Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

201 VA 149

Record No. 4971

In the Supreme Court of Appeals of Virginia at Richmond

VIRGINIA W. SMITH, ET AL.

v.

LUTHER D. GILLIKIN, SURVIVING EXECUTOR, ETC., ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4971

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 2nd day of December, 1958.

VIRGINIA W. SMITH, ET AL., Appellants,

against

LUTHER D. GILLIKIN, SURVIVING EXECUTOR, ETC., ET AL., Appellees.

From the Circuit Court of the City of Norfolk

Upon the petition of Virginia W. Smith, Harold H. Wrenn, Esther W. Washburn, Margaret S. Chambers, Ormand S. Sisson, Katherine W. Jasperson and B. Richards Wrenn an appeal is awarded them from a decree entered by the Circuit Court of the City of Norfolk on the 26th day of June, 1958, in a certain chancery cause then therein depending wherein Luther D. Gillikin, Surviving Executor of the last will and testament of Kate C. Wrenn, deceased, and Committee of McDonald Lindsay Wrenn, Jr., was plaintiff and Julia Bidgood Whitehurst, the petitioners and others were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of seven hundred fifty dollars, with condition as the law directs.

RECORD

* * * * *

page 8 *

* * * * *

Filed 6/6/57.

VIRGINIA MANNING, D. C.

THE ANSWER OF JULIA BIDGOOD WHITEHURST TO A BILL OF COMPLAINT EXHIBITED AGAINST HER AND OTHERS IN THE CIRCUIT COURT OF THE CITY OF NORFOLK BY LUTHER D. GILLIKIN, SURVIVING EXECUTOR, ETC.

This Respondent, for answer unto said bill, answers and says:

1. She admits the allegations in paragraph 1, and also admits the allegation in paragraph 2 that she, Julia Bidgood Whitehurst, Elizabeth C. Myers and Elizabeth J. Campbell are beneficiaries under the will of Kate C. Wrenn, deceased, but is not informed as to the heirs of McDonald Lindsay Wrenn, Jr.

2. She admits the allegations in paragraph 3 and 4 to the extent that Kate C. Wrenn purchased the annuities therein mentioned for the benefit of herself during her lifetime and for the benefit of her son, McDonald Lindsay Wrenn, Jr. upon her death.

3. She admits the allegations in paragraph 5, 6, 7 and 8 and also admits that McDonald Lindsay Wrenn, Jr. died July 1, 1956, survived by neither wife nor issue, nor brother, nor sister.

4. Not being fully advised as to all of the other allegations set forth in the remaining paragraphs, your Respondent denies same and calls for strict proof thereof.

5. Further answering, your Respondent says:

a. That McDonald Lindsay Wrenn, Jr. had been since birth helpless and incompetent, both mentally and physi-
page 9 } cally, which fact was well *know* to Kate C. Wrenn, his mother, who had lavished on him the love and care which she bore for her unfortunate son; and, therefore, during his lifetime furnished him capable nursing and care,

realizing his helplessness and incompetency, and in the year 1933, after the death of her husband, she purchased the annuities mentioned in the amount of $110,000.00, producing a monthly repayment of $506.60, providing that the said monthly installments should be paid to her during her lifetime and at her death to McDonald Lindsay Wrenn, Jr., her son. In doing this it was her purpose and intent to set up a definite monthly sum, namely: $506.60, to be used for the support, maintenance and care of her unfortunate son.

b. Having, as she believed, provided for her said son, she in 1938 proceeded to make her will, and in doing so took into consideration that she had already provided in said annuities a fund which was to be used for the support, maintenance and care of her said son, and, therefore, left the residue of her estate in trust with a provision that her Executors could use the income therefrom for the support of her said son, her intent being that if the $506.60 per month were insufficient, then the Executors could use the income from said trust. She thus made the income from said trust a second trust to be used for the support, maintenance and care of her son in the event the first fund, namely: the proceeds from the annuities, should not be sufficient.

