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IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 181192

RAE LEE DAVIS,

Appellant

v.

J. GARNETT DAVIS, JR., individually and as Executor of the Estate of Samuel Dickey Davis, deceased, AGNES C. DAVIS, SUSAN D. GOFORTH, WYTHEVILLE PRESBYTERIAN CHURCH,

Appellees.

BRIEF OF APPELLANT

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INTRODUCTION

This action concerns the validity of gifts that the decedent's mother, acting under a durable power of attorney, made shortly before decedent's death. In those transfer, the mother gave away real and personal property worth over $2.5 million—substantially all of decedent's property—to herself and other family members. This left decedent's estate with virtually no assets to distribute. Appellant, decedent's widow, was one of the principal beneficiaries under his will. But because the gifts drained the assets from decedent's estate, Appellant received nothing upon his death.

In the Circuit Court, Appellant argued that the gifts were invalid, asked the Circuit Court to restore the transferred property to the decedent's estate, and asked that the estate be administered in accordance with the terms of decedent's probated will. The Circuit Court refused to do so, holding that the transfers were valid.

This was error. An attorney-in-fact's authority to make gifts is circumscribed by the Virginia Uniform Power of Attorney Act, Code §§ 64.2-1600 *et seq*. Citing Code § 64.2-1622(A)(2), the Circuit Court ruled that the power of attorney "expressly" authorized the gifts (even

though it does not mention gifts at all). And citing Code § 64.2-1622(H), it ruled that the decedent's "donative history" authorized his mother to make these gifts (even though he rarely made gifts, of any sort, to anyone—and had never given substantial gifts to the recipients of the challenged gifts).

These rulings have no basis in law or fact. As explained below, the power of attorney is silent about gifts. It does not "expressly" authorize decedent's mother to give away *any*, let alone all, of decedent's property. Furthermore, there is nothing in decedent's sparse "donative history" that could serve as a valid precedent for his mother's wholesale looting of his estate.

Decedent's mother gave away his property to prevent Appellant—her daughter-in-law— from receiving any property upon her son's death. This is contrary to the decedent's natural fondness for his wife. It is contrary to the decedent's testamentary intent, as expressly stated in his will. And it is contrary to the plain language of the Uniform Power of Attorney Act.

The Court should reverse.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The facts relevant to this appeal are undisputed. The following narrative includes the facts found by the Circuit Court, as supplemented by undisputed Record evidence.

Dickey's Early Relationship with Rae Lee and His Injury

Since 1955, the Davis family has trained horses in the Wytheville area. (JA 463.) Appellant Rae Lee Davis ("Rae Lee")[1] has known the Davises for over 30 years. (JA 480.) As a teenager, she met Samuel Dickey Davis ("Dickey")[2] through their mutual interest in horses. (*Id.*) In the summer of 1993, while Dickey and Rae Lee were putting up hay in a field, Dickey fell from the hay wagon. (JA 481.) Rae Lee summoned help, and Dickey was taken to a local hospital and then flown by helicopter to UVA. Despite the treatment, "Dickey became a quadriplegic." (JA 314, 418.)

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[1] Because so many of the parties have the same last name, Davis, this Petition will refer to them by their first names.

[2] In its July 13, 2017 letter opinion, the Circuit Court refers to him as "Samuel Davis," but the parties and witnesses all refer to him as "Dickey." This brief will do likewise.

The Power of Attorney

Shortly after the 1993 accident, Dickey executed a one-page power of attorney (hereinafter, the "Power of Attorney") giving his mother, Agnes Davis ("Agnes"), the general power to manage his affairs. (JA 216.)[3] The Power of Attorney allowed Agnes, acting as Dickey's attorney-in-fact, "to transact for me, in my name, place and stead, all business for me that I could do if acting personally." (JA 10.) This included the power to "sell and convey any and all personal property and all real property I may own and execute and deliver an instrument for the same." (*Id.*) And it gave Agnes the power:

> to execute and perform all and every act or acts, thing or things in law needful and necessary to be done in and about my affairs, as fully, largely and amply, and to all intents and purposes whatsoever as I might or could do if acting personally . . . .

[3] There are two versions of Agnes's *de bene esse* deposition in the Record. Excerpts from the original version appears at JA 175-212. Excerpts from the "corrected" version appear at JA 213-54. Many of the corrections substantively changed Agnes's answers. In the Circuit Court, Appellant argued that those changes were not appropriate or timely. Because the present appeal does not depend on which version is used, however, Appellant will use the corrected version that Appellees relied on at trial.

Although the instrument exhaustively enumerates Agnes's broad powers as attorney-in-fact, it does not discuss "gifts" or any other kind of gratuitous transfers.

