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Clerk, Supreme Court of Appeals

Record No. 5150

In the Supreme Court of Appeals of Virginia at Richmond

MARY BOONE McCLURE, ET AL.

v.

CURRY CARTER, EXOR., ETC.

FROM THE CIRCUIT COURT OF AUGUSTA COUNTY

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. 5150

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 2nd day of March, 1960.

MARY BOONE McCLURE, ET AL., Appellants,

against

CURRY CARTER, EXOR., &c., Appellee.

From the Circuit Court of Augusta County

Upon the petition of Mary Boone McClure, Anna Katherine Brooks, Thomas Garland Hawpe, Charles Kemper Hawpe, William Erskine Hawpe, Edith Searson Hawpe, Polly Dunlop Hawpe and Thelma Sanders Hawpe an appeal and *supersedeas* is awarded them from a decree entered by the Circuit Court of Augusta County on the 14th day of November, 1959, in a certain chancery cause then therein depending wherein Curry Carter, Executor, etc., was plaintiff and the petitioners 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 five thousand dollars, with condition as the law directs.

RECORD

* * * * *

BILL OF COMPLAINT.

To the Honorable William S. Moffett, Jr., Judge of the Circuit Court of Augusta County, Virginia:

Your complainant, Curry Carter, Executor and Trustee under the will of the late Mrs. Alma B. Foster, respectfully represents:

(1) That the late Mrs, Alma B. Foster, who was residing at the time of her death in Middle River District, Augusta County, Virginia, near the Town of Grottoes, died testate on August 14, 1958;

(2) That your complainant who was nominated and appointed Executor and Trustee under the Testatrix's will, duly qualified as such before the Clerk of this Honorable
page 2 } Court on August 18, 1958, and posted the required bond for the faithful performance of his duties;

(3) That your complainant, after his qualification as such Executor and Trustee, proceeded to have made an inventory and appraisement of the estate of the said Testatrix, which appraisement has not yet been filed for recordation but will be completed and filed with reasonable promptness;

(4) That from the incomplete inventory and appraisement it appears that the Testatrix left a gross estate of approximately $107,000.00, $68,000.00 in personal property, and $39,000.00 in real estate; a copy of said inventory and appraisement will be exhibited to the Court upon its completion and certification;

(5) That under the will of the said Testatrix, a true copy of which will is herewith filed marked, "Complainant's Exhibit—Will," the bulk of the estate is directed to be turned over to your complainant as Trustee, with direction that, "Said Trustee and his successor or successors in title shall establish and maintain in perpetuity at the residence now (formerly) occupied by me (Testatrix) as a memorial to myself (herself) and my (her) beloved late husband, G. Kemper Foster, a home to be known and designated as 'Our Home,' to be used and enjoyed by indigent widows and maiden ladies, who shall be maintained and supported from the proceeds of said trust fund, supplemented by the rents, issues and profits from the farm lying adjacent to and/or surrounding 'Our

(c) A. E. Bailey, a nephew of the late G. K. Foster, is laying claim to one Grandfather clock, claimed to have belonged to his mother;

(d) Doubtless many other questions and problems will arise regarding the estate and trust fund;

(11) That Mrs. Mary Boone McClure, Mrs. Anna Katherine Brooks, Thomas Garland Hawpe, Charles Kemper Hawpe, and William Erskine Hawpe are the sole heirs at law of the Testatrix.

Wherefore, your complainant prays that Mrs. Mary Boone McClure, Mrs. Anna Katherine Brooks, Thomas Garland Hawpe, Charles Kemper Hawpe, William Erskine Hawpe, Edith Searson Hawpe, Polly Dunlop Hawpe, and Thelma Sanders Hawpe may be made parties defendant to this bill and required to answer the same, their answers under oath being hereby expressly waived; that your complainant may receive the guidance of the Court in the administration of the estate as Executor and in the conduct of the trust reposed in him as Trustee; that, *inter alia,* the Court may determine and adjudge the validity of the trust estate as set up in the Testatrix's will, and the provision for its perpetuation and/or termination; what title the devisees mentioned in Item 3 of the Testatrix's will take to the lots therein described; what disposition should be made by the Executor of the heirlooms mentioned in Paragraph (10) (a) and (c) above; what disposition should be made of the late home of the Testatrix and the fixtures and furniture therein; what disposition, if any, should be made of the farm mentioned in the Testatrix's will.