c. Further realizing that the uncertainties of life and the condition of her son might cause the aforesaid annuity installments and the income from the trust to be insufficient for his proper support, maintenance and care, she provided that her Executors might use the principal of the trust so far as necessary.

d. Thus, she set up for the benefit of her son in his maintenance and support three trusts: First, the in-
page 10 } come from the annuities, which, if exhausted, should be supplemented by the second fund, namely: the income from the trust, and should that be insufficient, same to be supplemented by the use of the principal of the trust so far as was necessary as a third and last resort.

e. Having thus insured the maintenance and support of her son, she disposed of her estate to the persons to whom she desired to take it, and under the provisions thereof your Respondent receives 1/2 of the residue of her estate after the death of McDonald Lindsay Wrenn, Jr.

f. It was never the purpose of Kate C. Wrenn to create an estate for her son, McDonald Lindsay Wrenn, Jr., to be passed on to his heirs, but it was her sole purpose in purchasing the aforesaid annuities to establish a fund to be used and consumed during his lifetime for his maintenance, care and support.

This is conclusively shown by the provisions of the several annuity contracts in which it is provided that upon the death of Kate C. Wrenn the remaining annuity payments should be paid over to the Executors or Administrators of the said Kate C. Wrenn.

I quote from said annuity contracts, as follows:

"If the Annuitant and said Kate C. Wrenn and said Ester Elizabeth Sjoblom should all die before the sum of the payments made by the Society equals the amount of the Capital Invested, the Society will pay the commuted value (discounted at 4% compound interest) of the remaining Annuity payments in a single sum to the executors or administrators of said Kate C. Wrenn."

The foregoing provision appears in annuity contracts with a total invested capital of $85,000.00. A third contract, with an invested capital of $25,000.00, contains identical language except that the name of Ester Elizabeth Sjoblom does not appear therein.

g. The intent and purpose of the said Kate C. Wrenn as above outlined was recognized by Judge Spindle in his appointment of the Committees for the said McDonald Lindsay Wrenn, Jr. and in the authority conferred on page 11 } them in his Order of June 6, 1938, in which he provided as follows: "And the Court doth further ORDER that the said Committees, Luther D. Gillikin and William H. Campbell, shall, from the installments of insurance to be paid to them periodically by insurance companys, expend such money for the support and maintenance of said McDonald Lindsay Wrenn, Jr. as may be reasonable for his proper support and maintenance."

h. Pursuant to and in conformity with the intent of said Kate C. Wrenn as expressed to persons at the time the annuities were purchased before and after the execution of her will, as shown by the terms of her will and the terms of the several annuity contracts, and as properly construed by the Court in the appointment and authority given to the Committees in the aforesaid Order, the said Committees provided the necessary care for the said McDonald Lindsay Wrenn, Jr., and in so doing used the aforesaid monthly installments of the annuities for his maintenance and support, and where the same was not sufficient, used the income from the trust set up in the will of Kate C. Wrenn, and even at times dipped into the corpus of the trust.

i. The said Executors and Committees, pursuant to the law in such case made and provided, have settled their

several accounts from time to time before the Commissioner of Accounts of the Corporation Court of the City of Norfolk, and said accounts have been from time to time confirmed by orders of the Court.

j. This Respondent, therefore, asserts and charges that the action of the Committees in the expenditures of the monthly installments of the annuities as set forth in the bill were proper and in accordance with the terms of the annuity contracts, the intent of the said Kate C. Wrenn, in conformity with the provisions of her will and also in con-
page 12 } formity with the authority and direction of the court in the order appointing the Committees, and, therefore, there was and is no reason or necessity for the institution of this suit seeking the direction of the court in the above regard.

k. Wherefore, these Respondents say that the several parties named as the heirs at law of McDonald Lindsay Wrenn, Jr. had and have no interest whatsoever in the proceeds from said annuitites and that this suit should be forthwith dismissed.

And now having fully answered, they pray to be hence dismissed with their costs in this behalf expended.

JULIA BIDGOOD WHITEHURST
By GEO. E. HAW OF HAW & HAW
Counsel.