Rae Lee Provides Care and Companionship to Dickey

At the time of Dickey's accident, Rae Lee was a special-needs teacher in Bluefield, West Virginia. (JA 484.) For several years after the accident, she made the hour-and-a-half round-trip drive to Wytheville every evening to work on the farm and to care for Dickey. (JA 420-21, 484-85.) In 1999, Rae Lee took a leave of absence from teaching so that she could care for Dickey's horses and, in the evening, care for Dickey. (JA 485-86.) Other than short intervals when Dickey was in a health care facility; when Rae Lee was helping her sister, who had cancer; or when Rae Lee herself was being treated for cancer; Rae Lee cared for Dickey continuously for the 20 years between 1993 to 2013. (JA 483-86.) At trial, Dickey's sister Susan agreed that "Rae Lee did a lot for Dickey." (JA 423.)

Relationship Between Agnes and Rae Lee

Rae Lee and Dickey's mother Agnes, however, had an acrimonious relationship. The record is clear that Agnes did *not* want Rae Lee to

receive anything from Dickey after his death. She believed that Rae Lee "had been adequately remunerated" for caring for Dickey, and feared that Rae Lee was "exploiting" him. (JA 329.)

Dickey's 2005 Will

Dickey had his own ideas about how his property should be distributed upon his death. In 2005, eight years before he died, Dickey consulted with an attorney, Kendall Clay, about preparing a will. (JA 375.) As Clay relates, "Dickey had strong opinions," was not easily swayed, and "knew what he wanted" to include in his will. (JA 375, 378.) Clay prepared a will ("Will") for Dickey, which Dickey executed on April 21, 2005. (JA 21-25.) It is undisputed that Dickey was clear-headed and mentally competent when he prepared his Will; there has never been any challenge to it.

In the Will, Dickey was generous to Rae Lee, giving her all of his money and bank deposits, all of his horse and farm equipment and pickup trucks, and most of his real estate. (JA 21-25.) But Dickey also made substantial bequests to others, including his brother Garnett.

Notably, however, Dickey conveyed no property to his sister Susan.[4] Dickey never revoked or amended his 2005 Will.[5]

Evidence of Lifetime Gifts

There was little evidence of Dickey having made any significant *inter vivos* gifts. Other than Christmas presents to Rae Lee and a $10,000 check to his brother Garnett in the early 1990s, there was no evidence that Dickey made any outright gifts to anyone during his lifetime. (JA 379, 453, 470-71.) And there is affirmative evidence that he did *not*. Garnett and Susan both testified that they could not recall any gifts. (JA 453, 470-71.) And Agnes said that Dickey "wanted to hold on to his property," adding that "[h]e wasn't in the mood of giving it to anybody." (JA 219-20.)

Dickey helped those he cared about, though. For instance, the evidence showed he helped Rae Lee's son, Burt Honacker, set up a horse-training business. Dickey gave Burt a 90-year lease on a 10-acre parcel in exchange for a one-time payment of $1000, plus payment of

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[4] Dickey disliked Susan's husband, Lynn Goforth. (JA 492-93.)

[5] All legatees other than the parties have disclaimed their interests under the Will. (JA 26-30.)

annual real-estate taxes on the property. (JA 403.) Dickey also agreed to use his property as collateral for a $450,000 loan that Burt took out to build a "state of the art" barn on the leased property. (JA 411, 487.) Without Dickey's credit, Burt likely would not have been able to get this business loan. (JA 406, 413.)

Dickey's Marriage to Rae Lee

In the first part of 2013, Dickey's health deteriorated. On May 31, 2013, he went to the hospital—he remained in health care facilities for the rest of his life. (JA 424.) Although not demonstrative in his affections, Dickey cared deeply for Rae Lee. (JA 396, 474.) Over the years, the two had talked off and on about getting married. (JA 373-74, 477, 494.) In December 2012, the couple resolved to do so. (JA 374, 478-79.) Thus, on October 1, 2013, while Dickey was at "Greystone"—a nursing facility in Tennessee—Dickey and Rae Lee got married in a small ceremony attended by friends and by some of Rae Lee's family members. (JA 374.) Dickey did not tell his mother Agnes about the wedding, believing that the news would upset her. (*Id.*)

In a couple of weeks, however, word indirectly reached Agnes via social media. Rae Lee had changed her last name on Facebook from

"Mills" to "Davis." (JA 343-44.) A family friend noticed the change and, in mid-October, called Agnes to tell her about Dickey's marriage to Rae Lee. (JA 391-92.) Agnes then called Dickey to see whether this was true. As Agnes relates:

> I asked him, I said, Dickey, are you married? And he sighed and said, Mother, I guess so.

