In The

Supreme Court of Virginia

RECORD NO. 170747

ROBERT LEE CANODY, II,

Appellant,

v.

CHERYL A. HAMBLIN and DEBRA CANODY,

Appellees.

BRIEF OF APPELLEE CHERYL A. HAMBLIN

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

Comes now, Cheryl A. Hamblin, Appellee, by counsel, and in response to Robert Lee Canody, II's Opening Brief in support of his Appeal, submits her Brief in Opposition pursuant to Rule 5:28 of Rules of Supreme Court of Virginia requesting that the opinion of the trial court be upheld and deny the relief requested in this appeal.

STATEMENT OF CASE

This matter arises from the Order of the Clerk of the Circuit Court of Nelson County ("Clerk") upon her denial to probate the purported will of Robert Lee Canody ("Will"). (App. Vol. I, p. 1) (App. Vol. II, pp. 138-140).[1] The Clerk noted that the type-written date of the document varied from the hand-written date of the document and held that the witnesses' names must be contained or set out in the notarial language added by the notary. The Will is not self-proving. Instead of calling one or more of the witnesses or using depositions as provided by § 64.2-447, Code of Virginia (1950, as amended) to prove the Will, the Clerk rejected the document. (App. Vol. I, p. 1). Cheryl A. Hamblin (Cheryl Hamblin), then acting *pro se*, filed her appeal from the Clerk's Order (App. Vol. I, p. 3). The Circuit Court of Nelson County set the matter for hearing on December 7, 2015 with

[1] The record in this case consists of an Appendix set out in two volumes. References to the Appendix will appear as ("App. Vol. __, p. __").

notice to Robert Lee Canody's ("Mr. Canody")[2] children: Cheryl Hamblin, Debra Canody and Robert Lee Canody, II ("Bobby Canody"). All parties initially appeared, *pro se*, December 7, 2015. The parties all agreed that the document offered for probate was the Last Will and Testament of their father. (App. Vol. I, p. 3). When queried by the trial court if Bobby Canody was "asking [the court] to probate the document" as his father's Will, Bobby Canody responded, "I am." (App. Vol. I, pp. 11-12). Debra Canody also agreed. (*Id.*)

Subsequent to the hearing, Bobby Canody had a change of heart, most likely due to the debt he owes the Estate of Mr. Canody. (App. Vol. I, p. 23). Bobby Canody withdrew his agreement to have the document probated as Mr. Canody's Will.

Cheryl Hamblin, now through counsel, petitioned the trial court for a hearing on her appeal. Bobby Canody, now through counsel, moved to dismiss the appeal. That same day, Bobby Canody filed a Motion for the probate of a 1967 document which he offered as an alternate will of Mr. Canody.[3] As an exhibit to that motion, Bobby Canody included a copy of a prior, unsigned document very similar to Mr. Canody's Will. (App. Vol. II, pp. 125-126, 134-136). Cheryl Hamblin moved that

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[2] Due to similarity of names, Appellant Robert Lee Canody, II will be referred to as Bobby Canody while the decedent, Robert Lee Canody will be referred to as Mr. Canody.

[3] Subsequently, counsel agreed that such Motion would be moot, and the Motion could be struck if the trial court ruled the 2014 document was the Will of Mr. Canody. (App. Vol. I, pp. 92-93).

Bobby Canody's motion be dismissed. (App. Vol. I, p. 24). The matters were set for hearing before the trial court on July 15, 2016.

Debra Canody appeared *pro se* at the hearing and remains unrepresented.

During the hearing, Cheryl Hamblin presented the testimony of the witnesses to Mr. Canody's Will and of a close friend to Mr. Canody as to his state of mind a few weeks before his death. Bobby Canody neither testified in support of his position nor produced any witnesses nor any evidence at the hearing to contest probating the Will. The trial court ruled that the document dated March 30, 2014 is the Will of Mr. Canody. (App. Vol. I, pp. 105-116). Following the denial of Bobby Canody's request for reconsideration (App. Vol. I, pp. 117-118, 121-122), the trial court entered its Order of March 2, 2017 admitting the Will of Mr. Canody. (App. Vol. I, p. 123).

STATEMENT OF FACTS

On November 7, 2015, Mr. Canody heard the voice of his good friend, Gene Hayden, over his telephone as he lay in his hospital bed. He would never hear another.