* * * * *

page 13 }

* * * * *

Filed June 24, 1957.

T. A. W. GRAY, D. C.

ANSWER OF ELIZABETH C. MYERS AND ELIZABETH J. CAMPBELL.

Respondents Elizabeth C. Myers and Elizabeth J. Campbell, for answer to the bill of complaint, answer and say:

1. They admit the allegations contained in paragraph 1.

2. They admit those allegations of paragraph 2 describing them and others as beneficiaries under the Will of Kate C.

Wrenn, deceased; they are not informed respecting the heirs of McDonald Lindsay Wrenn, Jr.

3. They admit the allegations contained in paragraph 3.

4. They admit the allegations contained in paragraph 4.

5. They admit the allegations contained in paragraphs 5, 6, 7 and 8.

6. They admit the allegations contained in the first sentence of paragraph 9. They are not informed as to the allegation contained in the last sentence in paragraph 9.

7. They are not fully informed as to the allegations contained in paragraphs 10, 11, 12 and 13, and deny the same and call for strict proof thereof.

8. They admit the allegations contained in paragraph 14.

9. They are not fully informed as to the allegations contained in paragraphs 15 and 16 and deny the same and call for strict proof thereof.

page 14 } Further answering these Respondents say:

10. Kate C. Wrenn learned soon after the birth of her said son, McDonald Lindsay Wrenn, Jr., that he was foredoomed to a life of total dependency upon others, not only for maintenance and support but for that protection and care of his person as ordinarily ceases in early childhood. To this son, her only child to survive infancy, she gave of herself and of her means unremittingly until her death nearly fifty years after his birth. Throughout these many years her dominating purpose was to sustain and nurture the said McDonald Lindsay Wrenn, Jr. by her own efforts and by bringing to his service the most competent, kindly and dedicated assistance, supervision and protection she could procure. To this end and in a time of great economic depression she purchased the annuities aforesaid to provide financial security for her said son and, (in two of the said contracts), in the event of his death, to provide for her son's faithful nurse, Ester Elizabeth Sjoblom, as follows:

If the Annuitant and said KATE C. WRENN and said ESTER ELIZABETH SJOBLOM should all die before the sum of the payments made by the Society equals the amount of the Capital Invested, the Society will pay the commuted value (discounted at 4% compound interest) of the remaining Annuity payments in a single sum to the executors or administrators of said KATE C. WRENN.

The capital invested in the two annuities containing the foregoing provision totals eighty-five thousand dollars. The

third of said annuities contains a like provision except that it makes no provision for Ester Elizabeth Sjoblom, as follows:

If the Annuitant and said KATE C. WRENN should both die before the sum of the payments made by the Society equals the amount of the Capital Invested, the Society will pay the commuted value (discounted at 4% compound interest) of the remaining Annuity payments in a single sum to the executors or administrators of said KATE C. WRENN.

The foregoing provision is found in annuity contract with an invested capital of twenty-five thousand dollars.

page 15 } 11. Following upon the purchase of the said annuities and until her death Kate C. Wrenn, the payee named in said contracts, received the proceeds thereof and applied these funds to the maintenance and support of her said son. She used no part thereof to create any estate which would pass to his heirs.

12. With full knowledge that the said annuities would after her death, continue to provide the sum of $506.60 per month for the maintenance of her said son, McDonald Lindsay Wrenn, Jr., and with full knowledge that in no event would any value thereunder which remained after her sons death pass to his heirs, the said Kate C. Wrenn by her Will directed that the Executor of her estate

* * * Expend the net income therefrom or so much thereof as may be necessary or proper during the life time of my said son, McDonald Lindsay Wrenn, for the support and comfort of my said son in the situation in life which he has occupied during my life time so that my said son may enjoy the necessities and comforts of life and all reasonable luxuries and conveniences * * *

13. After Complainants qualification as co-Executor of the Will of Kate C. Wrenn he, as such, filed his petition in the Corporation Court of the City of Norfolk, Virginia, for the appointment of a committee for McDonald Lindsay Wrenn, Jr. reciting in his said petition that, as Executor of said Will, he was

