IN THE

Supreme Court of Virginia

RECORD NO. 190832

SANDRA FLORA SNEAD LARSEN,

Appellant,

v.

PAMELA LARSEN STACK, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANT

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INTRODUCTION

Sandra Flora Snead Larsen ("Mrs. Larsen") appeals from a determination of her interests under the will of her late husband. The testator gave the property to his children, but made that devise expressly "subject to" Mrs. Larsen's "right to reside" in the home "for so long as she is physically and mentally able to do so."

The parties stipulated that the will was unambiguous. However, the trial court considered testimony about the testator's intent and the meaning of the will from the attorney who drafted the will. Based on this evidence, the court held that Mrs. Larsen did not have a life estate; her right to reside in the home would terminate if she could no longer live by herself; and the rights of the children were limited only by Mrs. Larsen's ability to live by herself.

The trial court erred. Because the will is unambiguous, evidence of actual testamentary intent was not admissible. Under the clear terms of the will, Mrs. Larsen has a conditional life estate in the entire property that terminates if she becomes physically and mentally unable to reside in the home, at which time the property goes to the children. The trial court also erred in finding that Mrs. Larsen must reside on the property *by herself* when the will expressed no such restriction.

Giving effect to the words used in the will, Mrs. Larsen was entitled to exclusive possession of the property, without interference from the children, until she died or was no longer "physically and mentally able" to reside in the home. This

is the testator's intent as clearly expressed in the language he used in the will. Because the trial court permitted the attorney who drafted the will to ascertain its meaning, rather than finding that meaning in the words that appear in the will, the decision below should be reversed.

ASSIGNMENTS OF ERROR

1. The trial court erred by failing to find that Sandra Larsen was given a life estate in the property located at 394 Mystic Lane, Wirtz, Virginia 24184, subject to the executory limitation "for so long as she is physically and mentally able to do so" as stated by Erik Larsen in his Last Will and Testament with remainder in fee simple to his children at the time of her death or otherwise when she is no longer physically and mentally able to reside on the property.[1]

2. The trial court erred by failing to find that the word "reside" as stated by Erik Larsen in his Last Will and Testament means the right to "live, dwell, abide, stay and remain upon" (as defined by the Sixth Edition of Black's Law Dictionary), free and clear of any control, influence, interference, and interruption of Erik Larsen's children.[2]

3. The trial court erred by finding that the term "for so long as she is physically and mentally able to do so" as stated by Erik Larsen in his Last Will and Testament was ambiguous and allowing parol evidence to find that Sandra Flora Snead Larsen's interest in residing on the property would end "in the event she had to go into a nursing home ... or couldn't live by herself anymore" and that the rights of the plaintiffs (Erik Larsen's children) in and to the 101.39 acres are limited only to the extent that they interfere with Sandra Flora Snead Larsen's ability to live on the property by herself.[3]

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[1] Error preserved at JA 11-13, 24-5, 32, 39-48, 53, 55-57, 64, 80-82, 84, 86-87, 93-96, 100-102, 111, 116-17, 120-22.

[2] Error preserved at JA 24, 98, 116-17.

[3] Error preserved at JA 11-13, 24-5, 32, 39-48, 53, 55-57, 64, 80-82, 84, 86-87, 93-96, 100-102, 111, 116-17, 120-22.

STATEMENT OF THE CASE

Pamela Larsen Stack and Kirk Larsen ("Pamela and Kirk" or "the children") filed a declaratory judgment action in the Circuit Court of Franklin County against Sandra Flora Snead Larsen ("Mrs. Larsen") seeking an interpretation of their father's will. (JA 1-3). Their father, Erik Larsen ("Mr. Larsen" or "the Testator"), was married to Mrs. Larsen at the time of his death. (JA 1).

The focus of the Complaint was on the former marital residence of Mrs. Larsen and the Testator, and alleged that the children "are unsure as to what property interest [Mrs. Larsen] has in the property." (JA 2). The Complaint sought a declaration that Mrs. Larsen did not have a life estate in the marital residence and that her rights were to "live in the home" and not on all of the property. (JA 3).