And your complainants prays that this suit may remain on the docket indefinitely for the guidance of your complainant, wherein decrees and orders may be entered from time to time for his guidance and control.

And he will ever pray, etc.

CURRY CARTER,
Executor and Trustee under the
will of Alma B. Foster, deceased.

CURRY CARTER
19 Court Place
Staunton, Virginia.

Home.' '' Additional instructions and directions were given to the Trustee and his successor or successors in the administration of the trust;

(6) That under Item 5 of the Testatrix's will it was provided that all the tangible personal property located in her home at the time of her death should be retained, used and preserved therein;

(7) That under Item 6 of the Testatrix's will the
page 3 } Trustee was vested with the right, power and au-
thority to appoint his successor or successors and a provision was made for his successor upon his failure so to do;

(8) That under Item 8 of said will the Testatrix provided that should occasion arise where there were no eligible persons available for the use of "Our Home" for a period of Five (5) years and "Our Home" should not be occupied for a continuous period of Five (5) years the Trustee is authorized and directed to "Liquidate the trust and turn the proceeds therefrom over to some strictly charitable organization of continued and proven service. In selecting said charitable organization said Trustee shall be the sole judge of its entitlement to said fund."

(9) That from the foregoing recitals it appears obvious that the Executor and Trustee needs guidance and control of said estate and to secure such guidance and control is the object and purpose of this bill;

(10) That aside from the questions that the will itself poses there are other questions that have arisen that require the direction of the Court, among which are the following:

(a) The heirs at law of the Testatrix assert that some pieces of the tangible personal property now situated in the late home of the Testatrix are heirlooms that justly belong to various heirs and that the Testatrix should not have attempted to dispose thereof. Before the appraisers were taken to the home to appraise the tangible personal property these heirlooms were, at the request of the Executor, marked or tagged and the appraisement shows opposite those various articles what branch of the Testatrix's family lays claims to those articles;

(b) The will devises to five nieces certain lots of land fronting on the Mt. Meridian-Grottoes Road, lying to the southwest of the Testatrix's former home; after devising said lots
Testatrix makes a provision for a reverter in case
page 4 } homes are not built thereon within a period of Five
(5) years;

upon and occupied shall be and remain a part of my estate, to be dealth with in accordance with Item Four.

Item Four: I direct my executor hereinafter
page 6 } named to liquidate all my personal estate, exclusive of those pieces of personal property used and enjoyed in and about the home which I now occupy, and the proceeds derived therefrom he shall turn over to himself as trustee hereunder upon the following charitable trust:

Said trustee and his successor or successors in title shall establish and maintain in perpetuity at the residence now occupied by me as a memorial to myself and my beloved late husband, G. Kemper Foster, a home to be known and designated as "Our Home," to be used and enjoyed by indigent widows and maiden ladies, who shall be maintained and supported from the proceeds of said trust fund, supplemented by the rents, issues and profits from the farm lying adjacent to and/or surrounding "Our Home," which farm I give, devise and bequeath to said trustee upon the foregoing and following trust. In the selection of the beneficiaries under this Item the trustee and his successor or successors in title shall be the sole judges of who shall be admitted, but he and his successors in title are requested to prefer such indigent widows and maiden ladies as are named in Item Three and their heirs; and said trustee and his successors shall endeavor to limit the number of occupants of "Our Home" to such number as the proceeds from said trust fund and the rents, issues and profits from said farm will comfortably support and maintain; however, said trustee and his successors shall have the right to accept from said beneficiaries or others such sums as they may be deemed able to pay.