(JA 225-26.) Agnes—99 years old at the time—then hung up on Dickey, the first time she had ever done so. (*Id.*) She testified that she "had nothing else to say." (*Id.*) A day or two later, Susan drove Agnes to see Dickey. (JA 429-30.) Dickey did not speak to his sister or mother during that visit, pulling his covers over his head. (JA 229-30, 429.)

Dickey's condition worsened. On October 25, 2013, he suffered a "code blue" event, leaving him with multiple organ failure and sepsis. (JA 368.) On the 28th, medical staff informed family members about Dickey's poor prognosis and recommended a do-not-resuscitate order. (JA 368-69.) Agnes "saw how things were going" and "noticed that his body was going down so fast." (JA 240.) She realized he was going to die. (JA 242.)

Agnes Gives All of Dickey's Property to Herself, Susan, and Garnett

At that point, believing that Dickey would soon die, Agnes took action to—as she put it—"protect" Dickey's assets. (JA 240, 242.) She consulted with Lynn Goforth's out-of-state lawyer, David Price,[6] asking what steps she could take and what "remedies" she had for her son's marriage. (JA 318-19.) As Price explained at trial, Agnes "felt like the wedding was kind of the coup de gras in the history of Rae Lee taking advantage of Dickey." (JA 320-21.) She felt that her daughter-in-law already "had been adequately remunerated" for caring for Dickey. (JA 329) And she wanted to put "Dickey's property in safer hands." (JA 242, 435.)

Price told Agnes that she could use the Power of Attorney to "transfer Dickey's assets out of Dickey's name so as to protect them from any further fleecing, that it would protect those assets from any claim." (JA 321.) This, Price said, would help allay concerns "about the assets that may be—may be depleted by this marriage." (JA 320.)

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[6] Price practices law in Indiana. He was not licensed to practice law in Virginia. (JA 330.)

Thus, on October 31, 2013, Agnes—acting pursuant to the Power of Attorney—gave away all of Dickey's property, real and personal, to herself and to her other two children, Susan and Garnett. Deeds of Gift ##130083115, 130083116, and 130083117 conveyed all of Dickey's (sizable) real-estate holdings to Susan and Garnett. (JA 13-20.) A gift-tax return prepared the following year valued the real estate at $2.1 million. (JA 32.) In an Assignment of Personal Property, instrument #130083114, Agnes gifted to herself all of Dickey's personal property. (JA 11-12.) Before these transfers, Dickey had property worth millions of dollars. Afterward, he owned nothing. Agnes had never discussed the transfers with Dickey or Rae Lee.

These gifts were out of character with Dickey's prior practice, and attitude, regarding gifts. Dickey's lawyer, Kendall Clay, had no recollection of Dickey ever having made gifts. (JA 379.) And, as noted above, Dickey's sister Susan was unaware of Dickey ever giving a gift of more than $1000. (JA 453.) Garnett could not recall Dickey ever giving

any substantial gifts.[7] (JA 470-71.) And Agnes said that Dickey "wanted to hold onto his property," adding that "[h]e wasn't in the mood of giving it to anybody." (JA 219-20.)

Dickey died two weeks later, on November 15, 2013. (JA 7.) His 2005 Will was admitted to probate on December 4, 2013. (JA 45, 112, 258.) There was no challenge to the validity of the Will. (JA 45.) Given Agnes's October 31, 2013 transfers, however, there were no longer any assets in the estate to administer. The transfers left Dickey—and later, his estate—destitute. So although Dickey's Will directed that the bulk of his property go to Rae Lee, his widow, the October 31, 2013 transfers resulted in her being left nothing by his estate.

The Lawsuit and Trial

After Rae Lee challenged the October 31, 2013 transfers, Garnett brought the present aid-and-direction suit to have the Court determine whether the transfers were valid. (JA 6-8.) Garnett also sought guidance on how to distribute the property in accordance with the terms of Dickey's Will. (*Id.*)

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[7] Garnett said that his wife told him about a $10,000 gift that Dickey had given him in the 1990s. He could not recall the event, though. (JA 470-71.)

The Circuit Court held a two-day bench trial on February 13-14, 2017, with the parties submitting closing argument in the form of briefs. In a July 13, 2017 letter opinion, the Circuit Court held that the transfers were valid *in toto* and that the remaining issues, concerning distribution under the Will, were therefore moot. (JA 152-58.)

In its Opinion, the Circuit Court held that the October 31, 2013 transfers were gifts. (JA 157) (stating that Agnes had the right to make "these gifts"). And it held that Va. Code § 64.2-1638(B) imposes monetary limits on gifts made pursuant to a power of attorney. (*Id.*) Nevertheless, the Circuit Court gave two reasons for why the transfers were valid under Va. Code § 64.2-1622.