W. Colby Brown, the attorney who drafted Mr. Larsen's Will, filed an Answer on behalf of Mrs. Larsen. (JA 4). Brown withdrew as counsel when it appeared he might become a witness. (JA 8, 37). Over Mrs. Larsen's objection, (JA 39-40, 42, 63-4, 111-12), Brown later testified at an evidentiary hearing. (JA 53). [4]

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[4] When the children pointed out that Attorney Brown's answer stated that Mrs. Larsen did not have a life estate in the marital residence, (JA 50), Mrs. Larsen's new counsel explained that if the Answer contradicted the position that she had a life estate subject to an executory limitation, leave to amend the answer was requested. (JA 55-56). Given counsel's representations, it appears that the court found it unnecessary to require a formal amendment. The court plainly understood Mrs. Larsen's position that she had a life estate subject to an executory limitation or a

After hearing evidence from Attorney Brown, the circuit court ruled from the bench, (JA 87-88), and later entered a final order memorializing its rulings. (JA 30). In the final order, the court indicated that it "accepts the testimony of the experienced attorney and draftsman of the Will, W. Colby Brown, to ascertain the true intent" of the Testator. Based on Brown's testimony, the court found that: (1) Mrs. Larsen was not given a life estate; (2) Mrs. Larsen had "the right to 'reside' in their home for so long as she is physically and mentally able to do so"; (3) the term "reside' means 'to live, dwell, abide, stay and remain upon'"; (4) the phrase "physically and mentally able to do so" meant that Mrs. Larsen's "interest in residing on the property would end 'in the event she had to go into a nursing home . . . or . . . couldn't live by herself anymore"; (5) the children's rights in the property "are limited only to the extent that they interfere with [Mrs.] Larsen's ability to live on the property by herself'"; and (6) the home extended to and included the entire 101.39 acres of property.[5] (JA 31).

Mrs. Larsen appealed, and this Court awarded her an appeal on all assignments of error. (JA 33).

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conditional life estate. Indeed, that position was clearly and repeatedly stated throughout the proceedings. (JA 24-5, 40, 46-8, 55-6, 81-4, 86, 120).

[5] The circuit court's finding that Mrs. Larsen's rights extended to and included the entire 101 acres – finding #6 above – has not been appealed and therefore is final.

STATEMENT OF MATERIAL FACTS

The Parties

Mr. and Mrs. Larsen were married in 2007. (JA 1, 32). Mr. Larsen died testate on April 14, 2017. (JA 2). Pamela and Kirk are the adult children of the Testator.

The Will

The facts necessary to decide this case are found in Erik Larsen's Last Will and Testament dated September 6, 2016 ("the Will"). The Will designates Mrs. Larsen and Pamela as co-executors. (JA 18). It gives Mrs. Larsen "all property that we accumulate jointly during our marriage," (JA 16), as well as the residue of the Testator's real and personal property. (JA 18).

The provision at issue concerns Mrs. Larsen and the Testator's marital residence, a 101 acre property in Franklin County. It provides:

> I devise the following described property to my children, namely Pamela Larsen Stack and Kirk Larsen, subject to my wife, Sandra Flora Larsen, having the right to reside in our home located at 394 Mystic Lane, Wirtz, Virginia, 24184, for so long as she is physically and mentally able to do so, and for my wife, Sandra Flora Larsen to receive the monthly rental payments, as provided for in the PCS Site Agreement (Cell Tower), dated April 16, 2013, for as long as she resides in our home, it being all that certain tract or parcel of land (Tax Parcel #28-90) containing 101.39 acres, more or less, situated, lying, and being in the Gills Creek Magisterial District, Franklin County, Virginia, it being the same property conveyed to Erik Larsen, from James C. Ellis, by Deed dated February 7, 1972, said deed being of record in the Clerk's Office of the Circuit Court of Franklin County, Virginia, in Deed Book 277, at page 38.

(JA 17).

The Will also gives Mrs. Larsen "a life estate in my property located at 5414 Quail Ridge Court, Roanoke, Virginia 24018" with "the remainder interest to my children." The Will provides that if Mrs. Larsen and the children jointly decide to sell the Roanoke property during Mrs. Larsen's "lifetime," the proceeds would be divided equally among them. (JA 17-8).

The Hearing

At a hearing on January 3, 2019, the parties stipulated that Attorney Brown was an experienced attorney who drafted the Will. (JA 42). At a later hearing,[6] the parties stipulated that the children were "vested remainderman." (JA 110).

Pamela and Kirk asserted that the language of the Will was not "at all" ambiguous, that "the language is clear," and "it would require only the Court's interpretation as to what the language means." (JA 38). However, the children then offered testimony from Attorney Brown about the Testator's intentions in drafting the Will. Counsel for Mrs. Larsen objected to the admission of this evidence, (*e.g.*, JA 39-40, 42, 63-4), and asserted that the Will is unambiguous and "no evidence is required to be presented." (JA 40; *see also* JA 42).