Item Five: All the tangible personal property located in my home at the time of my death shall be retained, used and preserved in "Our Home" and the occupants of "Our Home" shall have the use and enjoyment thereof.

Item Six: Said trustee is hereby vested with the right, power and authority to select and appoint his successor or successors by an instrument in writing, to take effect in his lifetime or at his death, and upon his failure to exercise said power of appointment it is requested that the Circuit Court of Augusta County appoint his successor and all successors in the future.

Item Seven: Said trustee and his successors shall
page 7 } give and keep in full force and effect a good and sufficient bond, with approved security, in the penalty of Fifty Thousand Dollars ($50,000.00) for the faithful performance of his or their duties.

Filed in the Clerk's office of the Circuit Court of Augusta Co. the 20th day of November, 1958.

Teste:

C. M. WAYBRIGHT, D. C.

page 5 }

* * * * *

THE WILL OF ALMA B. FOSTER.

I, Alma B. Foster, being of sound mind and disposing memory, do make, publish and declare this to be my last will and testament, hereby revoking any and all wills and/or codicils thereto at any time heretofore made by me.

Item One: I direct that all of my just debts and funeral expenses be paid as promptly as practicable after my death.

Item Two: I give, devise and bequeath Twenty-five Dollars ($25.00) each to the following children of my brother, W. S. Hawpe, namely: William Erskine Hawpe, Mary Boone McClure, Anna Katherine Brooks, Thomas Garland Hawpe, and Charles Kemper Hawpe.

Item Three: I give, devise and bequeath to each of my following nieces, to-wit: Edith Searson Hawpe, Mary Boone McClure, Anna Katherine Brooks, Polly Dunlop Hawpe, and Thelma Sanders Hawpe, the right and privilege to build, maintain and occupy six-room homes on the lots 50 feet by 150 feet fronting on the Mt. Meridian-Grottoes Road, which lots lie to the southwest of the home I now occupy. Should the foregoing nieces avail themselves of said privileges and build and occupy homes within five (5) years from my death, I direct that my executor or his successor in title convey said lot to the respective nieces that have built and occupied homes thereon. I give, as appurtenances to said lots the right to take water for domestic purposes from the well at the foot of the hill, with the right to conduct the same along such routes and by such means as they may desire, the expense of which shall be borne by the respective lot-owners. At the end of the five-year period mentioned above, those nieces who have not availed themselves of the foregoing privilege shall forfeit all right and interest herein and such lots as have not been built

Searson Hawpe; Polly Dunlop Hawpe and Thelma Sanders Hawpe to a bill of complaint filed against them in the Circuit Court for Augusta County by Curry Carter, Executor and Trustee under the will of Alma B. Foster, deceased:

The respondents, reserving to themselves the
page 9 } benefit of all just exceptions to the said bill, for answer thereto or so much thereof as they are advised it is material that they should answer, jointly and separately answer and say:

First: The respondents admit the averments of Paragraphs (1), (2), (3) and (4) of the bill.

Second: The averments of the remaining paragraphs, seven in number, of the bill concerning the last will and testament of the will of Alma B. Foster, a copy of which will is exhibited with the bill as "Complainant's Exhibit—Will," in so far as such averments are of matters or facts extraneous to the said will, these respondents neither admit nor deny.

Third: These respondents further answering, say:

(a). Alma B. Foster, who died on August 14th, 1958, was the widow of a certain G. K. Foster, who died testate on May 17th, 1951, leaving a comparatively large estate, which under the provisions of his will was held for the sole benefit of said Alma B. Foster for her life. The marriage of G. K. Foster and Alma B. Foster was childless. As averred in the bill, Alma B. Foster's estate consisted principally of intangible personal property; her real property consisted of a tract containing 69 acres situated on a public road, known as the Mt. Meridian-Grottoes Road. On this tract was a two-story twelve-room residence, fronting on the public road, in which the testatrix and her said husband resided until his death. The testatrix owned no farming machinery, farming equipment or livestock. Her home and its surroundings were and are entirely rural and at a considerable distance from any village or community.