The two men had been friends for approximately half a decade. Soon after Mr. Canody, a retired widower and father of three (3), relocated from California to the Afton area of Nelson County, Virginia, his habits and hobbies found him in the company of Mr. Hayden. They shared a common interest in the outdoors and the

manly pursuits of motorbikes, cars and guns. They became fast friends and saw each other weekly. (App. Vol. I, pp. 68-71).

Accordingly, it was no surprise to Mr. Hayden when in 2015, Mr. Canody informed his friend of his plan to make Mr. Hayden executor of Mr. Canody's Estate. Mr. Canody reviewed his general plan for his Estate with Mr. Hayden – leave a few things to his adult namesake, Bobby Canody, cut out his estranged daughter, Debra Canody, and leave the bulk of his Estate to his other daughter, Cheryl Hamblin. According to Mr. Hayden, Mr. Canody intended to revise his Will to ensure that every last instruction of his Will would be followed, including enforcing and collecting the debt Bobby Canody owed to him and to preclude Mr. Canody's Estate from forgiving that debt. (App. Vol. I, pp. 79-81).

Mr. Canody never had an opportunity to execute a change in his Will, for as he lay in the hospital that November 7th day of 2015 talking to his longtime friend, he died. (App. Vol. I, p. 70.).

The Will that Mr. Canody thought he might modify was his self-made Will bearing a printed date of "30 Mar 2014" but notarized by April Keziah, April 1, 2014. (App. Vol. II, pp. 131-133).

April Keziah had also become good friends with Mr. Canody. As an employee of the Waynesboro branch of the DuPont Community Credit Union, she first became acquainted with Mr. Canody when he called to open accounts as part

of his process of relocating from California to Virginia. His visits to her office become more frequent and they too struck up a friendship, sharing lunches and celebrating birthdays. (App. Vol. I, pp. 37-38).

On April 1, 2014, Mr. Canody once again swung through the doors of the DuPont Community Credit Union to conduct business with a friend. On this visit, Mr. Canody asked Ms. Keziah to do him the favor of notarizing a document for him. He produced a three-page type-written or printed document and identified it as his Will. She asked him to provide his driver's license while she went and found two (2) witnesses. She returned to her desk with Hunter Robertson and Andrew D. Moomau.[4] (App. Vol. I, pp. 39-44). Mr. Canody anticipated the need to verify his identity and had his driver's license at the ready for the witnesses. Ms. Keziah slid Mr. Canody's driver's license across her desk toward the witnesses. (App. Vol. I, p. 42). She identified Mr. Canody to them and advised them that they would be witnessing the signing of his Will. (App. Vol. I, p. 43). Because he was known to Ms. Keziah, she did not make note of notarizing Mr. Canody's Will in her notary log. (App. Vol. I, p. 42). Mr. Canody executed his signature to the Will and passed the document to the witnesses.

Both Mr. Robertson and Mr. Moomau attested Mr. Canody's signing of his Will and subscribed their names. Ms. Keziah then notarized the document. (App.

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[4] The transcription of the hearing from July 15, 2016 (App. Vol. I, pp. 42-65) misspells Mr. Moomau's name.

Vol. I, pp. 44, 56-57). Ms. Keziah recalls Mr. Canody's Will was a three-page document, that it did not have a place for anyone to initial the first or second page. (App. Vol. I, pp. 46, 56) and that the document contained some unfortunate language which she thought did not need to be aired in a final will. (App. Vol. I, p. 41). Neither she nor Mr. Moomau read the full document. However, both are clear that they understood it consisted of three (3) pages and Mr. Canody intended it to be his Will. (App. Vol. I, pp. 41, 46, 56, 59).

Recalling that day, Ms. Keziah noted that the conversation with Mr. Canody flowed naturally. He seemed to be in good spirits and not in any pain. (App. Vol. I, pp. 40-41, 49). He neither had the smell of alcohol about him nor was there any indication or discussion of him being on any medications. (App. Vol. I, pp. 48-49). All in all, he was in charge of the conversation and in charge of his faculties. No evidence was presented to the contrary. Neither Ms. Keziah nor Mr. Moomau could recall whether the Will was stapled. (App. Vol. I, pp. 47, 61).

Following the execution of the Will by the testator and witnesses, including Ms. Keziah, Mr. Canody took possession of the Will and left. (App. Vol. I, p. 48).

By the time Mr. Canody's Will came into the possession of the trial court, it had been stapled. On its own observation, the trial court determined that the Will had been stapled at some point prior to its possession by the clerk of the circuit

court, that the staple holes in all three pages of the Will correctly align with one another. (App. Vol. I, pp. 52, 114-115, 121).