Mrs. Larsen also explained her position that the Will grants her a life estate subject to executory limitation or is a conditional life estate, and that Pamela and

[6] The transcript from the second hearing is dated March 26, 2018. (JA 90). However, this hearing actually took place on March 26, 2019.

Kirk as the remaindermen have no interest in the property until Mrs. Larsen's life estate terminates. (JA 40, 46-8, 55-6). Pamela and Kirk agreed that their "interest in the home, the house, is limited to whatever time Ms. Larsen's interest expires or is terminated." (JA 49-50). Further Pamela and Kirk did not dispute that "Mr. Larsen wanted his wife to have a place to live for the rest of her ability to live there." (JA 52-3).

Mrs. Larsen also objected to introduction of the parties' Prenuptial Agreement as it conflicted with the provisions of the later-drafted Will. (JA 43, 45). Pamela and Kirk explained that the Prenuptial Agreement was not offered as "parole evidence," but rather, only to "see that Mr. Larsen was consistent in his language." (JA 45). The court admitted the document over Mrs. Larsen's objection, (JA 53, 132), but apparently did not rely on it in reaching its conclusions as this agreement contradicts the terms of the Will. (Compare JA 17 to JA 133).

At the hearing, the trial court observed that "the Will itself is clear." (JA 45, 54). Apparently, though, the court later found "confusing" whether Mrs. Larsen's rights extended to the entire property (as Mrs. Larsen urged) or just to the home (as the children claimed). (JA 57-8). Consequently, the court requested testimony from Attorney Brown on this point, (JA 58, 66-7), and he testified that the Testator intended Mrs. Larsen to have an interest in "the entire hundred acre parcel." (JA 68, 70).

However, Brown's testimony went far beyond the narrow issue of the scope of the property encompassed in the grant to Mrs. Larsen. At the court's request, Brown also explained that the Testator "wanted the property to end up being his children's." (JA 63). Over Mrs. Larsen's objection, Brown also testified that Mr. Larsen "didn't want any kind of a life estate interest being valued for Medicaid purposes" for Mrs. Larsen. (JA 63). He testified:

> I think he intended for Ms. Larsen to be able to stay on the property, and he even expanded it when we redid the Will to give her the money from the cell tower.[7] But he wanted his children to end up with the property. And regarding Medicaid, if you say life estate then the Medicaid worker is going to say there is an interest. And I'm sure he didn't want his children to have to pay anything to end up with the land, their parents' land.

(JA 67-8).

The children also asked Brown about what the Testator meant by the language "physically and mentally able to do so." In response, Brown testified that this meant "[t]hat in the event that she had to go into a nursing home basically, or had to, couldn't live by herself anymore, something like that, then at that point her interest in the property would dissolve, I guess, and then it would go to the children." (JA 69).

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[7] Brown testified that there was an earlier will, and that the Will which is the subject of the action was the same and only "added that [Mrs. Larsen] got the payments for the cell tower." (JA 61).

STANDARD OF REVIEW

This Court reviews the trial court's interpretation of legal instruments *de novo*. *Jiminez v. Corr,* 288 Va. 395*,* 413 (2014). Similarly, whether language in a will is ambiguous is a question of law. *See Virginia Fuel Corp. v. Lambert Coal Co.*, 291 Va. 89, 97-8 (2016) (contract interpretation).

ARGUMENT AND AUTHORITIES

1. The Will gives Mrs. Larsen a life estate subject to an executory limitation.

The Testator's intent, as expressed in the Will, was to secure a home for Mrs. Larsen for so long as she is physically and mentally able to enjoy the home and, thereafter, for the home to go to his children. Because the Will is unambiguous, the trial court erred in considering parole evidence from Attorney Brown about its meaning. Under the unambiguous language of the Will, Mrs. Larsen has a life estate that terminates when she is no longer "physically and mentally" able to reside in the home.

A. The Testator's intent should be gleaned from the four corners of the Will.

When interpreting a will, each case must be judged on its unique facts and circumstances. *Feeney v. Feeney*, 295 Va. 312, 320 (2018); *Wornom v. Hampton Normal & Agricultural Institute*, 144 Va. 533, 541 (1926). In all cases, though, the intent of the testator gathered from the whole will is controlling. *Wornom*, 144 Va. at 541. "'The language of the will itself must be relied on as the chief guide [to understanding how the will operates].'" *Jiminez*, 288 Va. at 413 (quoting *Senger v. Senger*, 81 Va. 687, 696 (1886)). "Once a court ascertains the testator's intention from the words used, its 'quest is ended and all other rules become immaterial.'" *Yancey v. Scales*, 244 Va. 300, 303 (1992) (quoting *Wornom*, 144 Va. at 541).