* * * Charged with certain duties relative to said McDonald Lindsay Wrenn (Jr.) * * *

and

* * * That periodically certain monies are payable to said McDonald Lindsay Wrenn (Jr.) from insurance companies, and it is important that a committee be appointed to handle these monies and any other monies to which he may be entitled, to expend so much thereof as may be proper for said McDonald Lindsay Wrenn (Jr.) * * *

Upon Complainants said petition the Court appointed Complainant and another committee for said McDonald Lindsay Wrenn, Jr. and ordered that said committee

* * * From the installments of insurance to be paid to them periodically by insurance companies, expend such monies for the support and maintenance of said McDonald Lindsay Wrenn as may be reasonable for his proper support and maintenance.

page 16 } 14. In carrying out the clear intent of the said Kate C. Wrenn as shown by the said annuities and by her Will and by expressions made by her from time to time and as determined by the Corporation Court of the City of Norfolk in its order aforesaid, Complainant as committee for McDonald Lindsay Wrenn, Jr. has since his qualification as such used and expended the monthly installments derived from the annuities aforesaid for the proper maintenance and support of McDonald Lindsay Wrenn, Jr.; and he has whenever the annuity installments were insufficient for that purpose used and expended such additional sums as were necessary, from the income from the trust created for the benefit of her said son by Kate C. Wrenn, and Complainants accounts both as Executor of the Will of Kate C. Wrenn and as committee for McDonald Lindsay Wrenn, Jr., reflecting all these several transactions, have been duly settled before the Commissioner of Accounts of the Corporation Court of the City of Norfolk, and thereafter confirmed by orders of that Court.

15. It was not and has never been the intention of the said Kate C. Wrenn in any way to create in her said incompetent son, McDonald Lindsay Wrenn Jr. any ownership of property which would create an estate to pass to his heirs or any of them. It was her clear and unmistakable purpose to provide as far as she could do so the certainty that he would want for nothing and that upon his death these Respondents and those other persons, the natural objects of her bounty, named in her Will should succeed to any property remaining in her estate after her sons death.

Wherefore, these Respondents say that the heirs at law of McDonald Lindsay Wrenn, Jr., have and have had no interest in the proceeds from the annuities afore-
page 17 } said and that this suit should be dismissed, and having fully answered these Respondents pray to be hence dismissed with the costs in this behalf expended.

ELIZABETH C. MYERS
ELIZABETH J. CAMPBELL
By JAMES E. HEATH
Their Counsel.

* * * * *

page 25 }

* * * * *

Filed 6-26-58.

HELEN M. ROMULUS, D. C.

STIPULATION OF FACTS.

The following are stipulated by counsel for all parties as the agreed facts in addition to the exhibits filed in this suit which were submitted to the Court for consideration at the hearing of this case:

McDonald Lindsay Wrenn, Jr. was the only surviving child of Kate C. Wrenn, the testatrix, who was from his birth a helpless incompetent and was for the period of his natural life dependent on others, not only for his maintenance and support, but also for the care and protection of his person. To this son the testatrix gave her unremitting affection and care for a period of more than forty years and until her death, and during her lifetime for his care, comfort and protection, employed one Ether Sjoblom, a Swedish nurse, who continued in his care during the lifetime of the testatrix and after her death.

Realizing the condition of her son, Mrs. Kate C. Wrenn, the testatrix, in order to insure his support and maintenance, in 1934 purchased from the Equitable Life Insurance Company three (3) annuities in the total amount of $110,000.00, repayable both as to principal and income in the amount of $506.00 per month to Kate C. Wrenn, the purchaser thereof, so long as she should live and at her death to her son, Mc-

Donald Lindsay Wrenn, Jr. for the period of his natural life.

page 26 } Two of these annuities provided that upon the death of the said McDonald Lindsay Wrenn, Jr., the remaining unpaid annuity payments would be paid in a single sum to the Executors or the Administrators of Kate C. Wrenn, the testatrix.