ASSIGNMENTS OF ERROR

I. The trial court erred in its consideration of parole evidence to establish the testamentary nature of the pages proffered for probate.

II. The trial court erred when it failed to require Cheryl Hamblin to authenticate all three (3) pages proffered for probate.

STANDARD OF REVIEW

The proponent of a will bears the burden of proving that a will meets the requirements of § 64.2-403 of the Virginia Code (1950, as amended). Once that burden has been met, a presumption of authenticity of the document arises unless rebutted by clear and convincing proof. *See Croft v. Snidow,* 183 Va. 649, 33 S.E.2d 208 (1945).

On appeal, the trial court's findings of fact should be given great weight. The review of the legal impact of the document itself is a review *de novo*. *See Perel v. Brannan*, 267 Va. 691, 594 S.E.2d 899 (2004).

ARGUMENT AND AUTHORITIES

A. NO PAROLE EVIDENCE WAS USED TO PROVE THE WILL OF ROBERT LEE CANODY.

The trial court clearly stated "Mr. Hayden's testimony was not accepted as parole evidence of what the document means, but rather as corroboration of the

genuineness of the document itself." (App. Vol. I, p. 114). In his request for reconsideration, Bobby Canody questioned the trial court's analysis stating it had improperly "elevate[d] the purported corroborating evidence to direct proof [that] the pages met" the statutory requirements for proving the Will. (App. Vol. I, p. 117). In his response denying reconsideration of his decision, Judge Garrett made quick work of Bobby Canody's accusation: "the court permitted the testimony [of Mr. Hayden] consistent with the holding in *Samuel v. Hunter's Executrix.*" (App. Vol. I, p. 121). Accordingly, the trial court did not "elevate" Mr. Hayden's testimony beyond the bounds permitted by this Court. *See Samuel v. Hunter's Ex'x,* 122 Va. 636, 95 S.E. 399 (1918) (holding that testimony as to testator's state of mind is permissible); *Shacklett v. Roller*, 97 Va. 639, 644, 34 S.E. 492, 494 (1899) (holding that the declarations of a testator as to the contents of his will are admissible and "are entitled to the *greatest weight*…" (emphasis added)). At no point does Bobby Canody cite, must less refute, the controlling nature of *Samuel* on the facts of this case.

A review of the trial court's analysis further and firmly establishes the trial court's reliance on long established law to admit Mr. Canody's Will and removes any doubt of its reliance on parole evidence. The trial court begins its analysis with a review of § 64.2-403 of the Virginia Code. (App. Vol I, p. 108.). The trial court thoroughly examined the pertinent issues of whether the Will was in writing,

signed by the testator in a manner to manifest that his name is intended as a signature, and whether at least two (2) competent witnesses attended at the same time of the testator's signing, both attesting and subscribing the Will in the presence of the testator. In every instance, the trial court, in reliance upon the evidence taken at the hearing of July 15, 2016, was able to conclude that the execution of the Will met all of these requirements.

Mr. Canody appeared before April Keziah at her place of employment requesting that she notarize his Will as he signed it. Before the document was signed, Ms. Keziah found two (2) witnesses, brought them to her desk and identified Mr. Canody who then signed in the presence of the two (2) witnesses and Ms. Keziah. The two (2) witnesses realized that the document being signed by Mr. Canody was a Will and that by signing his Will, they were attesting to Mr. Canody's signature. Mr. Moomau testified to that fact as did Ms. Keziah who notarized the document. (App. Vol. I, pp. 41, 43, 44, 49-50, 55, 57, 59). Ms. Keziah's signature, likewise, became that of an attesting witness once she subscribed to the document. *See Ferguson v. Ferguson*, 187 Va. 581, 47 S.E.2d 346 (1948).

In an attempt to further question the integrity of the Will of Mr. Canody, Bobby Canody attempts to argue that the Will both lacks internal integrity and that the Will fails to dispose of Mr. Canody's estate. Since both arguments are new in

this appeal and were not made to the trial court, they should fail for lack of preservation at the trial level. *See United Leasing Corp. v. Lehner Family Bus. Trust*, 279 Va. 510, 689 S.E.2d 670 (2010). Additionally, such arguments both ignore the clear language of Mr. Canody's Will[5] and fail to appreciate his design to provide some items for Bobby Canody *if* "all his debts to the estate are paid." (App. Vol. II, p. 139). The plan of Mr. Canody's Will is clear: Bobby Canody shares in the estate if he pays the debt he owed Mr. Canody's Estate. Otherwise, most everything goes to Cheryl Hamblin. Mr. Canody's Will may "not be in all the legalese" of a well-crafted will, but he definitely had a plan; he disposes of his assets and he did so with an integrally sound document. (App. Vol. II, pp. 138-140).

