IN THE

Supreme Court of Virginia

RECORD NO. 190832

SANDRA FLORA SNEAD LARSEN,

Appellant,

v.

PAMELA LARSEN STACK, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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SCV: Submitted on 02-14-2020 16:05:22 EST for filing on 02-14-2020

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INTRODUCTION

Sandra Flora Snead Larsen ("Mrs. Larsen") replies to the Brief of Appellees filed on behalf of Pamela and Kirk Larsen ("Pamela and Kirk" or the "Children").

Pamela and Kirk have taken inconsistent positions in this case. They asserted below that their father's Will was clear and unambiguous. At the evidentiary hearing, they stated:

> **Judge, I do not believe that the language used by Mr. Larsen in his Will is ambiguous at all.** I think it's pretty clear as to what he intended. I don't anticipate offering any parole evidence, at least from the prospective [sic] of the plaintiffs. **We believe the language is clear and that it would require only the Court's interpretation as to what the language means**, and we certainly would have argument to the Court as to the legal ramification of that language.

(JA 38, emphasis added). They also repeatedly instructed the court to ascertain Mr. Larsen's intent from the language of the Will itself. (JA 45: "I'm not disputing the language that he used in his Will. I'm not going to ask you to give it any other meaning than its normal, ordinary meaning."; JA 76: "You've got to read the whole document to ascertain what it is that – the intention of the words that Mr. Larsen used."; JA 82-3: "Judge, I'm just asking you to use the language that Mr. Larsen used.").

As the Children correctly observed at trial, "[i]t's the words used, not what a lawyer says fifteen years later to try to establish somebody's interest in the property." (JA 52). Nevertheless, the Children introduced the testimony of Attorney Brown,

who drafted the Will, to do just that – interpret Mr. Larsen's Will. And, in an apparent effort to justify the admission of Attorney Brown's testimony, Pamela and Kirk on appeal now reverse course and assert that the Will is ambiguous. (Br. of Appellees 7-8). They cannot have it both ways.

"A party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory." *Rowe v. Commonwealth*, 277 Va. 495, 502 (2009) (quoting *Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181 (2006)). The Children's "position in the trial court below prevents [this Court] from considering an opposite position on appeal." *Nelson v. Commonwealth*, 71 Va. App. 397 (2020).

Because the Will is unambiguous, testimony from Attorney Brown is not admissible.[1] Applying the plain language of the Will, Mrs. Larsen has a life estate in the former martial residence and surrounding property that terminates when she is no longer able to physically and mentally live there. Further, nothing in the Will required Mrs. Larsen to live by herself on the property. Therefore, the trial court's

[1] Pamela and Kirk mention the pre-nuptial agreement between their father and Mrs. Larsen as proof that Mrs. Larsen does not have a life estate in the 101 acre property. (Br. of Appellees 3). That agreement, which purported to grant Mrs. Larsen the right to remain in the marital residence "for up to one year" plainly contradicts the relevant language in the Will, which put no such time restriction on Mrs. Larsen's interests in the property. (JA 17). Given this clear contradiction, it appears that the trial court did not rely on this agreement to ascertain the meaning of the Will, particularly as there is no mention of it in the final order. (JA 31).

conclusion that Mrs. Larsen had a mere right to reside on the property by herself contradicts the plain language of the Will.

ARGUMENT

1. Mrs. Larsen has not waived her objections to the admissibility of Attorney Brown's testimony and timely informed the trial court of her position that she has a life estate in the 101 acre property.

