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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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Power of Attorney does not "expressly" grant Agnes the power to give away Dickey's property.

As Rae Lee noted in her opening brief, Code § 64.2-1622(A)(2) states that, subject to subsection (H),[1] an attorney-in-fact may "make a gift" only where "the power of attorney expressly grants the agent the authority." In the present case, the Power of Attorney, though broad, does not contain any language that clearly empowers Agnes to make gifts, bequests, or any other kind of donative transfers. (JA 10.) Because the Power of Attorney does not "expressly" give Agnes the power to make gifts, Agnes had no authority to give away any—let alone all—of Dickey's property.

In their brief, however, Appellees maintain that the Power of Attorney "expressly" gave Agnes the authority to make gifts of Dickey's property.[2] Echoing the Circuit Court's reasoning, Appellees contend

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[1] Discussed *infra*.

[2] Appellees claim that the October 2013 transfers "were not 'gifts' in the traditional sense" because they were meant to "protect[] and preserv[e] Dickey's assets." (Br. at 13.) It is not clear what Appellees mean by the "traditional" sense of the term "gift." But it is undisputed that, in the *legal* sense—the only sense relevant here—they were "gifts": i.e., transfers of property for no consideration. *Smith v. Mountjoy*, 280 Va.

that, by granting Agnes the power to "sell and convey" Dickey's property, the Power of Attorney "expressly" conferred on her the power to make gifts. (Br. at 27.) This is so, they claim, because the term "convey" is broad enough to encompass transfers for no consideration. (*Id.* at 27-28.)

Appellees, however, cite no authority to support the proposition that authorizing an attorney-in-fact to "sell and convey" the principal's property vests the attorney-in-fact with the power to make gifts. Nor can they. As Rae Lee noted in her opening brief, *all* the cases on point hold exactly the opposite. (Rae Lee Br. at 19-21.) The law is clear that giving an attorney-in-fact power to "sell and convey" property does not *ipso facto* authorize the attorney-in-fact to give away the principal's property. Appellees do not even attempt to distinguish this authority.

Although Appellees cite several cases on page 28 of their brief, none of these cases is relevant. Most of the them do not even concern

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(. . . note continued from previous page)
46, 53 (2010) (defining "gift," in the power-of-attorney context, as a "contract *without* a consideration"). There was no evidence that Dickey received any consideration at all for the transfers.

the scope of an attorney-in-fact's authority.[3] The one case that *does* involve a power of attorney, *Reineck v. Lemen*, 292 Va. 710 (2016), is distinguishable on precisely the point at issue here: the power of attorney in that case explicitly and expressly granted the relevant power—the power to transfer all the principal's property to any revocable trust that he or his attorney-in-fact created during his lifetime—to the attorney-in-fact. 792 S.E.2d at 271.

Without any authority to back their own legal position, Appellees resort to attacking a straw man. They first characterize Rae Lee's argument as a claim that a power of attorney needs to include "certain specified words." (Br. at 29.) They then claim that there is no legal support "for the proposition that the ability of courts to construe powers of attorney are [sic] so narrowly constrained." (*Id.*)

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[3] *Hamm v. Hazelwood*, 292 Va. 153 (2016), concerned whether a party could validly gift an interest in real estate that was subject to a possibility of reverter. *Deutche Bank Nat'l Trust Co. v. Arrington*, 290 Va. 109 (2015), concerned whether a particular deed of trust created a valid first-priority lien over a later-executed deed of trust. And *Larchmont Homes, Inc. v. Annandale Water Co.*, 201 Va. 178 (1959), concerned whether a deed of trust was a "conveyance."

Yet Rae Lee has never claimed—and does not now contend—that there are "certain specified" magic words that a power of attorney must include to validly authorize the attorney-in-fact to give away the principal's property. English is a flexible language. A power of attorney can "expressly" confer gift-giving power in manifold ways: e.g., by granting the power to make "donative transfers," "transfers for no consideration," "bestowments," "awards," "endowments," "grants," etc. No "certain specified words" are required. But—and here's the rub—the power of attorney must contain some term that, in plain English, confers upon the attorney-in-fact the power to give away the principal's property. As the case law reflects, merely conferring a broad power to "sell and convey" property does not do the trick.