First, it held that the Power of Attorney included a "specific grant of authority" to make gifts. (JA 157.) As noted above, the Power of Attorney does not mention "gifts." But the Circuit Court cited the provision conferring the power "to sell and convey any and all personal property and all real property I may own," and concluded that the "specific grant of authority to 'convey' includes the power to make gifts." (*Id.*) The Circuit Court cited no legal authority to support this conclusion.

Second, the Circuit Court held that the October 31, 2013 transfers were valid because Dickey had a "donative history."[8] (JA 157.) As evidence of Dickey's historical gift-giving practices, the Circuit Court cited: (1) the $10,000 transfer to Garnett in the early 1990s, (2) Dickey's 90-year lease to Rae Lee's son, Burt, and (3) Dickey's agreeing to use his property as collateral for Burt's loan to build his barn. (JA 156.) The Circuit Court held that the Power of Attorney's "general grant of authority, in conjunction with [Dickey's] donative history, makes the transfers by Agnes Davis valid." (JA 156-57.) Because those transfers emptied out Dickey's estate, leaving nothing to administer under the Will, the Circuit Court found that the remaining will-interpretation issues were "moot." (JA 158.) It entered final judgment on June 20, 2018.[9] (JA 159-64.) This appeal followed.

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[8] Respondents did not raise the issue of gift-giving history in their closing argument. (JA 63-106; 139-51.) Nor did they attempt to justify the transactions under Code § 64.2-1622(H). The Circuit Court raised the issue *sua sponte*.

[9] A prior order was appealed to this Court. But because there had been no final judgment—there were cross- and counterclaims that were still pending—this Court dismissed the appeal without prejudice. (*See* Record No. 180245.) The June 20, 2018 Order resolved all the remaining claims in the case.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that the Power of Attorney—which does not mention gifts—expressly authorized Agnes Davis, attorney-in-fact, to make gifts of substantially all of Dickey Davis's real and personal property.

   (Preserved at JA 2, 34, 49-51, 163-64, 472-73.)

3. The Circuit Court erred in finding that Agnes Davis's transfers of substantially all of Dickey Davis's real and personal property was in accordance with his prior gift-giving history.

   (Preserved at JA 3-4, 35-36, 163-64, 472-73.)

2. The Circuit Court erred in holding that Dickey Davis's "donative history," together with the broad authority conferred by the Power of Attorney, authorized Agnes Davis, as attorney-in-fact, to give away substantially all of Dickey Davis's real and personal property.

   (Preserved at JA 3-4, 35-36, 163-64, 472-73.)

ARGUMENT

I. Standard of Review

Whether the Power of Attorney authorized Agnes Davis to engage in the October 31, 2013 transactions presents a question of law, which this Court reviews *de novo*. *Smith v. Mountjoy*, 280 Va. 46, 53 (2010). ("[T]he facts establishing the transactions at issue [under a POA] are undisputed; therefore, whether those transactions constituted a gift is a question of law.").

"[P]owers of attorney are construed strictly." *Reineck v. Lemen*, 292 Va. 710, 716 (2016). *See also Jones v. Brandt*, 274 Va. 131, 137 (2007). The reason for this is that "the power to dispose of the principal's property is so susceptible of abuse that the power should not be implied." *Id.* This risk is particularly acute "in a case involving a durable power of attorney, which by its nature remains in effect after the principal has become incapable of monitoring the agent's conduct." *Id.* A power-of-attorney transaction that benefits the agent is "presumptively fraudulent." *Creasy v. Henderson*, 210 Va. 744, 749-50 (1970). The agent bears the burden of rebutting this presumption by "clear and satisfactory evidence." *Id.*

Because the relevant facts are undisputed, the question whether Agnes Davis's actions were in accordance with Dickey Davis's personal history of making lifetime gifts presents a question of law reviewed de novo. *Lane v. Starke*, 279 Va. 686, 690 (2010). To the extent that there is any factual dispute relevant to this issue, the Court reviews the Circuit Court's factual findings for clear error. *MCR Fed., LLC v. JB&A, Inc.*, 294 Va. 446, 457 (2017).

II. The Circuit Court erred in holding that the Power of Attorney—which does not mention gifts—"expressly granted" Agnes the power to make gifts.

A. Authority to sell and convey the principal's property does not entail the authority to make gifts.

The Circuit Court first erred by finding that the Power of Attorney "expressly granted" Agnes the power to make gifts. Under Virginia's version of the Uniform Power of Attorney Act, an attorney-in-fact generally can make a gift only where the power of attorney "expressly grants" that authority:

> Subject to the provisions of subsection H, an agent under a power of attorney may do the following on behalf of the principal or with the principal's property *only if the power of attorney expressly grants the agent the authority* . . . :
>
> …

2. Make a gift;

Va. Code § 64.2-1622(A)(2) (emphasis added). The "rationale for requiring a grant of specific authority" for certain transactions, including gifts, is to protect the principal against "the risk those acts pose to the principal's property and estate plan." Uniform Power of Attorney Act § 201, Comments.