"A court construing a will must determine the testator's intent from the language of the document, if possible." *Gillespie v. Davis*, 242 Va. 300, 303 (1991) (citing *Baker v. Linsly*, 237 Va. 581, 585 (1989)). "If the language of a will is plain and unambiguous, extrinsic evidence is never admissible to contradict or alter its meaning." *Baliles v. Miller*, 231 Va. 48, 57 (1986); *Gillespie*, 242 Va. at 303 ("Extrinsic evidence may never be used in aid of the interpretation of a will if the language is clear and unambiguous.").

B. The Will was not ambiguous.

The trial court relied on testimony from Attorney Brown in deciding two issues that are raised on appeal: (1) whether Mrs. Larsen had a life estate and (2)

what the phrase "physically and mentally able to do so" means. (JA 31). Indeed, the court specifically stated in the final order that it accepted Brown's testimony "to ascertain the true intent" of the Testator, and that its rulings were "based on the testimony of W. Colby Brown." (JA 31; *see also* 73-4, 79).

Over Mrs. Larsen's objection, Brown offered his opinions about what the Will meant as well as what he thought that the Testator actually intended. (JA 59-72). The trial court should not have considered this testimony because the Will was not ambiguous. Specifically, no language in the Will was susceptible to two different meanings and there was nothing equivocal about the persons or property referenced in the Will. *See Gillespie*, 242 Va. at 304 (will is ambiguous if it is "susceptible to more than one interpretation"). Indeed, the parties agreed that the Will was not ambiguous.[8] (JA 39-40, 42, 44-5, 52, 102-3).

Even if the Will was ambiguous, evidence of the Testator's actual testamentary intentions was not admissible. Where an ambiguity exists, this Court has described two classes of evidence that may be admissible to aid in ascertaining the testator's intent. *Gillespie*, 242 Va. at 304. The first class of evidence involves "facts and circumstances evidence," which is "evidence about the testator, the

[8] The trial court apparently thought that only one part of the Will was ambiguous, (JA 57-8), and that part of the Will is not challenged on appeal. The trial court admitted Brown's testimony on the remaining issues in order to "ascertain the true intent" of Mr. Larsen. (JA 31).

testator's family and property; the claimants under the will and their relationship to the testator; the testator's hopes and fears; the testator's habits of thought and language; and similar matters." *Id.* When an ambiguity exists, such "facts and circumstances" evidence is admissible to ascertain the testator's intent. *Id.*

The second class of evidence, however, applies to a very "narrow category" of cases involving "equivocation," that is, where the persons or property are not "clearly designated" or "the words in the will describe equally well two or more persons or two or more things." *Id.* In such rare cases, extrinsic evidence of the testator's "actual testamentary intentions" is admissible. *Id.* ("While this is a case where the use of extrinsic evidence was warranted, this is not a case of equivocation; the parties and the property are clearly designated.")

Applying these principles, the admission of evidence of the Testator's actual testamentary intentions (and Brown's opinions about what the Will means) was error. Brown's testimony falls within the second category of extrinsic evidence; it was direct evidence of Mr. Larsen's testamentary intent, offered by his attorney. Such evidence, however, is only admissible in cases of "equivocation" where there is uncertainty about the parties and the property referenced in the Will. No such deficiency appears in the Will. Rather, the Testator clearly identified the property of his estate and the individuals who were the recipients of his bounty. Therefore,

this was not a case of equivocation, and Brown's testimony was not admissible to aid in interpreting the unambiguous terms of the Will that are at issue on appeal.

Nor did the differing legal interpretations about the nature of the interest Mrs. Larsen acquired under the Will create an ambiguity. Although the parties disputed the issue whether the Will granted Mrs. Larsen a life estate or a "right to reside," this was simply a legal conclusion that should have been decided on the unambiguous terms of the Will, as the parties agreed. (JA 102-3). Even so, the fact that the parties disagree about the meaning of the Will does not create an ambiguity where none otherwise exists. *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.")

C. Mrs. Larsen has a life estate that is measured by her ability to live on the property, rather than by her life.

There is no clear rule as to when an instrument grants a life estate. Rather, this Court has found that "each case must be governed by its own particular facts and circumstances." *Wornom*, 144 Va. at 541 (internal quotations and citations omitted); *see also Feeney*, 295 Va. at 320 ("However, 'it often happens that the same identical words require very different constructions in different cases, according to the context and the peculiar circumstances of each case.'") (citation omitted).

Consistent with these principles, "[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" (such as language granting an estate "for life") or, on the other hand, "by implication." *Feeney*, 295 Va. at 318 (citing *Edwards v. Bradley*, 227 Va. 224, 229 (1984)).

