In The

Supreme Court of Virginia

RECORD NO. 170521

JAMES D'AMBROSIO,

Appellant,

v.

JANE WOLF and ELECTRA D'AMBROSIO,

Appellees.

REPLY BRIEF OF APPELLANT

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ARGUMENT

In 2014 Defendants filed a Petition for Appointment of a Guardian and Conservator (the "2014 Petition"). (JA 177-83). In their Petition, Defendants principally sought a declaration that two (2) documents were void: the 2013 General Power of Attorney executed in September 2013 and the 2014 Advance Medical Directive executed in May 2014. *Id*.

I. The Execution of Decedent's Last Will and Testament (the "Will") in February 2014 Involves a Separate and Distinct Transaction or Occurrence.

The purpose, language and intent of the three documents (i.e. the Will, the Power of Attorney and Advance Medical Directive) are distinct. (JA 9-15, 51-58, 60-71). In deciding what constitutes a single transaction or occurrence, a court must determine "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit." *Funny Guy*, *LLC v. Lecego*, *LLC*, 293 Va. 135, 154–55 (2017). Frankly, whether "discovery [was] taken by [Plaintiff] about the 2014 Will" during the course of the 2014 Petition does not alter this analysis. (Appellees' Brief P. 18).

Instead, the determination whether the Decedent had capacity to sign each document involves separate and distinct inquiries. Each document was signed as part of a separate transaction, with a different motivation,

and to accomplish different goals. (JA 9-15, 51-58, 60-71). Similarly, the documents do not arise out of the same occurrence. The documents were signed at different times, with different witnesses, and as the Decedent's health and capacity fluctuated throughout the final years of her life. *Id*. Several months separated the execution of each document. *Id*. Finally, the validity of the three (3) separate documents do not arise from the same conduct. The capacity of the decedent and the influence asserted over her during the execution of each document are all distinctly independent. Defendants incorrectly attempt to paint a broad picture, wherein the capacity of the Decedent remained static over approximately two (2) years. This simply is not the case. The conduct giving rise to the validity of the Power of Attorney executed in September 2013 was the capacity of Nancy D'Ambrosio, at that time, and the influence asserted over her, at that time. The same is true for the other documents. Thus, the validity of the Will remains a separate inquiry from that of any other document.

Further, to this effect Plaintiff has never assumed inconsistent positions. Notably, Defendants asserted that the Decedent lacked testamentary capacity with respect to the Power of Attorney and Advance Medical Directive, but that she maintained capacity with respect to the Will. Plaintiff has simply maintained the opposite of this, based upon the

dynamic and fluctuating nature of capacity determinations and the Decedent's health. Because Plaintiff has not asserted inconsistent positions, his claims are not barred by judicial estoppel. The Circuit Court even seems to have acknowledged this point, stating that "[t]hese positions are not, however, fatally inconsistent [. . .] [t]he status of a person's mental capacity can depend on the timing and circumstances of the particular instrument at issue." (JA 698).

II. Plaintiff Could Not Have Challenged the Validity of the Will.

Defendants contend that Plaintiff could have challenged the Will either as the Decedent's attorney-in-fact or as a beneficiary under the Will. While it is true that the 2013 Power of Attorney named Plaintiff as attorney-in-fact, it does not follow that he maintained standing to challenge the Will. Defendants principally rely upon Va. Code Ann. § 64.2-1632 for this proposition. (Appellees' Brief P. 22-23).[1]

A. Va. Code Ann. § 64.2-1632 Does Not Confer Standing.

Va. Code § 64.2-1632 provides that:

> Unless the power of attorney otherwise provides, language in a power of attorney granting general authority **with respect to estates, trusts, and other beneficial interests** authorizes the agent to:

[1] This position was first raised in Appellees' Brief, and was not considered by the trial court.

> Initiate, participate in, submit to alternative dispute resolution of, settle, oppose, or propose or accept a compromise with respect to litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal. (emphasis added).

However, "estate, trust, or other beneficial interest" is defined as a "trust, probate estate, guardianship, conservatorship, escrow, or custodianship or a fund **from which the principal is, may become, or claims to be entitled to a share or payment**." *Id*. (emphasis added). While an agent may have authority to engage in litigation over a will under which the principal stands to obtain an inheritance, this statute does not authorize, discuss, or relate to the present scenario. That is, this statute does not confer any authority on an agent to challenge the validity of the principal's own will (i.e. a document that provides for the distribution of the principal's assets).