The other annuity provided that upon the death of McDonald Lindsay Wrenn, Jr., the monthly payments would be made to Esther Sjoblom, but should she also be dead, then the remaining unpaid annuity payments would be paid in a single sum to the Executors or the Administrators of Kate C. Wrenn, the testatrix.

Kate C. Wrenn died on March 15, 1938. Her will was probated in the Corporation Court of the City of Norfolk on the 21st of March, 1938, and upon the qualification of William H. Campbell and Luther D. Gilliken, as Executors, they filed a Petition in the Corporation Court of the City of Norfolk for the appointment of Committee for the said McDonald Lindsay Wrenn, Jr. as an incompetent, and on June 6, 1938, by order of said Corporation Court, Luther D. Gilliken and William H. Campbell were appointed as Committees for said incompetent.

McDonald Lindsay Wrenn, Jr. died intestate, unmarried and without issue on July 1, 1956, and, so far as is known, the names of his heirs at law are correctly set out in the Bill in this suit.

BREEDEN, HOWARD & MacMILLAN
Counsel for Plaintiffs.

TOY D. SAVAGE, JR.
Of Counsel for Harold H. Wrenn, Virginia W. Smith, Esther W. Washburn, Margaret S. Chambers, Armon W. Sisson and Katherine W. Jasperson.

JAMES M. WOLCOTT
Counsel for B. Richard Wrenn and others similarly situated.

GEO. E. HAW OF HAW & HAW
Counsel for Julia Bidgood Whitehurst.

JAMES E. HEATH
Counsel for Elizabeth C. Myers and Elizabeth J. Campbell.

page 27 }

* * * * *

DECREE.

This cause, in which the plaintiff has filed his Bill; in which summons has been issued and returned executed as to the several parties named therein as defendants; in which B. Richards Wrenn, for himself and others similarly situated, Julia Bidgood Whitehurst, Elizabeth C. Myers, Elizabeth J. Campbell, Harold H. Wrenn, Virginia W. Smith, Esther W. Washburn, Margaret S. Chambers, Ormond W. Sission, Catherine J. Jasperson have filed their several answers; in which Harriet Campbell Brownette, Maria M. O. Dunn, Josephine Wrenn, Lawrence Wrenn, William A. Wrenn, Col. Theodore M. Wrenn, Margaret W. Dancy, Margaret B. Dennis, Elizabeth B. Allen, Alfred B. Kramer, Jr. and William A. W. Kramer have failed to appear, plead or answer; and in which publication has been duly had and returned upon parties unknown, came on this day to be heard *ore tenus* on the agreement of counsel for the plaintiff and the defendants; upon the Bill of Complaint; upon the several answers filed; upon the three annuity contracts purchased by Kate C. Wrenn; upon the last will and testament of Kate C. Wrenn; upon the Petition for the appointment of a Committee for McDonald Lindsay Wrenn, Jr., an incompetent person; upon the Order of the Corporation Court of Norfolk entered June 6, 1938, appointing Luther D. Gillikin and William H. Campbell as Committees for McDonald Lindsay Wrenn, Jr.; upon the statement of ac-
page 28 } count of the Executors of Kate C. Wrenn; upon the statement of account of the Committees of McDonald Lindsay Wrenn, Jr.; upon the Death Certificates of Esther Sjoblom and McDonald Lindsay Wrenn, Jr. and upon a stipulation of agreed facts signed by counsel for the plaintiff and defendants and filed to be read as evidence, and was argued by counsel.

UPON CONSIDERATION WHEREOF, the following appears:

1. All necessary parties are before the Court and the cause is duly matured.

2. McDonald Lindsay Wrenn, Jr., who was the only surviving child of Kate C. Wrenn, was from birth a helpless incompetent to whom his mother gave her unremitting care for

a period of more than forty years until her death, and for his comfort she employed Esther Sjoblom as his nurse who continued his care after the death of Mrs. Wrenn.

