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, and WYTHEVILLE PRESBYTERIAN CHURCH

Appellees.

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INTRODUCTION

Samuel Dickey Davis ("Dickey"), a quadriplegic from 1993 until his death in 2013 at the age of 69 years, lived in the home of his mother, Agnes C. Davis ("Agnes"), and was principally cared for by his mother and his sister, Susan D. Goforth ("Susan"), both personally and financially, until his deteriorating condition required institutional care in his final months. While Dickey continued his decline in an out-of-state care facility equipped to deal with his special needs, but while away from his family, Appellant Rae Lee Mills Davis ("Rae Lee") arranged to secretly marry him, a mere six weeks before his death, without notice to his family or closest friends.

Rae Lee was an employee of Dickey who shared Dickey's passion for the expensive avocation of raising show horses and who worked in Agnes' barn assisting Dickey with his horses. Over time, Rae Lee also ultimately came to serve as a care-giver for Dickey, assisting him with some of his day-to-day physical needs. For these services, Rae Lee received regular compensation, as well as some assistance with expenses relating to the care and showing of her own horses. Agnes, then 98 years old, knew Rae Lee only as one of Dickey's employees and was unaware of the existence of any romantic relationship between Rae Lee and Dickey that would support or justify a marriage. Upon

learning of the secret marriage approximately two weeks after it happened, Agnes was greatly alarmed and quickly transferred Dickey's assets to family members for safekeeping, acting as Dickey's appointed agent under a durable general power of attorney executed in September of 1993 after Dickey was paralyzed in a farming accident. She was unable to seek clarification as to the circumstances of the secret marriage from Dickey, who died shortly thereafter.

At trial, Rae Lee portrayed herself as Dickey's long-suffering, under-appreciated, romantic partner who lost a major inheritance through Agnes' spite and vindictiveness. Appellees Agnes, Susan, and J. Garnett Davis, Jr., Dickey's brother and executor ("Garnett"), (collectively, "the Davis Family"), presented opposing evidence that Agnes' exercise of her authority under the power of attorney was justified and valid under the circumstances. After resolving serious credibility issues and disputes over the actions, knowledge, intent, and motives of the involved parties, the trial court specifically found Agnes and her principal witnesses to be credible, found Agnes' actions to have been taken in good faith, and held the transfers valid and enforceable. That ruling was correct under the circumstances of this case.

STATEMENT OF FACTS

The lengthy Statement of Facts set forth in the Brief of Appellant, (Brief of Appellant, pgs. 3-12), underscores the degree to which this case was fact-driven, as does the trial court's July 13, 2017, opinion letter, which focuses heavily on the facts established at trial as to the history and relationships of the parties, viewed through the lens of the trial court's credibility determinations following two days' worth of testimony. (J.A. 152-158.)

At trial, the parties vigorously contested the nature of the relationship between Rae Lee and Dickey, as well as the nature of the relationship between Rae Lee and Agnes, Dickey's mother and attorney-in-fact. (J.A. 418.) Further contested were the relative contributions of each party to Dickey's care and support and the relative quality and strength of the different parties' relationships with Dickey throughout his life and until his death on November 15, 2013, as well as Dickey's susceptibility to influence from others.

The Davis Family disputes much in Rae Lee's lengthy Statement of Facts, including the erroneous depiction of the relationship between Dickey and Rae Lee and the unsupported speculation as to what Agnes knew or felt about Rae

Lee.[1] However, this brief will focus on those facts most pertinent to this appeal, stating them in the light most favorable to the prevailing party. *Palmer v. R. A. Yancey Lumber Corp.*, 294 Va. 140, 159 (2017).

DICKEY'S CIRCUMSTANCES

Following his farming accident in 1993, Dickey was rendered a quadriplegic with limited use of his arms and hands. (J.A. 418.) Dickey was in his late forties at the time of the accident but had lived with Agnes his entire life, and it is undisputed that Dickey and Agnes were quite close. (J.A. 280-281; 310; 331; 345; 418; 424-425.) On September 25, 1993, in light of his traumatic and life-altering injuries, Dickey opted to execute a durable power of attorney naming Agnes as his agent and granting her a broad range of powers. (J.A. 10.) Dickey did not name any alternate agents, nor did he ever execute any

[1] Although Rae Lee insists that she and Agnes had an "acrimonious relationship", (Brief of Appellant, pg. 5), the other evidence did not show that such ill will existed.

subsequent powers of attorney in the 20 years that followed.[2] (J.A. 301-302; 346; 371.) Regularly utilizing the power of attorney, Agnes faithfully assisted Dickey with his personal, medical and financial affairs until his death in 2013. (J.A. 216-217; 432; 442; 518-520; 559-561.) No evidence suggested that Dickey ever revoked or attempted to revoke the 1993 power of attorney or that Dickey ever questioned or objected to any actions taken by Agnes on his behalf pursuant to the power of attorney.