A. Mrs. Larsen timely objected to the admission of Attorney Brown's testimony.

The Children argue that Mrs. Larsen failed to object to the admission of Attorney Brown's testimony. (Br. of Appellees at 4: "There was no objection from Ms. Larsen's counsel."). To the contrary, the record reflects that Mrs. Larsen objected to the admission of any parole evidence *prior* to the evidentiary hearing. (JA 11). She also objected to the introduction of Attorney Brown's testimony before he testified by asserting that the Will was unambiguous and should be construed only from the language of the Will. (JA 40, 42). Further, Mrs. Larsen objected during Attorney Brown's testimony, complaining that "I don't think that Mr. Brown should put the robe on and decide the case." (JA 63-4). Later, and before the court entered the final order, Mrs. Larsen renewed her objection to the introduction of any parole evidence because the Will was unambiguous. (JA 93). Consequently, Mrs. Larsen has preserved the issue for appellate review. Rule 5:25.

Further, the Children also argue that Mrs. Larsen's ability to argue that she had a life estate was waived when she agreed to Attorney Brown's qualifications. (Br. of Appellees 4). The fact that Mrs. Larsen agreed that Attorney Brown was qualified to testify, (JA 59), does not mean that she waived the right to challenge the admissibility of his testimony. The *qualifications* of an expert witness are a different and separate issue from the *admissibility* of the expert's testimony.

Finally, Pamela and Kirk argue that Mrs. Larsen waived her objection to Attorney Brown's testimony because she cross-examined him at the evidentiary hearing. (Br. of Appellees 4). This is also incorrect. It is well-established that a party does not waive an objection to the admissibility of evidence by questioning the witness on cross-examination. *Drinkard-Nuckols v. Andrews*, 269 Va. 93, 101 (2005) ("when the objecting party elicits evidence of the same character either during cross-examination of a witness or in rebuttal testimony, a duly made objection is not waived"); *Zektaw v. Commonwealth*, 278 Va. 127, 134 (2009) (same). Indeed, this Court "ha[s] never held that the mere cross-examination of a witness . . . will constitute a waiver of an exception to testimony which has been duly taken." *Drinkard-Nuckols*, 269 Va. at 102. The Children's argument to the contrary, therefore, is plainly wrong.[2]

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[2] It is also worth noting that much of the cross-examination of Attorney Brown did not even involve the same issues that are presented on appeal, (JA 65-66; scope

B. The court had an opportunity to consider and rule on Mrs. Larsen's argument that she had a life estate in the 101 acre property.

The Children also maintain that because Mrs. Larsen never amended her Answer to clarify that she was claiming a life estate, she waived the right to claim a life estate. (Br. of Appellees 7). Mrs. Larsen addressed this issue in her Opening Brief. (Op. Br. 3). The Answer was filed by Attorney Brown, who drafted the Will. Because Pamela and Kirk intended to call Attorney Brown as a witness, he withdrew as counsel and new counsel stepped in. (JA 8). When the Children pointed out at the evidentiary hearing that Attorney Brown's Answer provided that Mrs. Larsen did not have a life estate, (JA 50), Mrs. Larsen's new counsel requested leave to amend the Answer if the court believed that an amendment was necessary to confirm her position that she had a life estate subject to an executory limitation.[3] (JA 55-56). The trial court apparently found it unnecessary to require a formal amendment of the Answer.

Further, Mrs. Larsen repeatedly informed the court of her position that she had a life estate subject to an executory limitation. (JA 11, 40, 46-8, 81-2, 84-7).

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of the property), and therefore could not waive Mrs. Larsen's objection to the issues she raises on appeal.

[3] Mrs. Larsen's counsel stated: "If the Court accepts that it somehow is contradictory, then I respectfully request leave to file an amended answer." (JA 56).

Mrs. Larsen even restated her position after the evidentiary hearing, and before the court entered the final order. (JA 120).

The purpose of the contemporaneous objection rule is to give the trial court an opportunity to rule intelligently on an issue. *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010). Here, Mrs. Larsen informed the court of her position that she had a life estate. Therefore, her argument is preserved. *Id.*; *Helms v. Manpile*, 277 Va. 1, 6-7 (2009) (once a litigant informs the circuit court of her legal argument, there can be no waiver unless the record "affirmatively show[s] that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection").