In order to insure his support and maintenance, in 1934 she purchased from the Equitable Life Insurance Company three annuities in the total amount of $110.000.00, repayable both as to principal and income in the amount of $506.00 per month to Kate C. Wrenn, the purchaser, so long as she should live, and upon her death to her son with a further provision that in the event there were any unpaid installments of the annuities at the date of his death, that same should be paid in one sum to her estate.

Kate C. Wrenn died on the 15th day of March, 1938, leaving a last will and testament executed on the 8th day of February, 1938, and duly admitted to probate in the Office of the Clerk of the Corporation Court of the City of Norfolk on the 21st day of March, 1938, and recorded therein in Will Book 20, page 36, in which will Luther D. Gillikin was duly

page 29 } appointed and qualified as Co-Executor of said last will and testament, and has since that time acted as Co-Executor and Surviving Executor thereunder, in which will, by clause two thereof, the Testatrix provided for her incompetent son, McDonald Lindsay Wrenn, Jr., as follows:

"I bequeath and devise to my executors hereinafter named all my property of every kind, real, personal and mixed, in trust, and direct that said executors, during the lifetime of my son, McDonald Lindsay Wrenn, shall control and manage this property and collect the income therefrom, and pay all expenses in connection therewith, including taxes, interest, repairs, commissoins and legal fees and to expend the net income therefrom or so much thereof as may be necessary or proper during the life time of my said son, McDonald Lindsay Wrenn, for the support and comfort of my said son in the situation in life which he has occupied during my life time so that my said son shall enjoy the necessities and comforts of life and all reasonable luxuries and conveniences. In the event the net income from my estate shall not be sufficient for the support and comfort of my said son as aforesaid, I authorize my said executors to expend any or all of the corpus of my estate for the support and comfort of my said son;"

and that, after making certain specific bequests in clause

three of her said last will and testament, the testatrix provided in clause four thereof as follows:

"4. At the death of my said son, and after the payment of the legacies contained in section number '3' of this will, I devise and bequeath all the rest and residue of my property and estate of every kind, including any lapsed legacy, as follows:

"a. To said Ester Sjoblom, if she is in the employ of my son or my estate at the time of the death of my son, one-third (1/3);

"b. To my said niece-in-law, Mrs. Julia Bidgood Whitehurst, one-third (1/3);

"c. To my said niece, Mrs. Elizabeth Campbell Myers, one-third (1/3).

"In the event said Ester Sjoblom is not in the employ of my son, then the one-third (1/3) of the rest and residue of my estate, which otherwise would have gone to her under this section number '4' of my will, shall go equally to said Mrs. Julia Bidgood Whitehurst and said Mrs. Elizabeth Campbell Myers."

page 30 } 3. That Ester Sjoblom predeceased McDonald Wrenn, Jr. who died on July 31, 1956.

4. By the Order of the Corporation Court of the City of Norfolk entered on June 6, 1938, Luther D. Gillikin and William H. Campbell were appointed and duly qualified as Committes of McDonald Lindsay Wrenn, Jr., an incompetent, which Order contains the following provision:

"And the Court doth further order the said committees, Luther D. Gillikin and William H. Campbell, shall, from the installments of insurance to be paid to them periodically by insurance companies, expend such monies for the support and maintenance of said McDonald Lindsay Wrenn, as may be reasonable for his proper support and maintenance."

Upon the death of William H. Campbell, Luther D. Gillikin continued to act as Sole Surviving Committee until the death of his ward.

5. MacDonald Lindsay Wrenn, Jr. died intestate, unmarried and without issue on July 1, 1956.

6. During the period of approximately 18 years which had elapsed from the death of Kate C. Wrenn in 1938 and that of her son in 1956, the Committee of the incompetent's estate used for his support and maintenance all of the monthly pay-

ments from the annuities purchased by the said Kate C. Wrenn so that at his death all of the annuity payments had been made and a very small balance thereof remained in the hands of the Committee. During said period, since the monthly payments on the annuities were insufficient for the support, comfort and maintenance of the incompetent and to furnish him the comforts of life and all reasonable luxuries and conveniences as provided for in the will, the Surviving Executor expended for that purpose a considerable sum of income from the trust estate set up under the will; however, there was left a balance of approximately $32,-
page 31 } 000.00 of income which was not expended and which was accumulated and added to the corpus of the trust, which has a present value of approximately $275,000.00.