In the present case, the Power of Attorney does not expressly grant Agnes the power to make gifts. In enumerating Agnes's broad powers as attorney-in-fact, it does not mention "gifts," "donations," or any other form of donative or gratuitous property transfer. Thus, unless the exception in Va. Code § 64.2-1622(H) applies (and it does not—*see infra*, Section III), the transfers were invalid.

The Circuit Court, however, held that "Agnes Davis was . . . given a specific grant of authority" to make gifts. (JA 157.) Citing no cases or statutes to support its conclusion, the Circuit Court reasoned that: (1) the Power of Attorney expressly granted authority "to sell and convey" any and all property; (2) "this specific grant of authority to 'convey' includes the power to make gifts," *ergo* (3) gifts like the October 31, 2013 transfers were expressly authorized. (*Id.*)

This was error. The Uniform Power of Attorney Act incorporates common-law principles. Code § 64.2-1619 ("Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter."). And when applying this "uniform" act, "consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it." Code § 64.2-1640.

It is black-letter law that a POA's grant of the power to "sell and convey" the principal's property does not confer upon the attorney-in-fact any authority to make gifts.[10] *See Estate of Casey v. Comm'r of*

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[10] Restatement (Second) of Agency § 65 (1958), ("Unless otherwise agreed, authority to sell does not include authority . . . to make a gift of it."); 2A C.J.S. Agency § 212 ("A power of attorney conferring authority to sell, exchange, transfer, or convey personal property for the benefit of the principal does not authorize a conveyance as a gift . . . and a conveyance outside the scope of the power conferred is void."); 2A C.J.S. Agency § 227 ("A general power of attorney that authorizes an agent to sell and convey property implies that the sale will be for the benefit of the principal and does not generally permit the agent to make a gift of the property."); POWER OF ATTORNEY AS AUTHORIZING GIFT OR CONVEYANCE OR TRANSFER WITHOUT A PRESENT CONSIDERATION, 73 A.L.R. 884 (Originally published in 1931) ("A general power of attorney authorizing an agent to sell and convey property, even though it authorizes him to sell for such price and on such terms as to him shall seem proper, implies a sale for the benefit of the principal, and does not authorize the agent to make a gift of the property, or to convey or transfer it without a present consideration inuring to the principal.").

Internal Revenue, 948 F.2d 895, 900-01 (4th Cir. 1991) (applying Virginia law) (holding that even though a POA gave the attorney-in-fact the powers to "grant, convey, assign, transfer . . . and set over" the principal's power, this did not include the power to make gifts); *Honeycutt v. Farmer's & Merchants Bank*, 487 S.E.2d 166, 167 (N.C. App. Ct. 1997) ("[A]lmost every jurisdiction which had considered the issue has held that '[a] general power of attorney authorizing an agent to sell and convey property . . . does not authorize the agent to make a gift of the property.'") (quoting *Whitford v. Gaskill*, 480 S.E.2d 690, 692 (N.C. 1997); *Archbold v. Reifenrath*, 744 N.E.2d 701, 709 (Neb. 2008) (holding that, although POA gave agent "plenary power," the defendant attorney-in-fact was "not authorized to make substantially gratuitous transfers to himself or his family absent an express provision in the POA"); *Shields v. Shields*, 19 Cal Rptr. 129, 130 (Cal. Ct. App. 1962) ("A power of attorney conferring authority to sell, exchange, transfer or convey real property for the benefit of the principal does not authorize a conveyance as a gift of without a substantial consideration."). *See also Matter of Estate of Smith*, 432 P.3d 6, 22 (Idaho 2018) (gift was not

authorized because "the power of attorney does not use the explicit statutory phrase 'make a gift'").

The rule derives from the premise that "'an attorney-in-fact is presumed to act in the best interests of the principal,'" *Honeycutt*, 487 S.E.2d at 167 (quoting *Whitford*, 480 S.E.2d at 692). Broad authority to give away the principal's property risks the attorney-in-fact acting contrary to the principal's interest—the power to give is the power to steal. *Id.* Thus, "'such power will not be lightly inferred from broad grants of power contained in a general power of attorney.'" *Id.* (quoting *Whitford*, 480 S.E.2d at 692). *See also Hewes v. Doddridge*, 40 Va. 143, 146, 1842 WL 2658, at *2 (1842) ("Broad as are the terms of the letter of attorney in question, the power given has relation to the business and concerns of the principal, and an act which is not only alien but ostensibly hostile to those interests is not within its scope").