Agnes assisted Dickey financially prior to his injury, allowing him to pursue a life as a breeder and trainer of Saddlebred show horses, and she continued this assistance after Dickey's accident. She was the principal financier of such activities by allowing Dickey continued use of her nearby barn and fields; assisting him with expenses relating to the care and maintenance of the horses, labor costs for barn help, and expenses associated with attending horse shows; and assisting him with his medical and other personal expenses,

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[2] Although Rae Lee asserts that she had been in some sort of relationship with Dickey for several years prior to his accident, he did not select Rae Lee to serve as his agent in 1993 or at any time thereafter, even as an alternate. Moreover, Agnes continued to regularly used the power of attorney on Dickey's behalf over the next 20 years even as Rae Lee came to provide greater day-to-day assistance to Dickey with his personal care and horse operations. (J.A. 518-520; 559-561.) If Dickey had trusted Rae Lee to have such power or authority with respect to his property, he would have executed a new power of attorney in her favor.

as well as with payments toward his indebtedness on nearby farm land that Agnes had helped Dickey purchase prior to the accident.[3] (J.A. 293-294; 300; 359; 436; 439-441; 445; 476.) No express restrictions were put upon Dickey's ownership of this property; however, it was Agnes' understanding from Dickey that he intended to leave this property to her or other members of the Davis Family after his death. (J.A. 220.)

After his accident, Dickey was relocated to a special handicapped accessible wing that Agnes added to her home, where Agnes and Susan prepared Dickey's meals, bringing trays to and from his room; laundered his soiled clothes and bedding; and generally helped with his day-to-day care. (J.A. 347-349; 419-424.) Due to this assistance, Dickey was able to avoid institutional care and to continue his training and breeding operations at Agnes' barn. These endeavors generated considerable losses, as demonstrated by the last income tax returns filed by Dickey during his lifetime, yet Agnes did not hesitate to continue funding Dickey's passion. (J.A. 562-636.) Absent Agnes' considerable personal and financial assistance, Dickey would have been

[3] Dickey's assets, including, particularly, his real estate, were either obtained from family members or with substantial financial assistance from Agnes. (J.A. 262; 325; 436; 443; 445; 505; 506-517.)

unable to obtain or maintain the assets that are the subject of the present dispute.[4]

Several individuals were paid to provide additional assistance to Dickey from time to time with his personal needs and also with the barn work. One of these individuals, Rae Lee, came to have increasing involvement in barn operations and in Dickey's personal care. (J.A. 274-279; 394-395; 420-421.) It is undisputed that Rae Lee was an employee of Dickey who was compensated for the time that she spent with him.[5] (J.A. 304; 350-351.) There is no evidence that either Dickey or Rae Lee ever suggested to Agnes that they were in love or otherwise a romantic couple. (J.A. 290-292; 461.) Agnes testified at her deposition that she did not think that Dickey had any romantic feelings for Rae

[4] Garnett testified, as Executor, that Dickey's checking account was frequently overdrawn. (J.A. 464-465.)

[5] When asked about the relationship during a deposition in 2011, Dickey described Rae Lee as an employee. (J.A. 173-174.)

Lee and other evidence supported her assessment of the relationship.[6] (J.A. 221-222.)

Dickey continued to reside at Agnes' residence until May of 2013, when complications from a surgical procedure required the placement of a tracheostomy tube and use of a ventilator. (J.A. 424.) Because of the additional medical care necessitated by the tracheostomy tube and ventilator, Dickey was unable to return home thereafter. Agnes first placed Dickey in a rehabilitation facility in Winston-Salem, North Carolina, and then transferred him in August of 2013 to Greystone Healthcare Center, in Blountville, Tennessee, which specialized in ventilator patients. (J.A. 217-218; 424-426.) The hope was that Dickey would be weaned from use of the tracheostomy tube and ventilator so

[6] Dickey and Rae Lee did not engage in public displays of affection or overtly hold themselves out publicly to be a committed, romantic pair. (J.A. 376-377; 395-397.) There was no evidence that Dickey discussed with Agnes his love for Rae Lee, identified her to Agnes as his romantic partner, or otherwise sought to clarify for Agnes' benefit and understanding that he and Rae Lee were anything other than employer and employee. (J.A. 461.) In fact, Helen Hartt, a family friend who testified at trial, believed that she and Dickey had a romantic relationship during the relevant time period. (J.A. 390-391.) Pastor Cindy Privette, who was asked at one point to officiate at the wedding ceremony, but refused to do so, testified that Dickey and Rae Lee "did not seem in love". (J.A. 381-382.) Rae Lee indicated during her deposition that she had limited interaction with Agnes and testified that she did not know what Agnes' understanding was as to the nature of her relationship with Dickey. (J.A. 287-288; 290; 302.)

that he could return home. Instead, Dickey began experiencing urinary tract infections and other complications that caused episodes of confusion and a general decline in health. (J.A. 228-232; 236-237; 367-369; 424-426; 430-431.)

