prevent exactly what has occurred here which is the imposition of the requirement that a Decedent must go see a lawyer for his ***thought or plan*** to be given effect. The Holographic Codicil is not a thought or plan, it is a valid holograph consistent with all requirements of VA Code § 64.2-403 and this Court's precedent. It cannot be ignored or set aside, and the trial court committed clear error in doing so.

V. The trial court erred in holding that Decedent's testamentary intent to create a codicil was not clear and manifest on the face of the holographic writing. (Final Order, Appendix, p. 542, 545).

The trial court erroneously disregarded Decedent's testamentary intent based upon the form of the signature he used and upon extrinsic evidence. This Court established the test for the determination of testamentary intent in a codicil in Wolfe v. Wolfe, 248 Va. 359, 448 S.E.2d 408 (1994). With the handwriting and signature requirements of Section 64.2-403 met, the examination turns to the four corners of the writing. "Testamentary intent is determined by looking at the document itself, not from extrinsic evidence. Whether a particular writing evidences testamentary intent must be determined on a case-by-case basis." Id. (Internal citations omitted). First, does the writing contain express language of

partial revocation or amendment. Second, provided the express language of partial revocation or amendment is present, is it accompanied by an intent to effect a testamentary disposition. Finally, is the expressed intent inconsistent with the disposition of property under the will. Here, these elements are clearly met. The Will leaves an interest to Patrick Irving. The codicil (1) amends the Will by removing Patrick and (2) that amendment affects the disposition of property under the Will. Third, the codicil is inconsistent with the terms of the Will.

> 11/17/03
> "I wish to remove Patrick named as my son entirely from this Will – no benefits."
> [Signature of Decedent]

All of the elements of the Wolfe test are met. The Decedent's intentions cannot simply be set aside or ignored. Based upon the clear language of the Holographic Codicil, there is no need or reason to turn to extrinsic evidence to interpret it. It is clear just from a review of the Holographic Codicil what the Decedent's wishes are and the core principal of Virginia law is to honor that intent.

VI. Alternatively, the trial court erred in holding that the requirements of Virginia Code § 64.2-404 were not established by clear and convincing evidence. (Final Order, Appendix, p. 542, 545).

All of the foregoing arguments are equally applicable to VA Code § 64.2-404. That section provides in relevant part,

> Although a document, or a writing added upon a document, was not executed in compliance with § 64.2-403, the document or writing shall be treated as if it had been executed in compliance with § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, ...

The evidence establishes that the Holographic Codicil was found in a binder provided by the law firm that prepared estate planning documents for Decedent several years before. (Appendix, p. 262-265). In the intervening years, Decedent had returned to Ireland and lived abroad for several years, only returning to receive cancer treatment shortly before he died. (Appendix, p. 253). In that binder, he wrote this Holographic Codicil. There is no other Will to which this Holographic Codicil could apply and none has been alleged. The Patrick referred to in the Holographic Codicil as, "Patrick named as my son" can only refer to the Patrick Irving, whose true name is Patrick Cahill, referred to as his only child in the Will. The intent is clear and manifest. While there is no reason to reach Section 64.2-404 as all of the requirements of Section 64.2-403 are met, this argument is preserved and the evidence is clear and uncontroverted. The only opposition is

that it was merely a "thought or plan" to change his will and not an actual change itself based upon timing and unnecessary formality. The evidence is clear and convincing and Decedent's intent must be honored.

CONCLUSION

Pursuant to Virginia Code § 64.2-403, Decedent executed a valid codicil. Pursuant to Virginia Code § 64.2-414 and this Court's clear and binding precedent, the Holographic Codicil speaks as of the time of death. It is not some thought or plan to do something in the future through a lawyer, it is a clear direction that must be followed and honored. The handwriting and signature are established and one need not look beyond the four corners of the instrument to understand Decedent's clear intent. Alternatively, all of the requirements of Section 64.2-404 are also established. The law is clear that Decedent's will must be done.

DONAL A. IRVING, IN HIS CAPACITY
AS EXECUTOR OF THE ESTATE OF
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CERTIFICATE OF SERVICE

Pursuant to Rule 5A:19(f), I certify that, on July 12th, 2017, an electronic copy of the Brief of Appellant and Appendix were 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 Brief of Appellant was served, via email, and an electronic copy on CD of the Brief of Appellant and Appendix were served, via UPS Ground Transportatin, upon:

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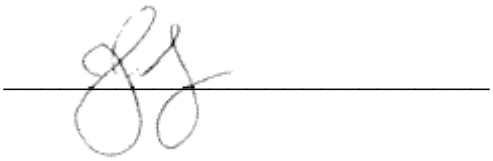
This Brief of Appellant contains 4,172 words, which complies with the word limitation. Counsel for the Appellant respectfully requests oral argument.