7. The persons who are the beneficiaries under the trust established in the will of Kate C. Wrenn are not in each instance heirs and distributees of Kate C. Wrenn.

Wherefore, the Court, upon consideration of the above facts and circumstances, as well as the conditions existing and surrounding the said Kate C. Wrenn and her incompetent son at the time her will was executed, the terms of the several annuities, the Order of the Corporation Court of Norfolk entered on June 6, 1938, and the provisions of the last will and testament of the said Kate C. Wrenn, proceeding to construe the will of the said Kate C. Wrenn in the light thereof, is of the opinion that in the purchase of the above mentioned annuities by Kate C. Wrenn at a cost of $110,000.00 in 1934, it was her intention to insure the support of her incompetent son in the event of her death and to thereby provide a monthly sum which would be ample for his support and maintenance. Having thus provided what she considered a monthly sum sufficient for his actual support and maintenance and with the controlling desire that he should also have the conveniences and luxuries with which she had always surrounded him, in 1938 she executed her last will and testament and therein provided for use of the income from her trust estate to supplement the annuity payments so far as should be necessary to support her son and to provide him those conveniences and luxuries to which he had been accustomed, and to that end vested in her Executors complete discretion in that regard.

The Court is of the further opinion that the force and effect of clause two of said last will and testament of Kate C.

Wrenn was to limit the expenditures from the in-
page 32 } come of the trust estate to such sums as should be
necessary in the opinion of the Executors to furnish her son such support, comfort, conveniences and luxuries which could not be afforded him by his Committees in the expenditure from the monthly payments of the annuities and that clause two should be so construed.

And the Court is of the further opinion that the Executors under the will of Kate C. Wrenn, in determining the amount of income which was necessary or proper to expend for the comfort and support of the beneficiary thereof, were entitled to require that the Committees of McDonald Lindsay Wrenn, Jr. first expend for that purpose the monthly payments from the annuities and that any balance of income not so expended by the Executors should be accumulated as a part of the corpus of the trust estate.

The Court is also of the opinion that the action of the Committee and the Surviving Committee in exhausting the monthly payments from the annuities for the support and maintenance of their ward was right and proper and that the Surviving Committee was not entitled upon the death of McDonald Lindsay Wrenn, Jr. to any reimbursement from the trust estate established under the will of Kate C. Wrenn, deceased.

WHEREFORE, the Court doth ADJUDGE, ORDER and DECREE, as follows:

1. Kate C. Wrenn, recognizing that she had purchased annuities which would provide for the support and maintenance of her incompetent son, McDonald Lindsay Wrenn, Jr., the sum of $506.00 per month, in the second clause of her will provided that the income from the trust estate therein set up should be used by her Executors so far as was necessary to support and maintain her said son and to furnish him the luxuries and conveniences to which he had been
accustomed. In so doing, it was her intention that
page 33 } the monthly payments from the annuities should
be first used for his maintenance and support and only so much of the income from the trust should be used as was necessary to supplement the annuity payments in furnishing him proper support and maintenance and the conveniences and luxuries to which he had been accustomed, and that any balance of the income not so expended was to remain a part of her estate.

2. That the monthly payments from the annuities consti-

tuted the primary fund for the support and maintenance of McDonald Lindsay Wrenn, Jr. and the Committees and Luther D. Gillikin, the Surviving Committee, have acted properly and in accordance with law in appying to the support and maintenance of their ward all of the monthly payments on the annuities which came into their hands and, therefore, neither the said Luther D. Gillikin, the Surviving Committee, or the Estate of McDonald Lindsay Wrenn, Jr. shall be entitled to receive from the trust estate established under the will of Kate C. Wrenn any reimbursement for the annuity payments so applied.