THE SECRET MARRIAGE

On October 1, 2013, Rae Lee married Dickey in a secret wedding ceremony conducted after normal business hours and behind closed doors at the Greystone facility. (J.A. 336-340.) No announcements or invitations were sent out, and Dickey's family had no knowledge that such an event was to occur. (J.A. 286; 308; 341-343; 432-433.) No prior notice of the planned event was given to Greystone's administrative staff. (J.A. 338.) The hastily arranged event was attended only by a few acquaintances informally invited by a friend of Rae Lee. (J.A. 284-286; 339-340.)

A Tennessee Deputy Clerk with no prior relationship with either party officiated. (J.A. 283.) Pastor Cindy Privette, the Presbyterian minister to the Davis Family who had been visiting Dickey during his hospitalization, was asked to perform the ceremony but declined to do so after speaking with Dickey. (J.A. 380-382.) In addition to being bothered by the rushed and secretive nature of the planning, Pastor Privette testified that Dickey seemed to be reluctant about the marriage and that Dickey and Rae Lee "did not seem in

love." (J.A. 381-382.)

AGNES' REACTION

Agnes learned of the ceremony approximately two weeks later, after Dickey had been transferred to Wellmont Bristol Regional Medical Center for treatment for a urinary tract infection,[7] when a friend contacted her about postings on Rae Lee's Facebook page which indicated that Rae Lee had married Dickey. (J.A. 223-224; 391-393; 427.) To Agnes, who was unaware of the possibility of any romantic relationship between Dickey and Rae Lee, this was profoundly shocking news, not just in the sense that such a thing might have happened without her knowledge or at a particular time or place, but that it might have occurred at all, particularly in light of Dickey's poor health. (J.A. 221; 451.) Compounding Agnes' concern was the fact that Dickey had been exhibiting episodes of confusion during his time at Greystone, during which he seemed generally unsure or even outright mistaken about his circumstances and the current state of affairs. Agnes and her daughter, Susan, both observed

[7] Dickey contacted Agnes to ask that she arrange for his transfer to the Bristol hospital via use of her power of attorney, rather than relying upon Rae Lee, even though the transfer occurred after the secret wedding ceremony. (J.A. 234-235; 429.)

this confusion.[8] (J.A. 228-232; 236; 424; 430-432.)

When Agnes telephoned Dickey's room at the nursing facility to inquire whether he had married Rae Lee, Dickey seemed uncertain, telling Agnes -- "I guess so". (J.A. 225-226.) Dickey did not attempt during this telephone call to explain to his mother what had occurred or why it occurred, to the extent that he was capable of doing so, or otherwise to give her any indication that he had knowingly and willingly entered into a marriage with Rae Lee. (J.A. 225.) Dickey was essentially uncommunicative during Agnes' subsequent visits as his health continued to deteriorate, such that Agnes never had a meaningful opportunity to follow up with Dickey about the marriage so as to have a better understanding of what occurred. (J.A. 228-233; 236-238; 429-432.)

Given that Dickey was away from her care in another state, was in poor health, and had exhibited multiple episodes of confusion during his stay at Greystone, Agnes worried that Rae Lee had taken advantage of Dickey's

[8] Dickey was known to suffer episodes of disorientation or confusion associated with urinary tract infections. Medical records documented various episodes of confusion prior to October 1, 2013, as well as the presence of a urinary tract infection on the date of the wedding. (J.A. 642-653.) Even Rae Lee acknowledged that such episodes of confusion had occurred in association with Dickey's UTIs. (J.A. 365-366.) Dickey was being prescribed antipsychotic and antidepressant medications during this period. (J.A. 640-641.)

compromised health and fragile state for purposes of gaining financial benefit for herself.[9] (J.A. 320-321.) Fearing that the secret marriage might be the first step in an effort to separate Dickey from his property, Agnes felt that it was imperative that she act, on Dickey's behalf, to ensure that Dickey's property was protected from Rae Lee while she attempted to gain better understanding of what had occurred. (J.A. 243-244; 247; 329.) Given the broad provisions of the subject power of attorney, and her long history of looking after Dickey's welfare, Agnes reasonably believed that she had the necessary authority to act to protect Dickey and his assets.