Curiously, Bobby Canody fails to mention the unsigned 2012 version of Mr. Canody's Will that he himself filed with his Motion for Probate of 1967 Will (App. Vol. II, pp. 125,134-136). This earlier 2012 version almost mimics the 2014 Will of Robert Lee Canody, but uses harsher language to disparage Bobby Canody. That Bobby Canody provides a copy of a purported earlier will that largely tracks the language of the Will, further supports the internal integrity of Mr. Canody's

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[5] The Will of Mr. Canody begins with, "This is my last will and testament as the lawyers would say. This will not be in all the legalese that may be a better format but it will contain my wishes for after my death." (App. Vol. II, p. 138)

Will, and further proves its integrity as the original and complete Will of Mr. Canody.

The trial court considered the internal logic of the document as well as the physical aspects of the document having been previously stapled. The trial court noted that the staple marks of all three (3) pages align perfectly. (App. Vol. I, pp. 52, 114-115, 121). The internal logic of the document does not rely solely upon carryover sentences or paragraphs from one page to another. Rather, the internal logic of the document requires an integrated reading of the document and whether the content of the document logically flows from one page to the next. *See Dearing v. Dearing*, 132 Va. 178, 111 S.E. 286 (1922).

But for the purposes of denying this appeal, however, when considering the first assignment of error and whether the trial court misused parole evidence to prove the Will, this Court need not consider the trial court's analysis. The Court need only consider Bobby Canody's failure to preserve any such objection in the record to the testimony of Gene Hayden at trial. At no point in his Opening Brief in support of his appeal does Bobby Canody cite an objection to the testimony of Mr. Hayden as the basis for his first assignment of error.

The first objection Bobby Canody raised to Mr. Hayden's testimony was a specific objection to the relevancy of discussing a Mustang which was missing from Mr. Canody's house. (App. Vol. I, p. 145). That objection was made a full

twelve (12) pages into the testimony of Mr. Hayden and was not raised until the redirect of Mr. Hayden. Bobby Canody made no objection to the direct examination of Mr. Hayden, to the purpose of his testimony, or to the declarations he attributed to the decedent.

Bobby Canody did not raise any objection to Mr. Hayden's testimony until his Letter of Authority (App. Vol. I, p. 99). The failure to preserve an objection during a hearing is fatal to any appeal on the issue. *See United Leasing Corp.,* 279 Va. at 518; *Shacklett*, 97 Va. at 644. Failure to object to evidence in the record below prevents raising the issue of the admissibility of a witness' testimony on appeal. Rule 5:25, Rules of Supreme Court of Virginia, and *See United Leasing Corp.*, 279 Va. at 518-519.

Without the benefit of a copy of the Will in front of him, Mr. Hayden adeptly recited the substantive contents of the Will based upon his conversation with Mr. Canody approximately a month before the decedent's death. (App. Vol. I, pp. 70-72). Mr. Hayden was offered not to prove the testamentary intent of the document itself, but to show Mr. Canody's state of mind just prior to his death; that his state of mind regarding his estate was substantially and materially the same as that reflected in the document offered as the Will of Robert Lee Canody. (App. Vol. I, p. 103).

The testimony of Gene Hayden provided both context as to the decedent's state of mind and continuity that the document offered as his Will does not contradict his state of mind. Virginia has long recognized the ability of trial courts to hear evidence which substantiates the testator's state of mind. *See Samuel*, 122 Va. at 641, (holding that ". . . the rule that declarations of the testator … are admissible to show the testator's mental condition, is entirely in harmony with the rule herein approved, that such declarations are not admissible to prove [a] substantive fact … but are admissible as showing the state of mind of the testator and his plan and intent as being consistent or inconsistent with a will …"). This Court has also commented that "the declarations of a testator [about the existence of a will or] its contents…is recognized under certain circumstances as entitled to great weight …" *Shacklett*, 97 Va. at 644.