(b). The testatrix' next of blood kin were three nephews, children of a deceased brother, and two nieces, children of her deceased sisters.

(c). Although the testatrix had an estate appraised at approximately $107,000, she bequeathed to each of her
page 10 } three nephews the sum of Twenty-Five Dollars and the same sum to each of her nieces.

(d). By the Third Item of her will she gave to each of five persons, designated by name and described as her nieces, what she termed the right and privilege to build, maintain and

Item Eight: Should the occasion ever arise where there are no applicants for the use and enjoyment of "Our Home" and there appeared to be no eligible persons available for its use and enjoyment as contemplated by this will, said trustee or his successor or successors in title shall preserve "Our Home" against wear and tear and depreciation and said trust shall be continued for a period of Five (5) years and if "Our Home" should not be occupied for a continuous period of Five (5) years said trustee is authorized, and he is hereby directed, to liquidate the trust and turn the proceeds therefrom over to some strictly charitable organization of continued and proven service. In selecting said charitable organization said trustee shall be the sole judge of its entitlement to said fund.

Item Nine: Said trustee shall account for his stewardship annually by presenting his accounts for settlement to the Commissioner of Accounts of Augusta County, Virginia, who in turn shall present them to the Circuit Court of Augusta County for approval and should it appear from any settlement that said trustee has not faithfully performed his duties any person having a substantial interest in said fund or any officer or director of the Augusta-Rockingham Bank and its successors shall have the right, power and authority to institute such a proceeding as may seem appropriate for a correct accounting and for the restitution of any funds lost or misappropriated or embezzled by said trustee.

Item Ten: I nominate and appoint Curry Carter, executor and trustee under this will, and he is empowered to sell and convey any property, real or personal, coming into his hands hereunder.

Item Eleven: Wherever the words executor and trustee are used herein they apply interchangeably and to their successors.

Given under my hand and seal this 6th day of December, 1951.

S/ ALMA B. FOSTER (Seal)

Attestation clause omitted.

To: The Hon. William S. Moffett, Jr., Judge of the Circuit Court for Augusta County:

The joint and separate answer and cross-bill of Mary Boone McClure; Anna Katherine Brooks; Thomas Garland Hawpe; Charles Kemper Hawpe; William Erskine Hawpe; Edith

Curry Carter, executor and trustee as aforesaid, and that he be required to answer the same and that the Court may declare in this suit and adjudicate that the proposed trust so created is and from the beginning has been null, void and of no effect and further, that after the various minor matters of administration, mentioned by the complainant and prayed to be settled, are hereinafter disposed of be afforded, the estate of the testatrix, free of all conditions and trusts, be held to have passed because of the intestacy in that respect of the testatrix to the heirs at law and distributees of the said Alma B. Foster, deceased, and that the same be disposed of by the executor accordingly.

And having fully answered, the respondents page 12 } further pray to be dismissed with their costs in this behalf expended.

And they will ever pray, etc.

MARY BOONE McCLURE
ANNA KATHERINE BROOKS
THOMAS GARLAND HAWPE
CHARLES KEMPER HAWPE
WILLIAM ERSKINE HAWPE
EDITH SEARSON HAWPE
POLLY DUNLOP HAWPE
THELMA SANDERS HAWPE
By J. M. PERRY
Their Counsel.

Filed in the Clerk's Office of the Circuit Court of Augusta County, Dec. 20, 1958.

Teste:

C. M. WAYBRIGHT, Dep. Clk.

* * * * *

page 13 } * * * * *

This day came the respondents by J. M. Perry, Esq., their attorney, and prayed leave to amend the answer of the above named respondents, heretofore filed in the Clerk's office by said respondents, so that the averments designated as (b) and (c) on the second and third page of said answer shall read, paragraph (b) that the testatrix' next of blood kin were three, instead of six nephews, children of a deceased brother, and two, instead of five nieces, children of a deceased brother, and that the paragraph designated as (c) shall read that she

occupy six-room homes on lots, parcels of her farm, each fifty by one hundred and fifty feet, fronting on the public road and lying to the southwest of the residence the testatrix occupied. This so-called right and privilege was to be exercised within five years from the testatrix' death and if any of the nieces should build and occupy such homes within five years from her death, her executor was directed to convey "said lot to the respective nieces that have built and occupied homes thereon." The testatrix added that the rights so given expire "in the case of those nieces who have not availed themselves of the privilege granted and the lot not built upon and occupied" shall remain a part of the testatrix' estate and was to pass as a part of her farm devised in Item Four of the will.