Agnes contacted David Price, an Indiana attorney who had previously performed work for Susan and her husband, shortly after learning of the secret marriage and before Dickey suffered a "code blue" event that preceded his ultimate death. (J.A. 318-319; 433; 462-463.) Agnes' sense of urgency did not permit her the luxury of an extended period of time in which to plan out the

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[9] The Davis Family introduced evidence at trial suggesting that Agnes' instincts about Rae Lee, her family, and friends were justified. For example, Rae Lee sold a horse belonging to Dickey named "Fort Chiswell's Wild Kiss" to her daughter-in-law three days before Dickey's death, without authority to do so, for the sum of $3,500.00, which funds she kept for her own use rather than turning the funds over to the Estate. (J.A. 357-358; 558) Rae Lee's son testified that he and his wife later received an offer of $200,000.00 for the horse and ultimately sold it for $150,000.00. (J.A. 409; 413.)

transfers, but she was convinced that she and her children were best positioned to look after Dickey's interests.[10] (J.A. 243-244; 247; 335.) In consultation with Mr. Price, Agnes, as Dickey's agent under the 1993 power of attorney, executed three deeds, conveying Dickey's real estate to his siblings, Susan and Garnett, and assigning his personal property to herself.[11] (J.A. 245-246; 321; 334-335.) These instruments were executed on October 30, 2013, and October 31, 2013. (J.A. 11-20.) These were not "gifts" in the traditional sense, in that the overriding purpose of the transfers was the protection and preservation of Dickey's assets, not the enrichment of the transferees.[12] (J.A. 323.)

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[10] In addition to the issue of Rae Lee's possible intentions, there was also the obvious factor of Agnes' age. She was 98 years old at the time of the transfers, such that there was an ever-present possibility that she might predecease Dickey, leaving him without an agent or guardian upon her death and presumably subject to the will of Rae Lee, as his wife.

[11] Dickey lived in Agnes' house and ran his horse operations from a barn situated on Agnes' property adjacent to the home, so Agnes already had possession of the assigned personal property. (J.A. 326-327; 332-333.)

[12] While there was no express or implied understanding between Agnes, Susan and Garnett in respect of the transfers, Susan and Garnett indicated that if Dickey had lived, they would have seen to it that all of his financial needs were met, as the family had always done. (J.A. 441; 469.) Susan further testified at trial that, had Dickey fully recovered and seemed "back to himself and capable," she would have re-conveyed her interest in the real property to him. (J.A. 456.)

RAE LEE'S REACTION

A little over a week prior to Dickey's death on November 15, 2013, Rae Lee met with an attorney at the Wythe County Clerk's Office to ascertain the status and extent of Dickey's property. (J.A. 298-299; 361-364; 409-410.) Rae Lee discovered that the transfers had occurred. She immediately retained the attorney to assist her with the first of a variety of lawsuits. (J.A. 362-364.) Shortly thereafter, Rae Lee exercised her right, as Dickey's newly-minted wife, to approve the discontinuation of Dickey's life support against the wishes of Dickey's family. (J.A. 437-439; 639.)

THE TRIAL COURT'S RULINGS

Under the foregoing facts, and after resolving innumerable credibility issues and evidential disputes regarding the actions, knowledge, intent, and motives of the contending parties, the trial court ruled that Agnes' actions as agent, in these circumstances, to protect the family-derived assets of her confused and incapacitated son for his benefit, were appropriate under Va.

Code §64.2-1622(H).[13] (J.A. 153-158.) The trial court specifically found as a fact that Agnes, Garnett, David Price, and Kendall Clay, who had previously drafted Dickey's last will and testament, were "highly credible" witnesses.[14] Notably absent from the court's list of credible witnesses were Rae Lee and her witnesses, including her son and daughter-in-law. (J.A. 154.)

The trial court further found as a fact that Agnes acted in good faith throughout the 20 years that she acted as Dickey's attorney-in-fact, including in making the disputed transfers. (J.A. 153; 157.) The trial court found as a fact that Dickey had made prior major gifts during his lifetime, including large gifts

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[13] The power of attorney contains language that underscores a desire on Dickey's part to extend to Agnes Davis as expansive a range of authority as possible, beginning first with a grant of authority to "transact for me, in my name, place and stead, all business for me that I could do if acting personally" and thereafter reiterating at the end of the document that Agnes should have the authority 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 do or could do if acting personally." (J.A. 10.)

[14] The trial court found as a fact that Agnes was unaware of the status or substance of Dickey's last will and testament, which named Rae Lee as a beneficiary of Dickey's estate. (J.A. 154.) Rae Lee has not assigned error to this finding of fact.

to Burt Honaker, Rae Lee's son, and a substantial gift of $10,000.00 to Garnett.[15] The trial court further found as fact that the transfers made by Agnes were of a quality and nature that were consistent with Dickey's prior history of lifetime gift-giving. These factual findings are entitled to the highest degree of appellate deference. Error is only assigned to this last finding of fact. (Brief of Appellant, pg. 15)

In light of these findings, the trial court ruled that Agnes' actions as agent, to protect the family-derived assets of her quadriplegic son for his benefit, were appropriate under Va. Code §64.2-1622(H).

