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Record No. 5256

In the Supreme Court of Appeals of Virginia at Richmond

THELMA PURNELL DELLY
v.
SEABOARD CITIZENS NATIONAL BANK OF NORFOLK, ADMINISTRATOR, C. T. A., 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. 5256

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 23rd day of November, 1960.

THELMA PURNELL DELLY, Appellant,

against

SEABOARD CITIZENS NATIONAL BANK OF NORFOLK, ADMINISTRATOR, C. T. A., ET AL., Appellees.

From the Circuit Court of the City of Norfolk

Upon the petition of Thelma Purnell Delly an appeal is awarded her from a decree entered by the Circuit Court of the City of Norfolk on the 31st day of May, 1960, in a certain proceeding then therein depending styled, In the Matter of the Estate of Marie Elizabeth Purnell, deceased; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

NOTICE OF APPEAL.

Thelma Purnell Delly hereby gives notice pursuant to Rule 5:1, §4, of the Rules of the Supreme Court of Appeals of Virginia, that she appeals from the judgment of this Court entered on May 31, 1960, in this case, and that she will apply for a Writ of Error.

ASSIGNMENTS OF ERROR.

Pursuant to said Rule, Thelma Purnell Delly assigns the following errors:

1. The Court erred in affirming the order of the Clerk entered on November 6, 1959, which admitted to probate as the last will and testament of Marie Elizabeth Purnell, a paper writing dated February 24, 1953, and which permitted The Seaboard Citizens National Bank of Norfolk to qualify as Administrator, c. t. a., of the estate.
2. The Court erred in rejecting from probate the will of Marie Elizabeth Purnell dated April 22, 1952, and the codicil thereto dated August 14, 1959.
3. The Court erred in striking the evidence relative to the will of April 22, 1952, and the codicil thereto dated August 14, 1959.

THELMA PURNELL DELLY
By JOHN S. HARPER
Of Counsel.

WORTHINGTON, WHITE & HARPER
914 Royster Building
Norfolk, Virginia.

Filed July 27, 1960.

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

* * * * *

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APPEAL FROM ORDER OF PROBATE.

On the application of Thelma Purnell Delly, an heir at law, devisee and distributee of the estate of Marie Elizabeth Purnell, deceased, and a party in interest, an appeal is allowed as of right to the order entered in the Clerk's Office of said Court by the Clerk of said Court on the 6th day of November, 1959, within six months, admitting to probate a certain paper writing as and for the last will and testament of the said Marie Elizabeth Purnell, deceased, and said appeal is docketed as a preferred cause for trial at the next term of the said Circuit Court of the City of Norfolk.

And it is further ordered that a copy of this order be served upon the following:

The Seaboard Citizens National Bank of Norfolk, administrator c. t. a.
John Wesley Purnell
Joseph Hugh Purnell
Margaret Nettie Purnell

Given under my hand this 15th day of January, 1960.

Teste:

W. R. HANCKEL, Clerk.

* * * * *

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An appeal to the Court having been taken and allowed from the Order of the Clerk entered on the 6th day of November, 1959, admitting to probate a certain paper writing bearing date the 24th day of February, 1953, as the will of Marie Elizabeth Purnell, deceased, a resident of the City of Norfolk, Virginia, who died on the 31st day of October, 1959, and granting to The Seaboard Citizens National Bank of Norfolk a certificate for obtaining letters of probate and administration *cum testamento annexo* upon the estate of the said decedent, the matter came on March 25, 1960, to be heard on the application of Thelma Purnell Delly for such appeal, the order allowing same, and the answer on oath of James M. Robertson, the duly appointed Guardian *Ad Litem* for Margaret Nettie Purnell, a person of unsound mind; the said

Thelma Purnell Delly, and John Wesley Purnell and Joseph Hugh Purnell, appearing in person and by their respective counsel, said The Seaboard Citizens National Bank of Norfolk, Administrator c. t. a. appearing by its counsel, and said Margaret Nettie Purnell appearing by said James M. Robertson, her Guardian *Ad Litem.*

THEREUPON, said paper writing bearing date the 24th day of February, 1954, purporting to be the will of Marie Elizabeth Purnell, deceased, was presented to the Court by counsel for the Administrator, d. b. n. c. t. a. and
page 9 } offered for probate. And thereupon came P. B. West, one of the three subscribing witnesses to said will, and being first duly sworn, testified that said Marie Elizabeth Purnell, deceased, signed, sealed, published and declared the said paper writing as and for her last will and testament in his presence, and in the presence of Elsie Martin and Louis H. Cohn, the other two subscribing witnesses thereto, and that they, three competent witnesses, at the request of the said testatrix, and in her presence, and in the presence of each other, all four being present together at the same time, subscribed their names as witnesses thereto.