None of the permitted houses have yet been built and until five years after the testatrix' death, each of the designated persons may build and occupy as her home a six-room house on any of said vacant lots and thereafter receive a conveyance.

(e). The terms of the Fourth Item of the will are such as to require the construction thereof by the Court and present a question which is vital to the respondents' case.

In said Fourth Item, the testatrix purports in her will to create a charitable trust, but the respondents deny that the trust is a charitable trust and charge that the so-called charitable trust in fact and in law is a mere benevolence and is null and void from its beginning.

page 11 } The respondents say that the trusts created by said will extend to a time beyond life and lives in being and twenty-one years thereafter and the said trusts are made null and void by the rule against perpetuities.

The respondents further say that the several complications with respect to personal property set forth in the complainant's bill in fact exist and in the course of this cause the rights of the claimants thereto may and should be determined and adjudicated.

And the respondents say that, although in the prayer of said bill, the complainant prays that the validity or invalidity of the trusts attempted to be created by the said will be determined, there is an actual controversy existing between the complainant and these respondents as to whether or not the testatrix has created a valid trust and in view of such actual controversy, this Court has power to make binding adjudication of right, whether or not consequential relief is or at this time could be claimed.

And the respondents pray that the answer of these respondents may be treated as a cross-bill directed against the said

bequeathed to each of her three, instead of six nephews, the sum of $25.00 and the same pecuniary legacy of $25.00 to each of her nieces, instead of, as written, "no pecuniary legacy to any of her nieces."

page 14 } Upon consideration whereof, the Court permitted the said amendments to be made and the same were made at the bar of the Court in writing upon the original answer.

And thereupon the said respondents moved the Court to order that the said joint and separate answer, heretofore filed by the respondents, be treated as a cross-bill filed against the said complainant and that he be required to answer the same.

Whereupon, upon consideration of the said answer and its averments, as above amended, and the prayer of the said respondents set forth therein, the Court doth order that the said joint and separate answer be deemed and treated as an answer and cross-bill against the said complainant, Curry Carter, Esq., Executor and Trustee under the will of Alma B. Foster, deceased, and the said Executor and Trustee, complainant as aforesaid, shall answer the said cross-bill, as he may be advised, within twenty-one days after the entry of this order.

And it appearing by the certificate of counsel appended to the said answer that a copy thereof has been served upon the said Executor and Trustee, the Court deems it unnecessary that a copy of said answer and cross-bill be served upon the said Executor and Trustee.

The Clerk will enter the foregoing order in the proper chancery order book in his office.

Given under the hand of the Hon. William S. Moffett, Jr., Judge of the Circuit Court for Augusta County, this 7th day of January, in the year nineteen hundred and fifty-nine:

WM. S. MOFFETT, JR., Judge.

* * * * *

page 15 } * * * * *

ANSWER TO CROSS-BILL.

To the Honorable William S. Moffett, Jr., Judge of the Circuit Court of Augusta County, Virginia:

The Answer of Curry Carter, Executor and Trustee under the will of Alma B. Foster, deceased, to the Cross-Bill filed

in this cause by Mary Boone McClure and others as amended by Order herein entered on the 1st day of January, 1959.