ARGUMENT

A. ASSIGNMENT OF ERROR 3.[16]

The third assignment of error concerns the trial court's finding of fact as

[15] The two gifts to Burt Honaker included a 90-year lease to Burt and his wife of a 17-acre section of Dickey's property for a total of $1,000.00 and Dickey's agreement to secure a portion of Burt's debt for building a new barn on the 17 acres in the underlying property, which was owned by Dickey. (J.A. 401-406; 500-504.) Burt testified at trial that the barn had been appraised at approximately $850,000.00. (J.A. 406.) Garnett testified as to the $10,000.00 gift on the second day of trial. (J.A. 470.)

[16] This Assignment of Error is placed second in the list of errors in the Table of Contents for Appellant's Brief but is numbered as "3". (Brief of Appellant, pg. i)

to the nature of the disputed transfers, i.e., whether they were of such a character as to be consistent with Dickey's prior history of lifetime gift-giving. This finding of fact underlies the trial court's ultimate determination that the disputed transfers were valid under Va. Code §64.2-1622(H). In disputing this finding, Rae Lee argues that the trial court is constrained to view Dickey's prior history of lifetime gift-giving in a narrow, formulaic manner, requiring exact replication of purpose, amount and recipient between the disputed transfers and the prior gifts in order for consistency to be found. Inherent in Rae Lee's argument is the position that a trial court is prohibited from considering the larger context of any disputed transfers or evaluating the equities surrounding such transfers. This narrow reading substantially eliminates the trial court's discretion to resolve disputed facts.

1. STANDARD OF REVIEW.

A trial court's findings, made on disputed evidence heard *ore tenus*, are not set aside unless error has been assigned to them and this Court rules that they are plainly wrong or without evidence to support them. VA. CODE §8.01-680; *Forest Lakes Cmty. Ass'n v. United Land Corp. of Am.*, 293 Va. 113, 117, 122-123 (2017)("we review factfinding with the highest degree of appellate deference"); *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 394

(2012); *Collins v. First Union Nat'l Bank*, 272 Va. 744, 749 (2006).

2. THE CIRCUIT COURT CORRECTLY FOUND AS FACT THAT, UNDER THESE UNIQUE CIRCUMSTANCES, THE DISPUTED TRANSFERS WERE SUFFICIENTLY CONSISTENT WITH THE GIFTS PREVIOUSLY MADE BY DICKEY.

The trial court found as a fact that Dickey had a relevant personal history of lifetime gifting. Specifically, the trial court found that Dickey had a history of making gifts of great value, such as his gift to Ronald Burt Honaker, Rae Lee's son, in the form of a 90-year lease of a valuable portion of Dickey's farm land for nominal consideration, and Dickey's voluntary and unremunerated use of his real property to secure Honaker's indebtedness in excess of $850,000, and also found that Dickey had a history of making gifts to his family, evidenced by his $10,000 gift to his brother, Garnett. (J.A. 153-154.) Considering these two characteristics of Dickeys' prior gratuitous transfers, and in the context of the unique circumstances under which the transfers occurred, the trial court then concluded that the disputed transfers to Dickey's family were consistent with Dickey's history of personal lifetime gift-giving, the disputed transfers clearly reflecting both of these characteristics. (J.A. 158B-158C.)

The trial court's analysis of, and characterization of, Dickey's history of lifetime gift-giving was not plainly wrong, and the trial court cited sufficient evidence in support of its findings. As the trier of fact, the trial court was

entitled to credit, and did give credit to, the Davis Family's evidence concerning the circumstances under which the transfers were made, the history of Dickey's family relationships, Agnes' testimony about the desire expressed by Dickey to leave his property to the family, and Garnett's testimony concerning a prior gift of $10,000.00 from Dickey, as well as the testimony concerning Dickey's lease of a portion of his property for a period of some 90 years for nominal consideration and Dickey's uncompensated subjection of his property to an indebtedness of more than $850,000, both of which constituted substantial gifts.

Considering this evidence, it was not plainly wrong for the trial court to conclude that Dickey's gift to Garnett evidenced an inclination to make gratuitous transfers to his family, of which Agnes and Susan were also members. The evidence showed strongly positive and meaningful relationships between Dickey and the remaining members of his family, including a history of Dickey's family caring for him physically and financially to such a degree that it was entirely reasonable to anticipate that Dickey would want to benefit his family in some way. No evidence suggested that Dickey had anything but a positive relationship with Susan. All the evidence showed that Dickey was extremely close with his mother, Agnes, without whose unflagging

support he would not have been able to acquire, maintain or retain the assets now in dispute. In fact, Agnes testified that Dickey had informed her at some point in the past that he wanted his property to go to her or the family. (J.A. 220.) It was also not plainly wrong for the trial court to conclude that, if Dickey were willing to make substantial gifts to Rae Lee's son, then he could reasonably have been expected to make substantial gifts to his family, given the history of Dickey's relationships with the various parties.[17]