Therefore, even where a will does not use the term "for life," a life estate may nevertheless be created. *E.g.*, *Feeney*, 295 Va. at 319 (finding that a will created a life estate even though the words "for life" were not used). For example, "[a] grant, devise, or lease of property to a person as long as he or she shall continue to live upon it or desire to live upon it creates a life estate." 28 Am. Jur. 2d *Estates*, §63 (2019); 45 A.L.R.2d 699, *4, *Quantum or Character of Estate or Interest Created by Language Providing Premises as a Home or Giving or Granting Same for Such Use* (2019). This is particularly true where, as here, the relinquishment of the interest depends on the will of the beneficiary, and therefore, it "does not differ from any life estate which can be renounced or gifted before death." *Estate of Peacock v. United States*, 914 F.2d 230, 233 (11th Cir. 1990); *White v. White*, 183 Va. 239, 242 (1944) (surviving spouse had a life estate where will provided "I want my wife to have a home at the mansion house . . . as long as she remains my widow"); *Disley v. Disley*, 75 A. 481, 484 (R.I. 1910) ("An estate is conveyed to the defendant which is capable of enduring for a life, and is, therefore, a life estate.").

Like the cases finding a life estate for "so long as" the beneficiary lives in the home, Mr. Larsen's Will provides that Mrs. Larsen's interest in the property continues for so long as she is "physically and mentally able to" reside in the home. (JA 17). This language simply makes Mrs. Larsen's ability to occupy the property essential to the continuance of her estate. And, once her ability to reside in the home ceases, her estate terminates by operation of the limitation stated in the Will. *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"); *Mid-State Homes, Inc. v. Johnson*, 128 S.E.2d 197, 198 (Ga. 1962) (finding a valid limitation on a life estate which was "subject" to "this condition and limitation, that if she and her family move away or vacate the property . . . at any time as long as three months, the property reverts"); *Smith v. Smith*, 242 S.W.2d 113, 114 (Ark. 1951) (finding a life estate where testator gave her home to Lorene "to be used by her as a home as long as she wishes, and in case she should not use it as such and wish to sell it, then the proceeds to be divided between my son and Lorene . . . in equal shares").

The Will evinces Mr. Larsen's intent that his wife reside in the home and enjoy the entire 101 acre property for so long as she is able to do so. Under these terms, Mrs. Larsen could be "physically and mentally able" to reside in the home until her death. Further, even if this Court considers the testimony of Attorney

Brown, that evidence indicates that Mr. Larsen "wanted his children to end up with the property," (JA 63, 67-8), a goal achieved by construing the language of the Will to provide a life estate that terminates when Mrs. Larsen is no longer "physically and mentally" able to live on the property.

Therefore, the Will grants Mrs. Larsen a life estate in the property even though the grant itself does not use those precise terms.

D. Mrs. Larsen's right to reside in the house does not defeat her life estate.

The trial court concluded that Mrs. Larsen had only a "right to reside" in the house, not a life estate. (JA 31). This finding fails to give effect to the language of the Will making the children's fee simple interest "subject to" Mrs. Larsen's right to reside in the home for so long as she was able, and that Mrs. Larsen have the full benefit and enjoyment of the property until such time as she was unable to do so.

Other courts have found that a life estate is created when an instrument grants a "right to reside" in a home or property. *E.g.*, *Estate of Peacock*, 914 F.2d at 319 (will provision giving husband the right "to occupy said property for as long as he desires" and pay taxes and insurance created a life estate under Alabama law); *Krieg v. Hieber*, 802 N.E.2d 938, 945 (Ind. App. 2004) (holding that the "'right of residency' for life is equivalent language to express a life estate" where grant of the farm to Hieber was "subject to right of residency of [Krieg] in the house"); *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); *see also Irons v. Maginnis*, 572 B.R. 877, 890 (N.D. Ohio 2017) ("'right to reside' language was in the nature of, or akin to, a contingent life estate").

This Court should follow the approach of these courts[9] and find that the interest Mrs. Larsen obtained under the Will was a life estate and not just a right to occupy the home. The Will evinces the Testator's intent that his wife reside in the home and enjoy the entire 101 acre property for so long as she is able, and that period may be until her death. Further, the Will does not give the children a present right to reside in the home. In fact, the children's interests were made expressly "subject to" Mrs. Larsen's right to reside on the entire 101 acre property.