The Circuit Court, for its part, cites no authority—in Virginia or any other jurisdiction—to support its conclusion that a POA's granting the power to "sell and convey" is an express grant of the power to make gifts. Nor can it. The whole point of Code § 64.2-1622(A)(2) is to foreclose arguments like this. If the principal wishes to give the agent

the power to make gifts, this must be "expressly" spelled out in the POA. The Power of Attorney in the present case, broadly worded though it is, does not "expressly" authorize Agnes to make gifts. The Circuit Court erred in holding otherwise.

B. Even if Agnes made gifts pursuant to an express authorization, such gifts were limited to $14,000 per person, per year.

Yet even if the Power of Attorney *had* expressly given Agnes the power to give away Dickey's property (and, again, it did *not*), Code § 64.2-1638(B)(1) limits the value of such gifts to $14,000 per person, per year.[11] The only exception to this monetary limit is where the power of attorney expressly authorizes the attorney-in-fact to make gifts that exceed this amount. Code § 64.2-1638(B). There is no such provision in the Power of Attorney in the present case. Thus, any transfers under Code § 64.2-1638(B). were limited to $14,000 per transferee per year.

In the October 31, 2013 transfers, Agnes gave property to Garett, Susan, and herself worth millions of dollars. (JA 11-20, 32.) Those

[11] The statute is pegged to the IRS's gift tax exemption, which in 2013 was $14,000 per person.

transfers far, far, exceeded the limit of $14,000 per transferee. So even if the Power of Attorney had expressly allowed Agnes to give away Dickey's property—and, again, it did *not*—those gifts were unlawful, invalid, and void to the extent they exceeded § 64.2-1638(B)'s $14,000 per-year, per-person limit.

III. The Circuit erred in concluding that Agnes's transfers were in accordance with Dickey's "donative history."

A. Code § 64.2-1622(H) authorizes an attorney-in-fact to make gifts only where those gifts are in accordance with the principal's history of gift-giving.

The Circuit Court attempted to circumvent § 64.2-1638(B)'s $14,000 per-person, per-year, limits by invoking Code § 64.2-1622(H). Under this provision, an agent who has been given general authority under a power of attorney to manage the principal's affairs may make gifts "in any amount" that are in line with the principal's history of making *inter vivos* gifts:

> Notwithstanding the provisions of subsection A, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent shall have the authority to make gifts in any amount of any of the principal's

> property . . . *in accordance with the principal's personal history of making or joining in the making of lifetime gifts.*[12]

Va. Code § 64.2-1622(H) (emphasis added). Thus, for example, if the principal has a history of annually contributing $10,000 to his alma mater, the attorney-in-fact can use the power of attorney's grant of general authority to continue making those $10,000 annual payments.[13] Or if the principal gave his grandchildren $500 in government bonds on their birthdays every year, the attorney-in-fact can use the power of attorney to continue that practice, even without express authorization to do so. *Estate of Ridenour v. Comm'r of the Internal Revenue Service*, 36 F.3d 332, 335 (4th Cir. 1994) (where principal had practice of making

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[12] "Lifetime gifts" are just *inter vivos* gifts. *See* BLACKS LAW DICTIONARY 946 (8th Ed. 2004). They are to be distinguished from testamentary gifts.

[13] This codifies the common-law rule. *See* Restatement (Third) of Property (Wills & Don. Trans.) § 8.1 (2003), illus.. 4 ("G, while mentally competent, executes a durable power of attorney making A his attorney-in-fact, with power to manage G's estate and do any act that G could do if competent. G becomes mentally incapacitated. A makes gifts out of G's property to certain charities. Extrinsic evidence establishes that G, when competent, customarily made gifts to the same charities. The gifts are valid."). *See also* Code § 64.2-1619 ("Unless displaced by a provision of this chapter, the principles of law and equity supplement this chapter.").

gifts to family members to reduce taxable estate on his death, the attorney-in-fact could continue this practice).

Gifts that markedly deviate from the principal's prior gift-giving practices—whether in purpose, magnitude, recipient, or otherwise—are *not* gifts made "in accordance with the principal's personal history of making or joining in the making of lifetime gifts."[14]