Appellees also argue that the Court must construe "convey" to mean a gift because otherwise the phrase "sell and convey" would be redundant. (Br. at 28.) This argument is baseless. "Legal writing is full of such doublets and triplets as will and testament, cease and desist, and remise, release, and forever discharge that waste time and space." Mark Mathewson, LAW STUDENTS, BEWARE, 8 Scribes J. Legal Writing 141, 142 (2002). The phrase "sell and convey" is legal "doublet"

with a standard legal meaning—not unlike the ones quoted above. *See* Wayne Schiess, Saxon Words & Romance Words, Mich. B.J., July 2019, at 58 (2019) (characterizing "sell and convey" as a Saxon-Romance pairing of terms).

The phrase's redundancy is a historical artifact of the polyglot origins of Anglo-American law, which borrowed terms from the Latin, Norman French, and English legal traditions. Lawyers came to use redundant doublets and triplets to cover all their linguistic bases.[4] Their continued use is the consequence of poor drafting style—it does not imply that the two terms have different meanings. Relevant here, nobody would construe an instrument stating that "the party of the first part hereby sells and conveys *x*" as both selling *x* and giving *x* away for free. But that is what Appellees' argument implies.

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[4] "The tendency to use verbal 'doublets' in legal English comes directly from the historical period following the Norman Conquest, when official proceedings were conducted in Norman French, while the parties themselves almost invariably spoke Old English, a Germanic tongue. This led to the practice of including both the French and Old English words in every critical phrase in a document; sometimes the Latin term as included as well, especially in ecclesiastical courts, resulting in a triplet." Drury Stevenson, Forensic Linguistics: An Introduction to Language in the Justice Sys., by John Gibbons, 77 U. Colo. L. Rev. 257 (2006).

Yet even if the Power of Attorney's language authorizing Agnes to "sell and convey" Dickey's property "expressly" gave her the power to give away Dickey's property—and it does *not*—the transfers were still invalid because the value of the gifts exceeds the limits set out in Virginia Code § 64.2-1638(B)(1). This provision limits the value of gifts made pursuant to a power of attorney to the annual federal gift-tax exemption.[5] Parties can modify this rule by expressly authorizing the attorney-in-fact to make gifts exceeding those allowed by statute. Uniform Power of Attorney Act § 217, comment ("The agent's authority is subject to this section unless enlarged or further limited *by an express modification* in the power of attorney") (emphasis added). But the power of attorney in the present case does not expressly modify or abrogate this limit. In the present case, Agnes's gifts to herself and to Susan and Garnett far exceeded § 64.2-1638(B)(1)'s annual limits. They were, to that extent, unauthorized.

In a footnote in their brief, however, Appellees argue that, by authorizing Agnes to sell and convey "any and all" of Dickey's property,

[5] In 2013, this was $14,000 per donee.

the power of attorney modified the $14,000 per-person, per-year, limit on gifts.[6] (Br. at 29, n.25.) But this language does not reference the statutory limit on donative transfers or otherwise modify or remove that restriction. It just gives Agnes broad rights to enter into transactions concerning the sale and transfer of some or all of Dickey's property. This is *not* an express modification or removal of the statutory limit on the value of annual gifts.

* * *

To summarize: the Power of Attorney in the present case uses boilerplate language to give Agnes general authority to transact business on Dickey's behalf. It neither expressly authorizes her to give away Dickey's property nor, *a fortiori*, expressly abrogates the statutory limit on annual gifts. Accordingly, the transactions in the present case were not authorized by § 64.2-1622(A)(2).

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[6] The Circuit Court held that—without the exception provided in subsection (H) (see *infra*)—the gifts would have been limited by § 64.2-1638(B)(1). (JA 157.) Appellees did not cross-appeal that ruling.