WHEREUPON, said Thelma Purnell Delly presented to the Court a paper writing dated the 22nd day of April, 1952, purporting to be a will of said Marie Elizabeth Purnell, deceased; and Dorothy L. Moore, one of the three subscribing witnesses to said will, being first duly sworn, testified that said Marie Elizabeth Purnell, deceased, signed, sealed, published and declared the said paper writing as and for her last will and testament in her presence, and in the presence of John H. Moone and Ernest L. Dyer, the other two subscribing witnesses thereto, and that they, three competent witnesses, at the request of the said testatrix, and in her presence, and in the presence of each other, all four being present together at the same time, subscribed their names as witnesses thereto.

And the said Thelma Purnell Delly thereupon offered for probate a certain other paper writing dated the 14th day of August, 1959, signed by the said Marie Elizabeth Purnell and purporting to be a codicil to the aforementioned paper writing of April 22, 1952; and thereupon came Edward R. Donlon and Vincent A. Bertolini, two of the sub-
page 10 } scribing witnesses to said paper writing dated August 14, 1959, and being first duly sworn, testified that said Marie Elizabeth Purnell, deceased, signed,

sealed, published and declared the said paper writing as and for her last will and testament in their presence, and in the presence of Doris S. Seibert, the other subscribing witness thereto, and that they, three competent witnesses, at the request of the said testatrix, and in her presence, and in the presence of each other, all four being present together at the same time, subscribed their names as witnesses thereto.

WHEREUPON, the said John Wesley Purnell, by counsel, and the said Guardian *ad Litem,* moved the Court to strike the evidence offered with respect to the said paper writings of April 22, 1952, and August 14, 1959, on the grounds that said paper writing of February 24, 1953, expressly revoked said paper writing of April 22, 1952, and that said paper writing of August 14, 1959, was not a testamentary paper of the said Marie Elizabeth Purnell, deceased, and did not operate to revive the said paper writing of April 22, 1952, as a will of said testatrix.

AND IT APPEARING that all proper parties are before the Court; and the Court, being of the opinion that the said paper writing of August 14, 1959, was not a testamentary paper of the said Marie Elizabeth Purnell, deceased, and that said paper writing of February 24, 1953, expressly revoked said paper writing of April 22, 1952, doth strike all of the evidence presented with respect to the said paper writings of April 22, 1952, and August 14, 1959, and doth reject the same from probate; and the Clerk shall mark said paper writings of April 22, 1952, and August 14, 1959, "Rejected," with a reference to this order, and place them in the
page 11 } file of rejected wills.

AND IT FURTHER APPEARING that the said paper writing of February 24, 1953, has been duly and fully proved, the same is established and adjudged to be the true last will and testament of Marie Elizabeth Purnell, deceased, and the order of the Clerk entered on the 6th day of November, 1959, admitting said paper writing to probate, ordering it to be recorded, permitting The Seaboard Citizens National Bank of Norfolk to qualify as Administrator, c. t. a., under said will, and granting to said Bank a certificate for obtaining probate thereof, is in all respects affirmed in like manner as if it were now here set out in full upon the Court's Order Book.

And the Clerk of the Court shall make appropriate references to this Order upon the records in his office.

And to all of the foregoing rulings, adjudications and orders the said Thelma Purnell Delly, by counsel, excepted.

Enter May 31st, '60.

C. H. J.

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DOROTHY L. MOORE,

called as a witness, having ben first duly sworn, testified as follows:

Examined by Mr. Harper:

Q. State your name, please.

A. Mrs. Dorothy L. Moore.

page 8 } Q. And your address, Mrs. Moore?

A. 835 Brandon Avenue.

Q. What is your occupation, Mrs. Moore?

A. Legal secretary.

Q. Were you back in 1952 the secretary to Mr. Ernest L. Dyer?

A. Yes.

Q. I hand you a paper which purports to bear your signature, and ask you if you recognize your signature on that paper?

A. Yes.

Q. Is that your signature?

A. Yes.

Q. And above your signature it states: "The above signature of the testatrix was made, and the foregoing will was acknowledged by the said testatrix in the presence of us, three competent witnesses, present at the same time; and we, the said witnesses do hereunto subscribe the said will in the presence of the said testatrix, and of each other, at the request of the said testatrix, this 22nd day of April, 1952."

Did you sign this as a witness to the will at that time?

A. Yes.

Q. Did Mrs. Marie Elizabeth Purnell sign in your

page 9 } presence?

A. Yes.

Q. Did she sign in the presence of you and the other witnesses named there?
A. Yes.
Q. Did each of you sign in the presence of each other?
A. Yes.
Q. And in the presence of the testatrix?
A. Yes.
Q. In short, all four of you were present and signed in the presence of all four of you?
A. That is right.

* * * * *

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The Court: It appears to me that this is a little discourse that she wanted to get off her mind; her feelings about certain things. A will under the law is an instrument page 14 } which passes title to property. That is the definition. Does this instrument pass title to any property?