In the instant case, the trial court did just that, finding that the testimony of Mr. Hayden was "permitted and considered by the court after the question was raised [by Bobby Canody] as to whether or not a page or pages *could have* been inserted after execution by the testator." (App. Vol. I, p. 112) (emphasis in original). The trial court "found Mr. Hayden to be a very credible witness" and relied upon his testimony not as "evidence of what the document means, but rather as collaboration of the genuineness of the document itself." (App. Vol. I, p. 114).

B. ROBERT LEE CANODY'S WILL WAS FULLY AUTHENTICATED

1. Presumption and Burden to Refute Same. There can be no doubt that the proponent of a will bears the burden of proof by a preponderance of the evidence to establish that a document offered for probate is the will of a decedent. *See Wolfe v. Wolfe*, 248 Va. 359, 448 S.E.2d 408 (1994). In *Weedon v. Weedon*, 283 Va. 241, 720 S.E.2d 552 (2012), this Court held that a proponent of a will bears the burden of proving by a preponderance of the evidence, compliance with all statutory requirements. Once the burden of proof is met, the proponent is entitled to a presumption that all statutory requirements for the valid execution of the Will are satisfied. Once the presumption exists, a contestant to the will then bears the burden of going forward with evidence to overcome this presumption.

The holding in *Weedon* makes clear that evidence of fraud –which is precisely what Bobby Canody's Brief implies without using the word - or other circumstances which would eviscerate a will requires anyone challenging the authenticity of a will to go forward with evidence sufficient to rebut the presumption of the authenticity of the Will. *See Weedon*, 283 Va. at 257.

At trial, Bobby Canody presented no evidence; no evidence of tampering; no evidence of replaced pages; no evidence of modified pages, sentences or commas. Only through his counsel's vague allegations, sheer speculation and ignominious innuendo does the record contain any hint of possibilities, conjecture or conspiracy

as to the authenticity of the first two pages of the Will.[6] But for Bobby Canody to successfully contest the authentication of Mr. Canody's Will, he must present evidence which rebuts the presumption that the witnesses properly attested and properly subscribed to the document purporting to be the Will. Just as Bobby Canody is required to present evidence if he were challenging the capacity of or existence of undue influence over his father, for him to successfully overcome the witnesses' attestation, he must present evidence of tampering. *See id.* To rebut the presumption once established, Bobby Canody has an obligation to substantiate his allegations. Bobby Canody attempted to suggest that the document may have been the product of page substitution. (App. Vol. I, pp. 51, 87). Submission to a court for probate of a document purporting to be a will following page substitution would be a fraud on the trial court. But beyond the suggestion of it, Bobby Canody never presented a scintilla of evidence to establish such a fraud. As this Court has stated time and time again, "[t]he ultimate burden of proof is always upon him who alleges fraud." *Weedon,* 283 Va. at 257.

Mere suggestion, innuendo or suspicion are not sufficient to rebut the presumption of the existence or validity of a testamentary document. *See Mullins*

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[6] During the hearing, Bobby Canody's counsel repeatedly probed the testamentary capacity of Mr. Canody and repeatedly asked questions about his use of alcohol, pain medications and health. (App. Vol. I, pp. 47-49, 62). Not until his counsel's letter of January 27, 2017, did Bobby Canody concede the case is not about testamentary capacity or undue influence. (App. Vol. I, p. 118).

v. Coleman, 175 Va. 235, 239, 7 S.E.2d 877, 878 (1940). Where a claim of fraud is asserted with respect to a testamentary document, the person claiming fraud bears that burden by clear and satisfactory evidence. *See id.* at 239 (citing *Redford v. Booker*, 166 Va. 561, 574, 185 S.E. 879, 885 (1936)).

Bobby Canody's conjecture that computer tampering may have altered the contents of Mr. Canody's Will never arose at trial. Not until trial counsel's letter argument of July 18th, 2016 was the issue of computer tampering raised. (App. Vol. I, p. 99). The suggestion that metadata might reveal hidden tampering with the Will was not raised until the Opening Brief of Bobby Canody. Not only were these points not preserved in the hearing, they were never raised at the hearing. Failure to raise an argument at trial is fatal to its consideration on appeal. *See United Leasing Corp.*, 279 Va. at 517.