This Court's decision in *Larkin v. Wright*, 185 Va. 447 (1946), does not compel a different result. In *Larkin*, a will gave the testators' daughter Blanche all of their property (except a piano) for life. Upon Blanche's death, the property was to be divided equally among the testators' other children then living. The will also gave to granddaughter Louise the piano and "a home at 101 Amelia Street, which is

[9] There is no clear rule as to when a grant in a will giving a "right to reside" creates a life estate, and courts have taken different positions on the issue. *See generally* 45 A.L.R.2d 699, *4, *Quantum or Character of Estate or Interest Created by Language Providing Premises as a Home or Giving or Granting Same for Such Use* (2019).

included in the above devise, so long as she may live and need the same, . . . and without the any power on her part to encumber, alien or otherwise dispose of the same, sublet, lease, or have other people live therein, except her own family, without consent of the said Blanche." *Id.* at 450-51. In answering the suit, Louise indicated that she had not lived at 101 Amelia Street for the past ten years and did not need to live on the premises as a home. *Id.* at 452.

This Court held that "[t]he primary intention of the testators was to provide for their daughter, Blanche . . , and, incidentally, to give their granddaughter, Louise . . . , the privilege of using the premises in question as a home if her need required such use." *Id.* at 452. Under the terms of the will, Blanche had a life estate. As the house "passed to Blanche for life," this Court held that the provision for Louise "is an invasion of, or limitation upon" Blanche's life estate, and was thus a privilege to Louise. *Id.* at 451-52.

Larkin is distinguishable on its facts. Here, Pamela and Kirk own the property in fee simple[10] expressly "subject to" Mrs. Larsen's life estate. The children do not have a life estate as Blanche did. Blanche's life estate gave her the present right to occupy the property. Further, unlike the provision to Louise, the Will here does not

[10] In fact, the children and the trial court agreed that the children were vested "remaindermen." (JA 110).

impose on Mrs. Larsen's interest any restrictions against alienation. *Larkin*, then, is not controlling.

2. The Will does not require Mrs. Larsen to live *by herself* on the property.

Relying on Attorney Brown's testimony, the trial court held that Mrs. Larsen's "interest in residing on the property would end 'in the event she had to go into a nursing home . . . . or . . . *couldn't live by herself anymore*.'" (JA 31, emphasis added). The trial court also held that her rights are limited to her "ability to live on the property by herself." (JA 31). These findings are plainly erroneous.

A. Nothing in the unambiguous language of the Will restricts Mrs. Larsen to living by herself.

The Will does not limit Mrs. Larsen's interest to living "by herself." It does not state that Mrs. Larsen's rights to occupy the property were restricted to living alone or that she could not enjoy the company of others on the property during her residency. Indeed, nothing in the Will limits her rights to live on the property or to reside in the home so long as she is physically and mentally able to do so.

Notably, the Will does not limit or define Mrs. Larsen's estate by reference to her marital status. It is not uncommon for one spouse to leave a life estate in the marital residence to the surviving spouse for so long as that spouse remains unmarried. *E.g.*, *Snidow v. Day*, 145 Va. 721, 723 (1926) ("By the first item of his will the testator gave to his wife, during her natural life and so long as she remained

unmarried, 800 acres of land . . . known as the home place.”). Here, though, the Testator expressed no intention to terminate or restrict Mrs. Larsen’s interests in the property if she remarried or desired the companionship of another person in the home.

Under the terms of the Will, then, Mrs. Larsen’s interests in the property are not affected by remarriage or occupancy with another person. Indeed, there is no intention expressed in the four corners of the Will that the Testator intended for Mrs. Larsen to live in isolation on the property during the last years of her life, even though he could have used language in the Will to impose such a restriction.

Mrs. Larsen’s rights extend to the entire 101 acres of the property. (JA 31). The only limitation expressed in the Will is that Mrs. Larsen’s interest in the property terminate when she is no longer “physically and mentally able” to reside in the home. That limitation does not contemplate – and certainly does not require –that her estate terminate if she resides on the property with others.

B. The trial court’s interpretation of the Will adds words that do not appear in the unambiguous instrument.

The trial court violated established principles of construction by interpreting the phrase “physically and mentally able to do so” to mean that Mrs. Larsen could only live by herself. The Will does not restrict – expressly or by implication – Mrs. Larsen’s right to enjoyment of the property to residing there alone. Thus, the only

way to read the Will this way is by adding the words **by herself** to the unambiguous language of the Will (i.e.: " . . . subject to my wife, Sandra Flora Larsen, having the right to reside in our home located at 394 Mystic Lane, Wirtz, Virginia, 24184, for so long as she is physically and mentally able to do so" **by herself**). Such a modification, however, is not permissible under Virginia law.