* * * * *

page 15 } VINCENT A. BERTOLINI,

called as a witness, having been first duly sworn, testified as follows:

Examined by Mr. Harper:
Q. Mr. Bertolini, state your name and occupation.
A. Vincent A. Bertolini; Attorney at Law; 214 Midtown Building, Norfolk, Virginia.
Q. I hand you what has been marked as "Contestant's Exhibit 2," which purports to bear your signature. Is that your signature?
A. Yes, it is.
Q. If you will, take just one moment and read the attestation clause to which your signature is affixed.
A. "The above"—
Q. Just read it to yourself.
A. Yes, I have read it.
Q. Are the contents of that clause correct?
A. They are.

Mr. Harper: No further questions.

Mr. Rixey: If Your Honor please, I again move to strike the evidence.

The Court: Motion sustained. We have here a probated will by the clerk, according to law, and appeal from it. The contestants first offered Contestant's Exhibit No. 1—a will which seems to be in proper order, and were it not page 16 } for a subsequent will, it would be the will that the court would have to recognize. This will is dated the 22nd day of April, 1952, which was of course prior to the date of the will that was probated by the clerk, that will being dated the 24th day of February 1953. So this will has revoked the prior will, and the instrument which is captioned in bold-faced type "LAST WILL AND TESTAMENT" does not meet the requirements of a will. A will is an instrument in writing that passes title to property. I cannot find any title to any property being passed by this will.

* * * * *

EXHIBIT C-1.

C. H. J.

I, Marie Elizabeth Purnell, widow, now residing at 110 Louisiana Drive, in the City of Norfolk, Virginia, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my last will and testament, hereby revoking all wills by me at any time heretofore made.

First: I desire all of my just debts to be paid as promptly after my death as may be practical.

Second: I give and bequeath to my son, John W. Purnell, III, the sum of One Thousand Dollars ($1,000.00).

Third: I give and bequeath to my son, Joseph Hugh Purnell, the sum of One Thousand Dollars ($1,000.00).

Fourth: I give and bequeath the sum of Three Thousand Dollars ($3,000.00) to the Seaboard Citizens National Bank of Norfolk, trustee for my daughter, Margaret Nettie Purnell, and the said trustee shall use the income and so much of the corpus of said fund as it deems advisable, for the maintenance, care and well being of my said daughter.

Fifth: All the rest and residue of my estate, real, personal and mixed, I give, devise and bequeath to my daughter, Thelma Purnell Delly.

*Sixth*s I hereby nominate and appoint my said daughter, Thelma Purnell Delly, as executrix of this my last will and testament; and I direct that my said executrix be allowed to qualify as such without surety.

Given under my hand and seal this 22nd day of April, 1952.

MARIE ELIZABETH PURNELL (Seal)

The above signature of the testatrix was made, and the foregoing will was acknowledged by the said testatrix in the presence of us, three competent witnesses, present at the same time; and we, the said witnesses do hereunto subscribe the said will in the presence of the said testatrix, and of each other, at the request of the said testatrix, this 22nd day of April, 1952.

DOROTHY L. MOORE
JOAN H. MOORE
ERNEST L. DYER

EXHIBIT C-2.

C. H. J.

LAST WILL AND TESTAMENT

WHEREAS, I MARIE ELIZABETH PURNELL did on the 22nd day of April, 1952, make my last Will and Testament in writing, and whereas I desire to make an affirmative declaration concerning Mrs. Ida Purnell O'Shura, I do now make this codicil thereto, to be taken as part thereof.

I wish it to be clearly understood that under no circumstances is the aforesaid Ida Purnell O'Shura to receive anything from my estate. I have been advised that under my Will she will receive nothing, however, being fully acquainted of her vicious trouble-making character, I deem it advisable to make this declaration.

While I lived, she made false accusations against my character and conducted a general course of action which caused me ill health and largely contributed to my illness and death.

IN WITNESS WHEREOF, I hereunto subscribe my name and affix my seal to this codicil to my last Will and Testament, at Norfolk, Virginia, this 14th day of August, 1959.

MARIE ELIZABETH PURNELL (Seal)

The above signature of the testatrix was made and the foregoing Will was acknowledged to be her last Will and Testament by the testatrix, in the presence of us, three competent witnesses, present at the same time; and we, the said witnesses, do hereunto subscribe the said Will on the date last above written, in the presence of the said testatrix and of each other, at the request of the said testatrix, who was then of sound mind and over the age of twenty-one years.

VINCENT A. BERTOLINI 214 Midtown Bldg., Norfolk, Va.
DORIS S. SEIBERT, 200 Regent Rd. Norfolk, Va.
EDWARD R. DONLON, 220 N. Blake Rd. Norfolk, Va.

A Copy—Teste:

H. G. TURNER, Clerk

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