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[14] *See, e.g.*, *Martin v. Moore*, 109 S.W.3d 305,311 (Tenn. Ct. App. 2003) ("[W]hile Mr. Moore may have been a generous husband, there is no evidence in the record that he ever made joint gifts to his wife and his brother-in-law."); *Matter of Estate of Jarvis*, 234 So. 3d 430, 435 (Miss. Ct. App. 2017), *cert. denied sub nom. Kilpatrick v. Jarvis*, 230 So. 3d 1025 (Miss. 2017) (holding that attorney-in-fact's giving herself hundreds of thousands of dollars was not "in accordance with" principal's historical practice of making annual Christmas gifts to family members and weekly gifts to his church); *Conkin v. Mettetal*, No. E2015-141-COA-R3-CV,-2015 WL 9259962, at *11-12 (Tenn. Ct. App. Dec. 17, 2015) (son's gifts to himself—acting as mother's attorney-in-fact—were not in accordance with mother's prior practice of financially helping him because that help was made during his medical training but son now had a medical license and could support himself.); *In re Conservatorship of Patton*, No M2012-1078-COA-R3-CV, 2014 WL 4803146, at *8 (Tenn. Ct. App. July 29, 2014) (attorney-in-fact's giving herself nearly $1 million of principal's property was not in accordance with principal, her father, regularly giving his wife—the attorney-in-fact's mother—gifts of $100); *In re Estate of Storey*, No. W2010-819-COA-R3-CV, 2011 WL 2174901, at *26 (Tenn. Ct. App. May 31, 2011) ("Though the record contains some evidence of Mrs. Storey's gift-giving, it certainly does not conclusively establish that the gifts by Mr. Yohanek were in accordance with Mrs. Storey's history of gift-giving").

In *Martin v. Moore*, for example, the POA named the principal's second wife as his attorney-in-fact. 109 S.W.3d at 307. The principal's daughter and grandchildren from his first marriage were devisees under his will. *Id.* After the principal had become mentally incompetent due to Alzheimer's disease, the wife—who was from the Philippines—gave her brother $45,000 of the principal's money to buy a chicken farm there. The farm was to be held jointly by the wife and her brother. The Court held that this transfer was void. Although it agreed that the principal had been generous to his second wife, it held that the $45,000 transfer was not in line with his prior gift-giving history: "While Mr. Moore may have been a generous husband, there is no evidence in the record that he ever made joint gifts to his wife and his brother-in-law." *Id.* at 311. Thus, the Court ordered that the funds be returned and be administered under the principal's will.

Likewise, in *Matter of Estate of Jarvis*, the principal named his daughter as attorney-in-fact under a POA. The father's will divided his property equally between his three children. But, acting as attorney-in-fact, the daughter drained her father's checking accounts and made herself a payable-on-death beneficiary of certain sizable certificates of

deposit. 234 So. 3d at 434. The father's only history of gift-giving was Christmas gifts to family members and weekly donations to his church. The court held that the daughter's gifts to herself from the checking account and the certificates of deposit were not "in accordance" with this gift-giving history. *Id.* at 435.

The exception that proves the rule is *Estate of Ridenour v. Comm'r of the Internal Revenue Service.* In that case, the principal had a prior history of making regular cash gifts to family members in an effort to lower his ultimate estate tax. 36 F.3d at 333. The principal named his son—an only child—as attorney-in-fact. Acting in that capacity, the son continued the father's prior practice of making cash gifts. The Fourth Circuit, applying Virginia law, held that the father "intended to permit [his son] to make gifts as [the father] would do personally." 36 F.3d at 335.

B. The October 31, 2013 transfers to Agnes, Susan, and Garnett were not in accordance with Dickey's historical gift-giving practices.

In the present case, Agnes—acting as Dickey's attorney-in-fact—gave away all of Dickey's real property to Susan and Garnett and all of his personal property to herself. Yet Dickey had no history of giving

away large tracts of his land to Susan or Garnett or of giving his personal possessions to Agnes. Indeed, the only evidence of outright gifts adduced at trial were (1) his Christmas gifts to Rae Lee, and (2) his purported payment of $10,000 to Garnett sometime in the 1990s.[15]

Agnes's October 31, 2013 transfers were of a different nature than—and orders of magnitude greater than—Dickey's earlier, sporadic, and modest gifts. Dickey had no history of giving Susan anything. And he had no history of giving Garnett any real estate—let alone half of all the land he owned. So the gift of $2.1 million worth of real estate to Susan and Garnett was not in accordance with Dickey's prior gift-giving practices. Likewise, there is no evidence that Dickey ever gave any of, let alone *all* of, his personal property to Agnes. Agnes herself testified that she knew that Dickey was not inclined to give away his property: "He wasn't in the mood of giving it to anybody." (JA 219-20.)

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[15] The Circuit Court deemed Dickey's assistance to Rae Lee's son, Burt (i.e., giving him a 90-year lease and helping him get a loan) to be "gifts." (JA 157.) Even if that is so, they are gifts to Rae Lee's son, not to Susan, Garnett, or Agnes. So they do not establish an historical pattern of gifts to those three.