The fact remains that Bobby Canody never provided, produced or introduced any evidence in support of a claim that all three pages of the document submitted for probate were anything other than Mr. Canody's Will. Instead, he attempts to question the witnesses' memory of the first two pages of the Will. (App. Vol. I, p. 62, 87). But Virginia law has long held that reliance on the memory of a witness to a will is not the basis for authentication. Instead, the authenticity of the witness' subscription to the document is proof that the document itself – the entirety of the document, not just the page subscribed by the witness – is authentic. To do

otherwise would make the validity of all wills hinge "upon the memory and good faith of a witness, and not upon the reasonable proof that all the statutory requirements had been met." *See Martin v. Coleman,* 234 Va. 509, 513, 362 S.E.2d 732, 735 (1987).

Virginia law neither requires a witness to read a will nor generally know its contents before attesting to it.

> It is not necessary that the subscribing witnesses to a will [know] … that the instrument is [the testator's] will. It is enough that he [the testator] should acknowledge in their presence that the act was his, with a knowledge of the contents of the instrument, and the design that it should be the testamentary disposition of his property." *Beane v. Yerby,* 53 Va. 239, 245, 12 Gratt. 239, 245 (1855).

More recently, this Court held that while "the requirements of Code § [64.2-403][7] must be strictly followed, the statute must not be construed in a manner that would 'increase the difficulty of the transaction to such an extent as to practically destroy' an uninformed layperson's right to dispose of property by will." *Hampton Roads Seventh-Day Adventist Church v. Stevens,* 275 Va. 205, 211, 657 S.E.2d 80, 83 (2008), (quoting *Savage v. Bowen,* 103 Va. 540, 546, 49 S.E. 668, 669-70 (1905)).

To grant the construction Bobby Canody requests,

> would … greatly increase litigation, and produce much mischief without any corresponding good. The perplexing question in all cases of acknowledgment of a will would be, whether what was said or done …

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[7] This section is the successor to Code § 64.1-49 which was considered in *Beane.*

> amounted to an acknowledgment. Too much would depend upon the loose recollection of the witnesses; and the danger of their being tampered with … *Beane* 53 Va. at 250.

Bobby Canody then asks this Court to do something extraordinary: he asks that this Court "adopt a rule that the proponent of the will must show no alterations or changes either before or after execution." Appellant's Opening Brief, p. 18. Further, Bobby Canody encourages this Court to enact "additional safeguards, such as page numbers, initials, and dates of each page, or metadata on [*sic*] the final document should be considered" for the proponent to prove the will. Appellant's Opening Brief, p. 18. Such rules and requirements are well beyond anything considered, much less required by Code § 64.2-403. Moreover, if the General Assembly had desired such strict standards (not to mention the legislative repeal of *Hampton Roads Seventh-Day Adventist Church v. Stevens*), it would have enacted legislation to that effect. It did not and has not. This Court must be guided by the language of Code § 64.2-403 and only its language, for "the intention of the legislature is our guiding star." *Kohl's Department Stores, Inc. v. Virginia Department of Taxation,* Record No. 160681 Va. Sup. Ct. Mar. 22, 2018.

While safeguards - such as pages initialed by either a testator or witnesses or both, for all pages to be affixed together, or any number of additional steps - may be desirable to assure the integrity of a will, Virginia law does not require anything other than the requirements set forth in § 64.2-403. Bobby Canody is asking this

court to legislate as to what must pass as a testamentary document. But the long-established rule in Virginia is "that courts lean strongly in favor of upholding the validity of wills fairly made, where there is no imputation of fraud. Toward that end, every reasonable presumption ought to be made in favor of finding proper execution of a will." *Martin*, 234 Va. at 513. Bobby Canody further asks this Court to change the law by requiring the memory and good faith of witnesses to prove a will rather than the reasonable proof that the statutory requirements have been met. *See id.*

In short, Bobby Canody is asking this Court to change the law and require all proponents of wills to prove a negative, namely, prove that no alteration has been made to a document offered for probate. Such a position simply is not the law in Virginia. To change the law invites "[t]he evils of increased litigation and confusion." *Beane,* 53 Va. at 250.

The record is completely void of any evidence that any pages of the Will had been switched, modified or subjected to tampering. As the trial court found as a matter of fact in the case and referenced in its opinion, "There is not one shred of evidence to support the argument that a page or pages have been substituted." (App. Vol. I, p. 116).

2. Authentication does not Require Proving a Negative. Bobby Canody asks this Court to rule that a proponent to a will must prove what the will is not.