2. The Will granted Mrs. Larsen a life estate in the 101 acre property.

A. <u>The Will was clear and unambiguous.</u>

As an initial matter, Pamela and Kirk also suggest that the trial court admitted evidence from Attorney Brown because Mrs. Larsen's position on the life estate changed from the time she filed the Answer to the time of the evidentiary hearing. (Br. of Appellees 8). This is not correct. The parties had agreed before the hearing that the Will was not ambiguous, (JA 40), but the trial court stated at the hearing that certain parts of the Will were confusing. (JA 57-8). The trial court's decision to hear from Attorney Brown had nothing to do with Mrs. Larsen's position on the life estate issue.

Pamela and Kirk assert that the Will was ambiguous because the parties had differing interpretations of the Will. (Br. of Appellees 7-8). It is well-established that a disagreement between the parties about the meaning of a will does not create an ambiguity. *See Wilson v. Holyfield*, 227 Va. 184, 187 (1984) ("Contracts are not rendered ambiguous merely because the parties disagree as to the meaning of the language employed by them in expressing their agreement.")

Further, Attorney Brown's testimony was not "facts and circumstances" evidence, as the Children now contend. (Br. of Appellees 10). First, "facts and circumstances" evidence is admissible when a will is ambiguous, which is not the case here. *Gillespie v. Davis*, 242 Va. 300, 304 (1991). Second, Attorney Brown offered his opinions as to what the language in the Will meant and what he thought Mr. Larsen intended. This testimony falls well outside the permissible boundaries of "facts and circumstances" evidence. *Id.* Instead, it was direct evidence of Mr. Larsen's testamentary intent, which cannot be admitted in this case. As Pamela and Kirk correctly observed below, "[i]t's the words used, not what a lawyer says fifteen years later to try to establish somebody's interest in the property." (JA 52).

Whether a will is ambiguous is a question of law for this Court to decide. *See Virginia Fuel Corp. v. Lambert Coal Co.*, 291 Va. 89, 97-8 (2016) (contract interpretation). The trial court committed legal error in concluding that the Will was

ambiguous. An ambiguity only exists when the language can be understood in more than one way, *Gillespie*, 242 Va. at 304, which is not the case here.

B. The words "life estate" are not required to create a life estate.

The fact that Mr. Larsen used the words "life estate" in the Sixth Paragraph of the Will, but not in the Fifth Paragraph relating to the 101 acre property, does not prove that Mrs. Larsen cannot have a life estate in the 101 acre property. (JA 17). Even where a will does not use the term "for life," a life estate may nevertheless be created. *E.g.*, *Feeney v. Feeney*, 295 Va. 312, 319 (2018) (finding that a will created a life estate even though the words "for life" were not used). Indeed, "[n]o specific words are required to create a life estate." *Gaymon v. Gaymon*, 258 Va. 225, 231 (1999). The intention to grant a life estate "can be manifested either by express language" or "by implication." *Feeney*, 295 Va. at 318 (citing *Edwards v. Bradley*, 227 Va. 224, 229 (1984)).

Here, the Will grants Mrs. Larsen a life estate in the property even though the grant itself does not use those precise terms. The grant is by implication. *See Feeney*, 295 Va. at 321 ("the residuary clause grants Marjorie a life estate by implication in the residual property, impaired to the extent of the limitations expressed"). The limitation on the life estate here is defined as the right to live in the home for so long as Mrs. Larsen is "physically and mentally able to do so," which could be for her life. (JA 17).

Pamela and Kirk contend that there is no life estate because Mrs. Larsen's right was limited by "use of the term 'reside.'" (Br. of Appellees 12). However, they do not even attempt to distinguish the cases cited in the Opening Brief (pages 16-17) that find that a "right to reside" or equivalent language creates a life estate. (Br. of Appellees 15). A "right to reside" is not language of limitation, and can indeed create a life estate. *E.g.*, *Estate of Kinert v. Pennsylvania Department of Revenue*, 693 A.2d 643, 645 (Pa. Commw. 1997) (will granting foster sons a "right to continue to reside" in testator's home "for the remainder of their natural lives or life or until both of them would have vacated the premises" for a specified period creates a life estate).