B. In Either Capacity, Plaintiff Was Not an Interested Party.

Defendants further posit Plaintiff could have challenged the Will in the same way he sought declaration of his rights under the 2013 Power of Attorney. (Appellees' Brief P.21). The difference between these documents, however, is readily discernable. As discussed in Plaintiff's Opening Brief, only an "interested party" capable of asserting a justiciable controversy has

standing to challenge a will. (Appellant's Brief P.11-21). Again, the Will was not operative or in effect, for any purpose, at the time of the 2014 Petition. Because no rights accrue or vest in any person upon the signing of a will, none of the parties had standing to challenge the Will in 2014. "A hypothetical or abstract interest is insufficient to confer standing to bring a declaratory judgment action." *Mosher Steel-Virginia v. Teig*, 229 Va. 95, 100 (1985). In contrast, the 2013 Power of Attorney did create actual vested rights in Plaintiff (e.g. the ability to pay bills, file taxes, etc.). Because this interest was not hypothetical or abstract, there existed standing to assert claims with respect to its legitimacy.

C. <u>The Decedent Cannot Challenge Her Own Will.</u>

Next, Defendants' propose that Plaintiff, as Nancy D'Ambrosio's agent, could have challenged the Will. This position would result in the absurd conclusion that a testator's interest in a will permits that testator to challenge the will's validity during her own life. Instead, a testator or attorney-in-fact could simply rescind or destroy the document, thus highlighting the ambulatory nature of an inoperable document. Only upon the conclusion of the 2014 Petition was a conservator appointed for Nancy D'Ambrosio. (JA 82-86). Accordingly, she still maintained control and direction of her assets throughout the duration of the 2014 Petition, or, at a

minimum was not deemed to be incapacitated until that time. Thus, the prospective interests set forth in the Will were still speculative and insufficient to create a justiciable controversy, as such future interests could have been modified or revoked by Nancy D'Ambrosio. Defendants seem to acknowledge this fact, stating "Nancy, in her own right, would have had the ability to void the 2014 Will." (Appellees' Brief P. 21).

III. The Decedent's Capacity During the Execution of the Will Has Never Been Determined.

Collateral estoppel is a narrower doctrine than claim preclusion, as it applies only to issues that were actually litigated. *Winchester Neurological Consultants*, *Inc. v. Landrio*, 74 Va. Cir. 480 (2008). Nevertheless, Defendants argue that "Nancy's capacity and the 2014 Will itself were very much part of the 2014 Case." (Appellees' Brief P. 25.) There exists no pleading, transcript or other support for the proposition that the Decedent's capacity, and the influences asserted upon her, in February 2014 was ever decided. It was not. Again, the time at which a will is executed is the vital time that mental capacity must exist. *Forehand v. Sawyer*, 147 Va. 105, 121 (1927). Thus, whether the Decedent had capacity or was unduly influenced during the Will signing on February 7, 2014 is entirely independent of her capacity or the undue influence asserted on September 9, 2013 or May 31, 2014. That issue (i.e. the Decedent's capacity on

February 7, 2014) was never litigated or determined. *See e.g. Hare v. Simpson*, 621 F. App'x 748, 754 (4th Cir. 2015) (explaining that an issue is "actually litigated" when it is "properly raised, submitted for determination, and then actually determined"). Because this matter was never submitted for determination or actually determined, it is not barred by collateral estoppel.

CONCLUSION

For the reasons stated above, Appellant respectfully requests this Court to reverse the decisions of the Circuit Court, deny the plea in bar, and remand for further proceedings.

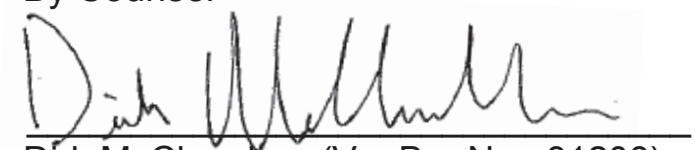
ORAL ARGUMENT REQUESTED

Plaintiff requests oral argument for all matters addressed herein.

Dated: November 27, 2017

Respectfully submitted,
JAMES D'AMBROSIO

By Counsel



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CERTIFICATE

Pursuant to Rule 5:26 of the Supreme Court of Virginia, I hereby certify the following:

1. The Appellant, James D'Ambrosio, is represented by:

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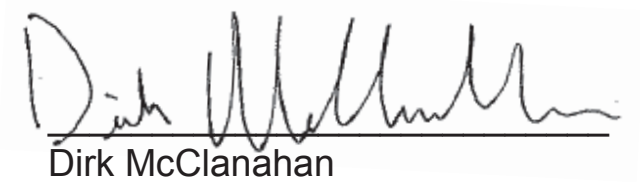
3. I am causing three (3) copies of this Reply Brief of Appellant to be hand-filed on this date with the Clerk of the Supreme Court, and an electronic copy of the same to be filed, via VACES. On the same day, one (1) electronic copy of the Reply Brief of Appellant was served, by email to counsel for Appellees at the address shown above.

4. Counsel for Appellant desires to state orally and in person to this Court the reasons why this Brief should be granted.



Dirk McClanahan

Date: November 27, 2017