Viewed in the light most favorable to the Davis Family as the prevailing party below, and the deference given to findings of fact, the evidence and reasonable inferences derived therefrom support the trial court's findings. Rae Lee seeks to impose strict limitations upon the trial court in terms of how closely the circumstances of the disputed gifts must mirror those of prior gifts, and to impose limitations upon the breadth of factors that the trial court can consider in characterizing the disputed transfers vis-à-vis the prior gifts,

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[17] *Estate of Ridenour v. Comm'r*, T.C. M. 1993-41 (1993)(aff'd *Estate of Ridenour v. Comm'r*, 36 F.3d 332 (4th Cir. 1994), rejected the argument that the phrase "in accordance with" required that gifts made on the principal's behalf by his agent be identical in kind to prior gifts made by the principal or that such gifts be made only to people who previously received gifts from the principal. Instead, *Ridenour* approved gifts made to "the natural objects of decedent's bounty" as being permissible under the statute. The agent's gift in *Ridenour* fell clearly within the decedent's documented interest in tax avoidance.

including the history of the parties' relationships and other equitable considerations. (Brief of Appellant, pg. 25.) However, Rae Lee fails to cite to any authority in this jurisdiction for the proposition that the trial court's discretion is so limited.[18] (Brief of Appellant, pgs. 25-27.)

B. ASSIGNMENT OF ERROR 2.

The second assignment of error concerns the trial court's holding that Agnes' transfers on Dickey's behalf were valid under Va. Code §64.2-1622(H). That holding was born of the trial court's view of the parties' relationships and the circumstances leading to the disputed transfers, which, in turn, led to the court's findings that Agnes acted in good faith,[19] that Dickey had a relevant personal history of making lifetime gifts for purposes of that statute, and that the character of the disputed transfers was consistent with that prior personal

[18] Rae Lee incorrectly characterizes the trial court's findings concerning Dickey's prior history of lifetime gift-giving and the consistency between the disputed transfers and such prior gifts as matters of statutory interpretation, rather than findings of fact. (Brief of Appellant, pg. 30.)

[19] At trial, Rae Lee asserted that Agnes violated her duty to act in Dickey's best interest and in good faith under Virginia Code §64.2-1612. However, under Code §64.2-1612(B) and (C), an agent is excused from any obligation to comply with an estate plan that the agent knew nothing about, and such agent is released from any liability for failing to act in accordance with an estate plan where the agent otherwise acted in good faith.

history. Relying upon cases from other jurisdictions, Rae Lee argues that the trial court could not rule, on this record and in these particular circumstances, that the disputed transfers were valid under the statute.

1. STANDARD OF REVIEW.

The interpretation of a statute is subject to *de novo* review on appeal. *Commonwealth v. Amos*, 287 Va. 301, 305 (2014). To the extent a trial court's holding is a mixed question of law and fact, it is subject to *de novo* review but with the factual component entitled to deference. *Cattano v. Bragg*, 283 Va. 638, 645 (2012).

2. THE CIRCUIT COURT CORRECTLY HELD, ON THE RECORD BEFORE IT, AND IN LIGHT OF THE COURT'S FINDINGS OF FACT, THAT THE DISPUTED CONVEYANCES WERE VALID UNDER VA. CODE §64.2-1622(H).

The subject power of attorney contains general grants of authority, permitting the agent to "transact . . . all business for me that I could do if acting personally" and 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." Code §64.2-1622(H) provides in pertinent part that "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 to any individuals . . . in accordance with the principal's personal history of making or joining in the making of lifetime gifts."[20] The trial court concluded that, under the foregoing terms of the power of attorney, and in light of its findings of fact in this unique situation, the disputed transfers were authorized, valid, and final under the statute. (J.A. 157-158.)

Rae Lee first argues that the trial court erred in its finding of fact concerning the consistency between the disputed transfers and Dickey's prior gifts. Then, she appears to argue that the trial court did not, in fact, make that finding, instead asserting that the trial court held, under Code §64.2-1622(H), that consistency between the disputed and prior transfers was not required

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[20] Section 201 of the Model Uniform Power of Attorney Act, which is the source of most of Va. Code §64.2-1622, lacks a subparagraph (H) and lacks any language of similar purport. The drafters of the Virginia statute borrowed subsection (H) from a prior Virginia statute, former Code §11-9.5(A) (Supp. 1992). That statute was enacted in response to, and to negate the effect of, *Casey v. Commissioner*, 948 F.2d 895 (4th Cir. 1991), predicting that Virginia courts would exclude a gifting power from the ambit of a broad but general grant of power to "do all acts." *Estate of Ridenour*, 36 F.3d 332 (4th Cir. 1994), aff'g T.C. Mem. 1993-41 (1993). *Ridenour* affirmed that former Code §11-9.5 (A) was retroactive, meaning that the gifts at issue, made by the decedent's agent before the statute's enactment, were irrevocable and thus not subject to federal estate taxation.