II. The gifts in the present case were not "in accordance with" Dickey's sparse gift-giving history.

The Circuit Court also found that the gifts were authorized under a separate provision, Code § 64.2-1622(*H*), because Dickey had "a personal history of making gifts." (JA 157.) But § 64.2-1622(H) requires more than just a showing that the principal had a history of making some gifts. It requires that the gifts made by the attorney-in-fact be "in accordance with" that gift-giving history. As Rae Lee pointed out in her opening brief, the gifts that Agnes made to herself, Susan, and Garnett were nothing like any gift that Dickey had ever made during his lifetime. They differed from Dickey's past gifts in fundamental respects, including magnitude, donee, and purpose. As a matter of law, Agnes's giving away *all of Dickey's property*—worth millions of dollars—to family members (including those whom Dickey had not previously given any significant gifts) was not "in accordance with" Dickey's prior gift-giving practices.

In their brief, Appellees strain mightily to characterize this inquiry as one of fact, not law, and ask the Court to defer to the Trial Court's resolution of evidentiary conflicts, witness credibility, etc. (Br. at 16-18, 20.) Contrary to Appellees' arguments, however, *there are no*

disputed facts concerning whether Agnes's gifts were "in accordance with" Dickey's gift-giving history. The only facts germane to this question are: (1) facts concerning Dickey's gift-giving history, and (2) facts concerning the gifts that Agnes made to herself, Susan, and Garnett.

Those facts are set out in the Circuit Court's short opinion. The only outright gift that the Circuit Court identifies is the $10,000 payment that Dickie made to Garnett several decades ago. The two other "gifts" that the Circuit Court cites are: (1) a 90-year lease of property to Rae Lee's son, Burt Honaker, for $1000 plus payment of property taxes, and (2) Dickey's using his house as collateral for a business loan that Burt took out. (JA 154.) As for Agnes's October 2013 gifts to herself and to Susan and Garnett, those facts are spelled out in the instruments effectuating the transfers. (JA 11-20.)

Rae Lee has not challenged the Circuit Court's factual findings about Dickey's past gifts or about Agnes's transfers. (Rae Lee Br. at 7-8.) She *does*, however, challenge the Circuit Court's conclusions about the significance of those facts—i.e., whether they satisfy the requirements of Code § 64.2-1622(H). This, however, presents a pure

question of law, to which the Circuit Court is not entitled to any deference. *See, e.g.*, *Hilton v. Martin*, 275 Va. 176, 180 (2008) (noting that, when "presented solely with a question of law concerning the trial court's application of the law to essentially undisputed facts," the Court will "apply a de novo standard of review"). Appellees, for their part, fail to identify any relevant factual dispute as to which the Circuit Court needed to weigh evidence or resolve credibility. [7]

More to the point, Appellees fail to explain how Agnes's giving away *all* her son's property—worth millions of dollars—was "in accordance with" the few modest gifts that Dickey made during his lifetime. "Accordance" means "agreement, accord." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 12. For two things to be in "agreement" or "accord," there must be some congruence or resemblance between the two. There is no such congruence in the present case.

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[7] Appellees claim that the present case presents "unique" facts that explain Agnes's actions—namely, the "secret wedding," which caused Agnes to be alarmed about Rae Lee's intentions. (Br. at 25-26.) None of that, however, has anything to do with the statutory question before the Court, i.e., whether the gifts that Agnes made were "in accordance with" Dickey's prior gift-giving practices. Code § 64.2-1622(H).

Agnes's wholesale looting of Dickey's property bears no resemblance to the small infrequent gifts that Dickey made during his lifetime.[8]

Appellees claim that Agnes's transfers were similar to Dickey's prior gift-giving practices inasmuch as they were gratuitous transfers made to family members. (Br. at 20.) But the transfers that Agnes made were to *different* family members (Agnes and Susan), for *different* purposes (to "protect" Dickey's property from Rae Lee), and were *orders of magnitude greater* than the previous "gratuitous transfers" (millions of dollars versus the $10,000 gift to Garnett). Furthermore, the "gratuitous transfer" on which Appellees appear to place the most weight—Dickey's assistance to Rae Lee's son, Burt—was to a person who at the time was not even one of Dickey's family members.