Dickey certainly had no history of giving away *all* his property and possessions. But that is what the October 31, 2013 transactions accomplished, rendering Dickey penniless. The three deeds gave away all of Dickey's real estate. And the assignment of personal property was so broad (encompassing "all untitled personal property") that it literally gave Agnes the shirt off Dickey's back. The gifts to Agnes, Susan, and Garnett were completely out of character, not "in accordance," with Dickey's prior gift-giving practices.

Worse, Agnes—acting as attorney-in-fact—manifestly frustrated Dickey's estate plans. Dickey plainly cared for Rae Lee. He married her, notwithstanding his mother's strong disapproval. Consistent with that, the record shows that Dickey's "donative history" was mostly a history of giving gifts and providing favors to Rae Lee and her son. Agnes's transfers frustrated Dickey's testamentary intent. Although Dickey's Will devised most of his property to Rae Lee, Agnes's transfers emptied out Dickey's estate. Agnes did not carry out Dickey's wishes; she thwarted them.

The Circuit Court, however, concluded otherwise. Reviewing the undisputed facts concerning Dickey's gift-giving history, it concluded

that Dickey had a "donative history." Thus, it concluded, the "general grant of authority, in conjunction with [Dickey's] donative history, makes the transfers by Agnes Davis valid." (JA 157-58.)

This was error.[16] As noted above, there was no "donative history" of Dickey giving away large amounts of his land or belongings to Garnett, Susan, Agnes, or anyone else. To the contrary, the record shows that Dickey did *not* make regular gifts of his property at all. And to the extent Dickey made gifts, they were mostly to Rae Lee and her son Burt, not Agnes, Garnett, or Susan. Thus, giving all of Dickey's property to them, not Rae Lee, is contrary to—not "in accordance with"—Dickey's "donative history." There is no support in the record for the Circuit Court's conclusion that the October 31, 2013 transfers were licensed by Code § 64.2-1622(H).

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[16] The facts about Dickey's "donative history" were largely undisputed. As a matter of law, they do not establish a donative history that was in accordance with Agnes's actions. Rae Lee anticipates, however, that Respondents will characterize this question as a factual dispute. It is not. Even viewed in the light most favorable to Respondents, the facts do not show that Dickey had a history of making massive gifts of substantially all of his property to his mother and siblings. To the extent that the issue could be viewed as a factual dispute, the Circuit Court committed clear error.

The implications of the Circuit Court's decision for the present case—and for future cases—are troubling. The upshot is that Agnes, who disliked her daughter-in-law, was able to frustrate her son's stated intent to give his wife the bulk of his property upon his death. If the Circuit Court's construction of § 64.2-1622(H) is correct, it means that, so long as the principal has a "donative history"—i.e., a history of making *some* gifts to *some* individuals at *some* time or other over the course of several decades—an attorney-in-fact is free to give away *all* of the principal's property to *any* persons of her choosing, even herself. This is, to understate the matter, bad policy.

It is also an incorrect reading of the statute. Contrary to the Circuit Court's ruling, Code § 64.2-1622(H)'s requirement that the gifts be "in accordance with" the principal gift-giving history is not satisfied merely by showing that the principal had a history of occasionally giving some gifts to some people. "Accordance" means "agreement, accord." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 12. Thus, as the case law reflects, being "in accordance with" the "principal's personal history of making . . . gifts" means that the gifts must be congruent with prior gift-giving practices. (*See supra*, Section III.A.) In

the present case, there is zero similarity between Agnes's October 31, 2013 wholesale transfers of Dickey's property and Dickey's prior history of making occasional, modest, gifts to other people.

Finally, "in accordance with" implies that the attorney-in-fact is aware of the prior gifts and that this knowledge of gift-giving history is what guides her actions. In the present case, however, there is no evidence that Agnes was aware of any of events comprising Dickey's "donative history." Agnes did not justify the transactions on those grounds. Nor was there any evidence that Price, the out-of-state attorney who advised Agnes to give away all of Dickey's property, knew about any of Dickey's prior gifts.

Rather than rely on Dickey's "donative history," Agnes and Price justified the transfers by citing improper purposes, saying they wanted to keep the property in "safer" hands and to prevent it from being "depleted" by the marriage—i.e., they did not want Rae Lee to have it. (JA 320; JA 242.) As there was no evidence that Agnes even knew about Dickey's gifts, Agnes's actions were not "in accordance with" Dickey's gift-giving history. Thus, Code § 64.2-1622(H) did not authorize the transfers.

CONCLUSION

For all the foregoing reasons, Rae Lee Davis respectfully requests that this Court find Agnes's transfers to be invalid, reverse the judgment below, and remand for further proceedings regarding construction of the will.

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RULE 5:26(e) CERTIFICATE

The undersigned hereby certifies that, on July 17, 2019, a PDF copy of this brief and the Joint Appendix were sent to the following e-mail addresses:

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