and that *any* history of lifetime gift-giving, regardless of the facts or circumstances, would support gifts of any size or character by the agent. (Brief of Appellant, pgs. 27-32) Rae Lee mischaracterizes the trial court's holding – at no place in the July 13, 2017, memorandum opinion does the trial court suggest that the mere existence of any donative history is *per se* sufficient to justify transfers of the nature and scope found in this case. (J.A. 152-158.) Rather, the trial court made it clear in its November 21, 2017, Order that the particular and unique facts of this case led the court to its conclusion that the particular transfers in dispute were consistent with Dickey's prior gifts. (J.A. 158C.)

Additionally, Rae Lee seeks to read into Code §64.2-1622(H) a requirement that an agent must have actual knowledge of the full extent of the principal's history of giving before acting, and that the agent must act solely to further the principal's prior gifting history.[21] (Brief of Appellant, pg. 32) However, Code §64.2-1622(H) does not contain such requirements. While many cases may involve one or both of these elements in their factual background, the statute does not require them. Here, the trial court was

[21] Rae Lee asserts that Agnes acted for "improper purposes", ignoring the trial court's finding of fact that Agnes acted in good faith, a finding to which Rae Lee has not assigned error. (Brief of Appellant, pg. 32)

justified, based on its factual findings, in ruling that the statute was satisfied.

Rae Lee argues that the trial court's decision would create a "troubling" precedent that could be used to justify unconstrained gifting by an agent under a durable power of attorney. (Brief of Appellant, pg. 31) This argument ignores the trial court's crucial finding that Agnes acted in good faith, which is not a matter in dispute in this appeal. (J.A. 153; 157.) This finding of fact is the critical difference between this case and the "troubling" scenarios imagined by Rae Lee. At no point in the trial court's opinion was it suggested that an agent under a power of attorney was not subject to the duty to act in good faith and in accord with the principal's best interest under Va. Code §64.2-1612.

The facts of this case are unique, in that Dickey was only able to acquire and maintain his property and sustain his show horse business through the continuous infusion of funds by Agnes, who was also his agent. This is clearly not the case of a less financially viable agent seeking to acquire the funds of a wealthier principal. Moreover, Agnes' actions were prompted by reasonable concern over the circumstances of Dickey's wedding, circumstances created by Rae Lee's own decision to keep the ceremony a secret from Agnes and the rest of Dickey's family. If the secret wedding had not occurred in the manner that it occurred, then Agnes would not have felt compelled to act to protect Dickey's

interests. The facts of the present case do not form a "troubling" scenario, nor does the trial court's decision based upon these facts create any precedent that could create unintended consequences if applied to other cases.

The Davis Family respectfully submits that the trial court's ruling that Agnes' transfers were valid under Code §64-2-1622(H) was permissible under the facts of this case and should not be disturbed.

C. ASSIGNMENT OF ERROR 1.

Rae Lee argues, in essence, that a power of attorney cannot expressly grant an agent the authority to make gifts or other gratuitous transfers for purposes of Va. Code §64.2-1622(A)(2) unless that power of attorney contains specific words such as "gifts" or "donations", and that the trial court, therefore, erred in construing the word "convey," as used in the subject power of attorney, to encompass gratuitous transfers.

1. STANDARD OF REVIEW.

This Court reviews the trial court's interpretation of the subject power of attorney *de novo*. *Perel v. Brannan*, 267 Va. 691, 698 (2004).

2. THE CIRCUIT COURT CORRECTLY HELD THAT THE POWER OF ATTORNEY EXPRESSLY AUTHORIZED AGNES DAVIS TO MAKE GIFTS ON DICKEY DAVIS' BEHALF AS ATTORNEY-IN-FACT.

The trial court concluded that the subject power of attorney, with its array of general and specific grants of authority, was deliberately drafted to give Agnes broad powers in dealing with Dickey's affairs.[22] (J.A. 156.) The document contained various specific grants of authority, including the authority 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." The trial court interpreted the use of the term "convey" in this specific grant of authority to encompass gifts of Dickey's property. (J.A. 157.)