3. That Luther D. Gillikin, Surviving Executor of the last will and testament of Kate C. Wrenn, deceased, is hereby authorized and directed to make provision for and fully pay the specific bequests provided for in clause three of the last will and testament of Kate C. Wrenn in accordance with the terms and provisions thereof, and thereafter to pay over and deliver all of the rest and residue of said trust estate and any accumulated income thereof unto the surviving beneficiaries under clause four of said last will and testament in accordance with the terms and provisions thereof.

page 34 } Enter June 26, '58.

C. H. J.

* * * * *

page 35 }

* * * * *

Filed 8-22-58.

VIRGINIA MANNING, D. C.

NOTICE OF APPEAL TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND ASSIGNMENT OF ERRORS.

The defendants, Virginia W. Smith, Harold H. Wrenn, Ester W. Washburn, Margaret S. Chambers, Ormand S. Sisson, Katherine W. Jasperson and B. Richards Wrenn, hereby give notice, pursuant to Rule 5:1, Section 4 of the Rules of the Supreme Court of Appeals of Virginia, that they will appeal from the judgment of the Circuit Court of

the City of Norfolk entered on June 26, 1958, and will apply to the Supreme Court of Appeals for an appeal.

ASSIGNMENT OF ERRORS.

The following errors are assigned:

1. The Court erred in entering the final decree.

2. The Court erred in finding that the force and effect of clause two of the last will and testament of Kate C. Wrenn was to limit the expenditures from the income of the trust estate to such sums as should be necessary, in the opinion of the Executors, to furnish her son such support, comfort, conveniences and luxuries as could not be afforded him by his Committees in the expenditure of the monthly payments from the annuities, and that clause two should be so construed.

3. The Court erred in finding that the Executors, in determining the amount of income which it was necessary or proper to expend for the comfort and support page 36 } of the beneficiary thereof, were entitled to require that the Committee of McDonald Lindsay Wrenn, Jr. first expend for that purpose the monthly payments from the annuities.

4. The Court erred in finding that it was the intention of the testatrix that the monthly payments from the annuities should be first used for the support and maintenance of McDonald Lindsay Wrenn, Jr. and that only so much of the income from the trust should be used as was necessary to supplement the annuity payments, and that any balance of the trust income not so expended was to remain a part of her estate.

5. The Court erred in finding that the payments from the annuities constituted the primary fund for the support and maintenance of McDonald Lindsay Wrenn, Jr., that the Committees and surviving Committee acted properly and in accordance with law in applying to the support and maintenance of their ward all of the monthly payments on said annuities which came into their hands, and that neither the surviving Committee nor the estate of McDonald Lindsay Wrenn, Jr. shall be entitled to receive from the trust estate any reimbursement for the annuity payments so applied.

6. The Court erred in directing the surviving Executor under the last will and testament of Kate C. Wrenn, after making provision for and fully paying the specific bequests therein provided for, to pay over and deliver all of the rest

and residue of said trust estate, and any accumulated income therefrom, unto the surviving beneficiaries under clause four of said last will and testament.

7. The Court erred in not finding that McDonald Lindsay Wrenn, Jr. was entitled to receive his support and maintenance from the trust estate, irrespective of his personal resources, which were the annuity payments.

8. The Court erred in not directing that the annuity payments erroneously applied should be restored to his estate by the trust estate.

VIRGINIA W. SMITH, HAROLD H. WRENN, ESTHER W. WASHBURN, MARGARET S. CHAMBERS, ORMAND S. SISSON, KATHERINE W. JASPERSON AND B. RICHARDS WRENN,

By TOY D. SAVAGE, JR.
Of Counsel.

JAMES M. WOLCOTT
Of Counsel.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Appeal Awarded	1
Record	2
Answer of Julia Bidgood Whitehurst	2
Answer of Elizabeth C. Myers and Elizabeth J. Campbell	5
Stipulation of Facts	9
Final Decree—June 26, 1958	11
Notice of Appeal and Assignments of Error	16

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME COURT OF APPEALS
RECEIVED
FEB 9 1959
RECEIVED
RICHMOND, VIRGINIA