Further, the Sixth Paragraph where the words "life estate" appear concerns a different piece of property ("the Roanoke property") – not the parties' former marital home. Also, the Sixth Paragraph contemplates that the parties could "jointly decide to sell" the property and share the proceeds of the sale equally, (JA 18), as they in fact have already done. Plainly, then, Mr. Larsen contemplated that this property would ultimately be sold, and would not serve as Mrs. Larsen's principal residence and home. The altogether different plan for the Roanoke property explains why different language was used.

3. The Will does not require that Mrs. Larsen reside by herself in the home.

Pamela and Kirk argue that Mrs. Larsen may only reside on the property by herself because the Will "does not give the right to extend that interest to any others." (Br. of Appellees 12). The problem, however, is that the Will does not state that Mrs. Larsen must live by herself or alone on the property. Indeed, no language in the Will indicates that Mrs. Larsen's interest excludes anyone else from residing with her. Had Mr. Larsen intended to impose such a restriction, he would have said so.

To achieve the interpretation that Pamela and Kirk suggest, the Will must be rewritten to add language requiring Mrs. Larsen to live "by herself" or "alone." That, however, is plainly impermissible. *E.g.*, *Rule v. First National Bank*, 182 Va. 227, 235-36 (1944) (words may not be added to an unambiguous will).

In fact, nothing in the Will requires Mrs. Larsen to reside in isolation in her former marital home. The Will provides that Mrs. Larsen's rights extend to the entire 101 acres of the property, (JA 31), and the only limitation is that her interest terminate when she is no longer "physically and mentally able" to reside in the home. (JA 17). The language "for so long as she is physically and mentally able to do so" does not restrict her to living in isolation on the property as the Children suggest. (Br. of Appellee 12, 18). Instead, that language simply defines when her interest terminates, in the event it terminates before her death.

Because the plain language of the Will does not in any way limit Mrs. Larsen to living by herself on the property, testimony from Attorney Brown on this issue was inadmissible. Instead, the plain language of the Will controls. The trial court therefore committed plain error in relying on testimony from the drafting attorney to ascertain Mr. Larsen's intent on this point.

4. Nothing in the Will permits Kirk and Pamela to interfere with Mrs. Larsen's interests.

Contrary to the Children's argument, the decision in *White v. White*, 183 Va. 239 (1944) actually supports Mrs. Larsen's position that the Children may not interfere with her interest in the property – whether that interest is a life estate or something else. In *White*, the testator left a will providing his son Arnold with a fee simple interest in "the mansion house," and stating that "I want my wife [Mabel] to have a home at the mansion house with Arnold, as long as she remains my widow." *Id.* at 242. Arnold later died, and his decedents and relatives did not get along with Mabel. This Court held that the rights of Arnold's decedents and relatives were "subject to" Mabel's right to live in the home. *Id.* at 252. Therefore, Mabel had a right to live in the home "free from molestation and interference" from Arnold's relatives. *Id.* at 252.

As the Will states, the Children's rights are expressly "subject to" Mrs. Larsen's rights. Therefore, they may not interfere with her interests and rights during her residency on the entire 101 acre property.

CONCLUSION

The trial court's judgment should be reversed.

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on February 14, 2020, the correct number of true and accurate copies of this Reply Brief were hand-filed with the Supreme Court of Virginia, and that this brief was served upon counsel for the appellee by email: Eric H. Ferguson (VSB No. 27425), Rhodes, Ferguson & Stone, Ltd., 305 South Main Street, Rocky Mount, Virginia 24151; eferguson@rfsattys.com. I further certify that this brief complies with the page limitation for the reply brief.

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