It is well-settled that a court may not add words to an unambiguous instrument. *E.g., Rule v. First National Bank*, 182 Va. 227, 235-36 (1944) (words may not be added to an unambiguous will); *Wilson*, 227 Va. at 187 (a court may not add words to an unambiguous contract). Rather, in interpreting a will, "[t]he cardinal rule of construction is that the intention of the testator must be determined from what he actually said and not from what it may be supposed he intended to say." *Rule*, 182 Va. at 230.

Here, interpreting the Will to restrict Mrs. Larsen's interest to occupancy *by herself* can only be achieved by adding words to the Will that the Testator chose not to include. A court must ascertain the testator's intent from the language in the will, and may not "make a will for him." *Feeney*, 295 Va. at 317 (quoting *Jackson v. Fidelity & Dep. Co.*, 269 Va. 303, 310 (2005)). The trial court, therefore, plainly erred.

C. Attorney Brown's testimony interpreting the Will was inadmissible.

In holding that the Will limited Mrs. Larsen to living "by herself" on the property and that her interest would terminate if she went to a nursing home, the trial court stated that it relied on Attorney Brown's testimony. (JA 31). Brown's testimony, however, was not admissible to contradict the Testator's intent as expressed in the unambiguous language of the Will.

A will should be interpreted based on the testator's intent as expressed in the instrument itself. *Gillespie*, 242 Va. at 303. Where a will is unambiguous, parole testimony is not admissible. *Id.* Indeed, "[e]xtrinsic evidence may never be used in aid of the interpretation of a will if the language is clear and unambiguous." *Id.*

The language of the Will indicating that Mrs. Larsen could reside in the home "for so long as she is physically and mentally able to do so" is unambiguous. It means that her estate terminates when she is no longer physically and mentally able to reside in the home. Therefore, the meaning of this provision is clear and easily ascertained.

Even worse, Attorney Brown's testimony that the Testator intended that Mrs. Larsen's interests would terminate if she no longer lived alone in the home *contradicts* the intent expressed in the four corners of the Will. As discussed, the Will in no way limits Mrs. Larsen to solitary residence on the property. Although her interest in the property will terminate if she becomes "physically and mentally"

unable to reside in the home, the Will does not restrict her interests to living alone, and nothing in the Will suggests that the Testator intended to relegate Mrs. Larsen to a life of isolation if she exercised her right to reside on the property. To the contrary, the Will evinces the Testator's intent that Mrs. Larsen live the rest of her life in comfort on the property she had enjoyed as her marital residence.[11]

Even if the Will is ambiguous in this regard, Attorney Brown's testimony about what the Testator meant is nevertheless inadmissible. His testimony went far beyond the "facts and circumstances" evidence that may be admissible when there is an ambiguity. *See Gillespie*, 242 Va. at 304. In fact, Brown actually testified about what he thought the Testator meant, introducing his "opinion" on the subject. (JA 63, 67-70). Because the property and the individuals are clearly identified in the Will, this is not a case of equivocation where testimony about a testator's intentions *could* be admissible. *Id.*

Therefore, the trial court erred in considering Brown's testimony in interpreting the unambiguous terms of the Will. "The pertinent inquiry is not what the testator meant to express but what the words used do express." *Rule*, 182 Va. at

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[11] Examining the entire Will, Mr. Larsen was very generous to Mrs. Larsen. He gave her a life estate in property in Roanoke (although the Will contemplated that Mrs. Larsen and the children would sell that property as, in fact, they already have). (JA 17-8, Sixth Paragraph). The Will also designates Mrs. Larsen as the beneficiary of the residue of the real and personal property of the estate, (JA 18, Seventh Paragraph), as well as the beneficiary of property she and Mr. Larsen jointly acquired during their marriage. (JA 16, Fourth Paragraph).

235-36; *Chavis v. Myrick*, 190 Va. 875, 878 (1950) ("If the meaning of the words is plain there is no room for construction.") As written, the Will does not restrict Mrs. Larsen's estate to her living *by herself*.

3. The Will gives Mrs. Larsen full enjoyment of the property without interference from Pamela and Kirk.

The trial court held that the Testator intended that the word "home," as used in the Will, "extend[] to the entire 101.39 acres" he owned at the time of his death. (JA 31). Further, the trial court found that the children were remaindermen. (JA 110). Because these holdings have not been appealed, they are the law of the case. *See Kondaurov v. Kerdasha*, 271 Va. 646, 658 (2006) ("Under law of the case doctrine, a legal decision made at one [stage] of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.") (citation and quotations omitted).