The trial court correctly interpreted the meaning of "convey" as used in the specific grant at issue. "Convey" is a broad term that can be used to encompass a wide range of property transfers, including transfers where no

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[22] In *Reineck v. Lemen,* 292 Va. 710 (2016), this Court addressed both broad and specific grants of authority, namely the broad authority "to do and perform in a fiduciary capacity as my Attorney-in-Fact may deem advisable anything of any character which I might do or perform for myself" and the specific authority to "assign, transfer and convey all or any part of my real or personal property" to "any revocable trust established by my Attorney-in-Fact during my lifetime which directs the trustee or trustees to administer the trust for my benefit". As *Reineck* makes clear, broader language contained in a power of attorney is to be read in conjunction with its more specific provisions in order to ascertain the overall intent of the principal. See also *Jones v. Brandt*, 274 Va. 131 (2007)(considering a combination of specific and general grants).

consideration is exchanged. BLACK'S LAW DICTIONARY 357 (8th ed. 2004); see also, for example, *Hamm v. Hazelwood*, 292 Va. 153 (2016); *Deutsche Bank Nat'l Trust Co. v. Arrington*, 290 Va. 109 (2015); *Larchmont Homes, Inc. v. Annandale Water Co.*, 201 Va. 178, 181 (1959); Va. Code §64.2-1625(2) (using the term "convey" in a manner that could include both gratuitous and non-gratuitous transfers of real property).

"Convey" appears in the document unrestricted by any words requiring the exchange of valuable consideration. The terms "sell" and "convey" stand together in the document as terms of equal importance and, as such, "convey" can reasonably be interpreted to have been intended to encompass transfers without consideration in order to avoid redundancy.[23] Similar to the specific grant of authority at issue in *Reineck v. Lemen*, 292 Va. 710 (2016), this provision does not attempt to limit the circumstances under which such conveyances must occur, the nature of the property conveyed, or even the amount of assets conveyed.[24] *Reineck*, 292 Va. at 715-718 (agent properly

[23] Likewise, Va. Code §64.2-1625(2) uses the terms "Sell; exchange; convey . . . " to describe distinct acts within the authority of the agent.

[24] There was no suggestion in *Reineck* that the term "convey" was limited to transfers for consideration.

conveying all of the principal's assets).[25]

In her Brief, Rae Lee argues that an express gift-giving provision cannot be found in a power of attorney absent the use of certain specified words, such as "gifts" or "donations", but cites to no case law or statutory authority for the proposition that the ability of courts to construe powers of attorney are so narrowly constrained. (Brief of Appellant, pg. 18.) There are, in fact, no such restrictions upon the courts reviewing such documents or the drafters who prepare them. Notably, in *Estate of Casey v. Commissioner*, 948 F.2d 895 (4th Cir. 1991), the Fourth Circuit Court of Appeals indicated that, under Virginia law, an express gifting authority could be drafted without reliance on the word "gift", suggesting that language authorizing an agent to "convey [property] with or without consideration", or "the like", would be sufficient to constitute an express gift-giving provision. *Id.*, 948 F.2d at 897. Similarly, in the present case, the mere juxtaposition of the words "sell" and "convey" in the subject power of attorney, unrestricted by any language suggesting a need for consideration,

[25] Because this provision of the power of attorney expressly authorized the unrestricted conveyance of *any and all* of Dickey's property, not only were the transfers valid and proper in terms of their character vis-à-vis this specific grant of authority, they were also valid and proper in terms of their *value*, the limitations of Va. Code §64.2-1638(B)(1) having no application. This constitutes an alternate, independent grounds for affirming the judgment.

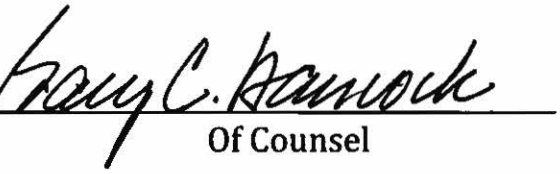
could reasonably be construed as evidencing an intent to grant Agnes the authority to make both transfers for consideration and gratuitous transfers, particularly when considered in light of the document's repeated emphasis on granting Agnes the most comprehensive power possible. For this reason, the trial court's ruling was not in error.

CONCLUSION

For the foregoing reasons, the Davis Family respectfully requests that the Court affirm the ruling of the trial court in its entirety.

Respectfully submitted,

AGNES C. DAVIS, SUSAN D. GOFORTH, and J. GARNETT DAVIS, JR., in his individual capacity and as Executor of the Estate of Samuel Dickey Davis

By: 
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CERTIFICATE

I HEREBY CERTIFY that I have complied with Rule 5:26(e) of the Rules of the Supreme Court of Virginia, and that on this 12th day of August, 2019, an electronic copy of the foregoing Brief of Appellees was sent to the following:

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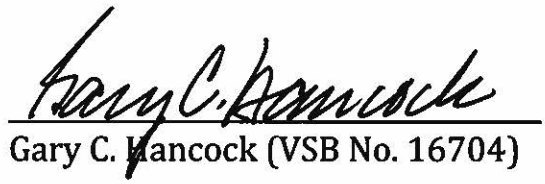

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