He makes much of the fact that the two attesting witnesses could not recall or did not read the first two pages of the Will. But Virginia has never required a witness to read – much less remember – any will they have witnessed. Again, *Beane* is instructive:

> … the acknowledgment of the instrument, and *a fortiori,* of the signature, though the witnesses be not informed of the name or nature of the instrument, is sufficient; ... In this case, both the instrument and the signature were acknowledged by the testator; and that he knew its contents, and intended it to operate as a testamentary disposition of his property, is conclusively proved by … one of the subscribing witnesses thereto. *Beane* at 249.

At one time in Virginia, wills were regularly authenticated by witnesses who did not know the contents of a will they witnessed. Witnesses often lacked the ability to know its contents or the ability to definitively identify each and every page of any will they witnessed because they were illiterate. Yet a will so witnessed will not be rejected at probate. One case illustrates what regularly occurred – and still occurs to this day – where a surviving witness is illiterate.

Rosser v. Franklin, 47 Va. 1, 6 Gratt. 1 (1849) is such a case. Three witnesses subscribed to the will, but only two of the witnesses were literate. The third was illiterate. As fate would have it, the testatrix outlived the two literate witnesses. The sole surviving (and illiterate) witness had no ability to identify each page of the will and had no knowledge of the will's contents when he was called to prove and authenticate it sixteen (16) years following his subscription to

it. Nevertheless, upon making his mark to the will, the witness proves his acknowledgment of the testatrix's signature. The surviving witness proved the signing of the will by the testatrix, proved it was signed in the presence of other witnesses, "and this is sufficient signing within the meaning of the statute." *Rosser,* 47 Va. at 24.

As if to establish that this Court has held that proving a negative *is* necessary to authenticate a will, Bobby Canody posits that the holding of *Triplett's Executor v. Triplett*, 161 Va. 906, 172 S.E. 162 (1934) is something far beyond its actual ruling. In that case, one of the questions was whether the witnesses were aware of interlinings in a will that they had attested. At issue was whether the interlined information was originally part of the document that the witnesses had actually attested or was subsequently interlined following attestation. While the document itself was proven as the will of the decedent, the interlined information – written in a different color of ink - was not accepted as part of the original will which had been witnessed. However, since the will of Triplett was entirely in his own hand, the entirety of the document was admitted as his holographic will.

Bobby Canody asserts that the proposition of *Triplett* is that witnesses must examine all pages of a testamentary document. Bobby Canody misreads the holding of *Triplett* and improperly extrapolates authentication requirements far beyond what *Triplett* held or the requirements set forth in § 64.2-403. As this

Court previously stated, the holding in *Triplett* with respect to "the discussion of the will as an attested will was *dictum*." *Etgen v. Corboy*, 230 Va. 413, 417, 337 S.E.2d 286, 289 (1985). Just as the appellant in *Etgen* misplaced her reliance on *Triplett*, so too does Bobby Canody.

The law does not "require attesting witnesses to sign each sheet or acquaint themselves with the contents of a Will before signing" it. *Dearing,* 132 Va. at 183. Likewise, Virginia has now long held that "where the subscribing witnesses identify their signatures, but have no recollection of having attested the instrument, or the circumstances of execution, the presumption that it was properly executed will uphold it in the absence of clear and satisfactory proof to the contrary." *Croft*, 183 Va. at 655. Bobby Canody offered no evidence whatsoever rebutting the witnesses to Mr. Canody's Will.

Proponents have an obligation to establish by a preponderance of the evidence that the requirements of Virginia Code § 64.2-403 have been met. But upon meeting that standard of proof, the proponent then enjoys a presumption as to the integrity of the document. The burden then falls on the contestant to rebut that presumption. In all respects, Bobby Canody failed to rebut the presumption.

CONCLUSION

On the basis of the foregoing authorities and analysis, the ruling of the trial court should be affirmed, and the Will of Mr. Canody admitted to record.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Appellee complies with Rule 5:26 and further certifies as follows:

On this 17th day of April, 2018, three copies of the foregoing Brief of Appellee were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing, and an electronic copy was filed, via VACES. On this same day, one electronic copy of the foregoing Brief of Appellee was sent, via e-mail, to counsel for Appellant, Thomas S. Leebrick, 1011 Court Street, Lynchburg, Virginia 24505, tsleebrick@verizon.com, and by U.S. Mail to Debra Canody, P.O. Box 533, Piqua, Ohio, 45346.

This Brief consists of 5,687 words, on the 17th day of April, 2018.

B. E. Brannock