Consequently, Mrs. Larsen's interests extend to the entire property, and the children have no rights until her interest is terminated. Nevertheless, the trial court held that the rights of the children "are limited only to the extent that they interfere with [Mrs. Larsen's] ability to live on the property by herself." (JA 31). This finding is erroneous for four main reasons. First, nothing in the Will restricts Mrs. Larsen's

rights to the property to living "by herself." Second, the trial court's interpretation fails to give effect to the life estate Mrs. Larsen has in the property. Third, the parties agreed that under the terms of the Will, the children were remaindermen who could not take the property until Mrs. Larsen's interest terminated. Finally, this interpretation fails to give effect to the Will as a whole.

First, for the reasons discussed, the trial court's finding that Mrs. Larsen's interests are limited to living "by herself" is erroneous.

Second, as Mrs. Larsen has a life estate in the property, she is entitled to enjoyment of that property without interference from Pamela and Kirk. "A tenant for life is entitled to the full use and enjoyment of the property in which he or she has a life estate." *See* 51 Am. Jur. 2d *Life Tenants and Remaindermen* § 28 (2019). Therefore, to the extent that the trial court suggested that the children have a right to use or occupy the property during Mrs. Larsen's occupancy, that finding is wrong.

Third, the children agreed that under the Will they could not take the property until Mrs. Larsen's interest in the property ceased. (JA 50). Nor did they assert a present right to occupy the property beyond their claim that Mrs. Larsen's interests extended only to the home itself, an issue that they lost and have not appealed. (JA 3, 31). Mrs. Larsen's interests therefore extend to the entire 101 acre property. Given this record, the children are not entitled to interfere with Mrs. Larsen's broad rights in the property until her interest terminates according to the terms of the Will.

Fourth, regardless of how Mrs. Larsen's interest is classified, the language in the Will contemplates that she occupy the property without interference from the children. Pamela and Kirk's interests were made "subject to" Mrs. Larsen's rights to reside in the home and 101 acres of property, including farm land and a cell tower. Indeed, the definition of the term "reside" means, as the trial court held, the right "'to live, dwell, abide, stay and remain upon'" the property. (JA 31). And, nothing in the Will even suggests that the children have any immediate rights to the property, let alone the right to occupy the house or any part of the property during the period of Mrs. Larsen's estate. The only individual identified in the Will with the right to occupy the property now is Mrs. Larsen.

Similarly, in *Jenkins v. Bynum*, 61 Va. Cir. 314 (Norfolk 2003), the court held that a remainderman did not have the right to live with the life tenant. There, the will provided that the testator's son and another relative have the home in fee simple, but also gave the testator's brother a life estate. The will further provided that the testator's son "be responsible for any and all maintenance costs and mortgage payments on the property." *Id.* at 314. The trial court rejected the son's argument that his obligation to pay the mortgage gave him the right to "jointly occupy" the house with the testator's brother. *Id.* at 315-16. According to the court, the life tenant had exclusive use of the home, and the son's rights as the remainderman, even

one who was paying the mortgage, did not give him the right of joint occupancy with the life tenant. *Id.*

The case of *White v. White*, 183 Va. 239 (1944) is also instructive. In *White*, the testator left a will providing his son Arnold with a fee simple interest in "the mansion house." The will further stated 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, leaving a wife and son; however, Mabel and her daughter-in-law did not get along. The will plainly contemplated that two individuals would reside in the mansion home at the same time, Mabel and Arnold, with Mabel having a life estate. But given that the rights of Arnold's heirs were "subject to the right of [Mabel] to make a home there for the duration," this Court ruled that Mabel had a right to live in the home "free from molestation and interference" from her grandson and his relatives. *Id.* at 252. Thus, this Court held that the right of the grandson and his relatives "to make their home there is subject to the defined rights of [Mabel]." *Id.*

Like the grandson in *White*, the rights of the children are expressly "subject to" Mrs. Larsen's right to occupy the home and 101 acre property. Accordingly, she is entitled to the enjoyment of that property without interference from the children until she is no longer "physically and mentally" able to reside in the home.

CONCLUSION

Therefore, the trial court's judgment should be reversed. Further, the case should be remanded with instructions directing the trial court to enter an order finding that the Will gives Mrs. Larsen a life estate subject to the executory limitation "for so long as she is physically and mentally able to do so" and that her right to use, enjoy, occupy, and possess the property during the term of her estate is exclusive and free of any control, influence, interference, or interruption from Pamela and Kirk.

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on January 7, 2020, the correct number of true and accurate copies of this Opening 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 opening brief.

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