Curry Carter, Executor and Trustee under the will of Alma B. Foster, deceased, for answer to said Cross-Bill and the amendment thereto answers and says:

(1) Under Item (e) of the Cross-Bill it is alleged that the provisions of Item (4) of the will of Alma B. Foster, deceased, constitute "a mere benevolence" and are null and void under the Rule against Perpetuities;

(2) Item Four of said Bill is as follows: "I direct my executor hereinafter named to liquidate all my personal estate, exclusive of those pieces of personal property used and enjoyed in and about the home which I now occupy, and the proceeds derived therefrom he shall turn over to himself as trustee hereunder upon the following charitable trust:

"Said trustee and his successor or successors in title shall establish and maintain in perpetuity at the residence now occupied by me as a memorial to myself and my beloved late husband, G. Kemper Foster, a home to be known
page 16 } and designated as "Our Home," to be used and enjoyed by indigent widows and maiden ladies, who shall be maintained and supported from the proceeds of said trust fund, supplemented by the rents, issues and profits from the farm lying adjacent to and/or surrounding "Our Home," which farm I give, devise and bequeath to said trustee upon the foregoing and following trust. In the selection of the beneficiaries under this Item the trustee and his successor or successors in title shall be the sole judges of who shall be admitted, but he and his successors in title are requested to prefer such indigent widows and maiden ladies as are named in Item Three and their heirs; and said trustee and his successors shall endeavor to limit the number of occupants of "Our Home" to such number as the prooceeds from said trust fund and the rents, issues and profits from said farm will comfortably support and maintain; however, said trustee and his successors shall have the right to accept from said beneficiaries or others such sums as they may be deemed able to pay."

(3) The testatrix was the widow of the late G. K. Foster, who, during his lifetime and at the time of his death was a relatively large stockholder in the Augusta-Rockingham Bank, and its Vice-President and a Director; this doubtless accounts in some measure for the testatrix selecting the bank's attorney and one of its officers and directors as her Executor and Trustee, and the Board of Directors of the bank as a

group who should nominate a successor and/or successors to the Executor and Trustee. At any rate, she (the testatrix) seemed to have reposed considerable confidence in those persons.

The testatrix evinced a deep attachment for her home with its contents, and seems to have wanted to perpetuate it as a home "to be used and enjoyed by indigent widows and maiden ladies" to be called "Our Home." At the time her will was written the draftsman knew little of the page 17 } testatrix's estate and the latter made no disclosure beyond what the draftsman was cognizant of. What seemed to be uppermost in the testatrix's mind were:

(a) The preservation of her home to be known after her death as "Our Home";

(b) To establish a memorial to herself and her late husband; and

(c) To provide a place "to be used and enjoyed by indigent widows and maiden ladies," whose selection "The trustee and his successor or successors in title shall be the sole judges."

There were doubtless other methods that could have been employed to carry out the will of the testatrix, but the method adopted was in conformity with her specific directions; and this respondent denies that Item (4) of said will is null and void under the Rule Against Perpetuities.

And now having fully answered the Cross Bill, this respondent renews his prayer of the Bill and prays the Court that the question raised in the Cross Bill and those raised in the original Blil may be adjudicated and that this respondent may have the full guidance and control of the Court in the administration of his trust.

And he will ever pray, etc.

CURRY CARTER
Executor and Trustee under the will of Mrs. Alma B. Foster, deceased.

CURRY CARTER
19 Court Place
Staunton, Virginia.

Attorney for complainant in original Bill and respondent in the Cross Bill.

Filed in the Clerk's Office of the Circuit Court of Augusta County, January 20, 1959.

Teste:

C. M. WAYBRIGHT, Dep. Clk.

* * * * *

page 18 }

* * * * *

DECREE.

This cause, which has been regularly matured, set for hearing and docketed, heretofore came on to be heard upon the Bill of Complaint and Exhibit filed therewith; upon the joint and several answers, together with cross bill, of all defendants to the cause; upon the amended answer of the said defendants, as amended at the Bar of the Court by leave of Court; and was argued by counsel, both orally and by memoranda; and now, having taken time to consider carefully the record in the matter, the authorities cited and the views of counsel, and being of the conclusion,

The Court doth accordingly adjudge, order and decree that the will of the said Alma B. Foster should be, and hereby is, construed to establish a valid charitable trust provided only that, firstly evidence shall subsequently be taken in this cause; and secondly, that the evidence so taken indicates, by a preponderance thereof, the availability of sufficient funds to establish and reasonably maintain the intended trust, as provided in Item Four of the said will; to which ruling of the Court defendants, by counsel, note an exception.