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[8] Appellees cite the self-serving testimony of Susan and Garnett that, had Dickey lived, they would have given back his property. (Br. at 13, n.12.) This testimony does not change the donative character of the transfers. Furthermore, their purported intent to honor Dickey's wishes if he survived is belied by their own actions after he died. In his Will, Dickey plainly stated that he wanted to give the bulk of his real estate to Rae Lee. (JA 21-25.) Yet Susan and Garnett did not honor that wish. They have not conveyed Dickey's real estate back to the estate so that it could be distributed in accordance with Dickey's wishes. So even if Susan's and Garnett's testimony on this question were relevant—and it is *not*—it carries no weight.

Appellees protest that Rae Lee is applying an overly exacting standard of equivalence, stating that she "seeks to impose strict limitations upon the trial court in terms of how closely the circumstances of the disputed gifts must mirror those of the prior gifts." (Br. at 20.) Again, Appellees attack a straw man. Rae Lee does not contend that the transfers must exactly mirror the principal's prior gifts. She simply observes that, under the plain language of Code § 64.2-1622(H), there must be enough similarity for the court to be able to find that the attorney-in-fact's transfers are "in accordance with"—i.e., are in agreement or in accord with—the principal's gift-giving history.

Where, as here, the attorney-in-fact's gifts look nothing like any gift the principal ever made to anyone during his lifetime, those transfers are not "in accordance with" the principal's gift-giving history. This is not a "strict limitation" of the trial court's powers, it is a plain-language and common-sense application of the statutory text—one that also happens to be supported by a wealth of case law and legal commentary. (*See* Rae Lee Br. at 24-27.)

Appellees, for their part, fail to articulate what it means for a gift to be "in accordance with" the principal's gift-giving history. They set no bounds on how far the attorney-in-fact can deviate from that history. If a gift to a different person, in a vastly greater amount, for entirely different reasons, can be "in accordance with" the principal's gift-giving history, it is hard to see what would *not* be "in accordance with" that history. If accepted, Appellee's arguments would effectively do away with all the legal constraints that the Virginia Uniform Power of Attorney Act places on an attorney-in-fact's power to give away the principal's property. It would turn Code §§ 64.2-1622(A)(2) and -1638(B)(1) into dead letters.

Appellees, however, argue that—under their view of the matter—the power to give away the principal's property is not limitless because the attorney-in-fact still must act in good faith.[9] (Br. at 25.) For this reason, they repeatedly stress that, in the present case, the Circuit

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[9] Appellees also cite Agnes's testimony about how she thought Dickey would want his property to be disposed upon his death. (Br. at 19.) But it is not the role of an attorney-in-fact to anticipate the principal's testamentary wishes. In any event, Dickey's probated will shows that Agnes incorrectly predicted how he would want his property to be distributed upon his death. (JA 21-25.)

Court found that Agnes had acted in good faith. (Br. at 21, 25.) This misses the point. The Virginia Uniform Power of Attorney Act's good-faith requirement, Code § 64.2-1612(A)(2), is distinct from the Act's requirements vis-à-vis gifts, Code §§ 64.2-1622(A)(2), -1622(H), and -1638(B)(1). That there are *other* statutory provisions that constrain an attorney-in-fact's conduct does not mean that one can ignore the separate limits that the Act places on an attorney-in-fact's power to give away the principal's property.

Appellees' arguments are also noteworthy for what they lack: any support in, or citation to, the relevant case law. In her opening brief, Rae Lee cited several cases where the courts held, as a matter of law, that gifts that materially deviated from the principal's prior gift-giving practices—whether in donee, size, or purpose—were unauthorized and invalid. (Rae Lee Br. at 24-27.) In their brief, Appellees make no attempt to distinguish these cases. Nor do they cite any contrary authority.

There is no such authority. Giving away all a principal's property for reasons unrelated to any prior gift is such an extreme deviation from past gift-giving practices that no appellate court would ever deem it to

be "in accordance with" the principal's gift-giving history. The Circuit Court's contrary holding is not good law and it unjustly deprived Dickey of his right to dispose of his estate as he saw fit.

This Court should reverse.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in her opening brief, Rae Lee Davis respectfully requests that this Court find Agnes's transfers to be invalid and void, 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 August 22, 2019, a PDF copy of this Reply Brief of Appellant was sent to the following e-mail addresses:

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