And the Court, considering it proper so to do, doth now refer the matter to one of the Master Commissioners in Chancery of this Court, who will inquire into and report as to the following matters, taking such evidence as may be requisite to that end:

page 19 } 1. Whether or not there will be sufficient funds out of the estate of the said Alma B. Foster, deceased, first to establish, and thereafter to reasonably maintain the intended trust, subject of Item Four of the said will;

2. A. Who are the owners, and B. What is the proper disposition of certain tangible personal property referred to in paragraph (10), sub paragraphs (a) and (c) of the Bill of Complaint, Paragraphs which, for convenience in reference, are here repeated:

"(10) That aside from the questions that the will itself

poses there are other questions that have arisen that require the direction of the Court, among which are the following:

"(a) The heirs at law of the Testatrix assert that some pieces of the tangible personal property now situated in the late home of the Testatrix are heirlooms that justly belong to various heirs and that the Testatrix should not have attempted to dispose thereof. Before the appraisers were taken to the home to appraise the tangible personal property these heirlooms were, at the request of the Executor, marked or tagged and the appraisement shows opposite those various articles what branch of the Testatrix's family lays claim to those articles;

(c) A. E. Bailey, a nephew of the late G. K. Foster, is laying claim to one Grandfather clock, claimed to have belonged to his mother;

3. Any other matter, specially stated, which the Commissioner may deem pertinent or which any party may request to be so stated.

But before proceeding to execute the reference the Commissioner shall give notice by ....., of the time and place fixed for executing the same.

Enter 11/14/59.

WM. S. MOFFETT, JR., Judge.

* * * * *

page 22 } * * * * *

To Curry Carter, Esq., Executor and Trustee under the will of Alma B. Foster, deceased, and C. M. Elder, Esq., Counsel for the above complainant:

PLEASE TAKE NOTICE: That the undersigned, all of whom are respondents to the bill of the said complainant, whose answer, as prayed by them, has been treated as a cross-bill against the said complainant, are about to file with the Supreme Court of Appeals of Virginia their petition for an appeal from and *supersedeas* to the final judgment entered in the above entitled cause on the fourteenth day of November, 1959; and they assign as error complained of by them in the said decree the following:

page 23 } ASSIGNMENT OF ERROR.

The Judge erred in construing the will of the said Alma B. Foster, deceased, as establishing a valid charitable trust, whereas, as is insisted by the undersigned appellants, the first trust sought to be created by the testatrix for the establishment of a memorial to herself and her deceased husband is not a charitable or public trust and is void in its inception, in that it is not for the benefit of an indefinite number of persons, but only of a limited and personally designated number, and also void in its inception in that it offends the rule against perpetuities; and the second trust sought to be created by the testatrix, under which, upon the failure of the objects of the first trust the trustee or his successor will turn over the trust subject in his or their hands to some strictly charitable organization of continued proven service, to be selected by the trustee or his successor in office, likewise is void in its inception, for the limitation over is conditioned upon a contingency which may occur at an indefinite future time and offends the rule against perpetuities; and the appellants, heirs at law of the said Alma B. Foster, deceased, are entitled to the estate of the said decedent.

Respectfully,

MARY BOONE McCLURE;
ANNA KATHERINE BROOKS;
THOMAS GARLAND HAWPE;
CHARLES KEMPER HAWPE;
WILLIAM ERSKINE HAWPE;
EDITH SEARSON HAWPE;
POLLY DUNLOP HAWPE;
THELMA SANDERS HAWPE;
By J. M. PERRY
Counsel.

Filed in the Clerk's Office of the Circuit Court of Augusta County, November 23, 1959.

Teste:

C. M. WAYBRIGHT, Dep. Clk.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

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