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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 760745

ANNE MUTTER WOODWARD HAGEMANN, et al.

Appellant

v.

NATIONAL BANK AND TRUST COMPANY et al.

Appellee

APPENDIX

Lewis A. Martin, Jr.,
415 Fourth Street, N.E.
Charlottesville, Virginia

Counsel for Appellant

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

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ANNE MUTTER WOODWARD HAGEMANN
360 Shelley Court
Hampton, Virginia 23369

FLETCHER D. WOODWARD, JR.
107 H Street
San Rafael, California 94901
Complainants

v.

NATIONAL BANK AND TRUST COMPANY,
Administrator, c.t.a. of the Estate of Mildred Hart Woodward, deceased and Trustee u/w Mildred Hart Woodward, deceased
123 East Main Street
Charlottesville, Virginia 22901

MALCOLM P. WOODWARD
1006 Rugby Road
Charlottesville, Virginia 22903

Infant Beneficiaries, now born or as yet unborn, under ARTICLE EIGHT of the will of Mildred Hart Woodward
Defendants

BILL TO CONSTRUE WILL

To the Honorable George M. Coles, Judge of said Court:

Your Complainants respectfully represent as follows:

(1) That Mildred Hart Woodward died in the City of Charlottesville, Virginia, testate, on February 13, 1971. Her will was duly probated in the Corporation Court of the City of Charlottesville, Virginia on the 16th day of March, 1971, Fletcher D. Woodward, Jr. and Malcolm P. Woodward, the Executors named in said will declining to qualify as such and, at their request, National Bank and Trust Company, Charlottesville, Virginia, qualifying as Administrator, c.t.a., as will appear from an order of probate and qualification recorded in the Clerk's Office of said Court in C.O.B. 36, p. 178. Said will is recorded in the Clerk's Office aforesaid in W.B. 15, p. 61, a copy

WIS A. MARTIN, Jr.
TTORNEY AT LAW
ARLOTTESVILLE, VA.
22901

thereof being filed herewith as Exhibit "A".

(2) That your Complainants, Anne Mutter Woodward Hagemann and Fletcher D. Woodward, Jr., and the Defendant, Malcolm P. Woodward, who are named as beneficiaries in said will, are the children and only heirs of the said Mildred Hart Woodward as will appear from a list of heirs filed in the Clerk's Office aforesaid in W.B. 15, p. 68.

(3) That by ARTICLE EIGHT of said will the testatrix devised her residuary estate to National Bank and Trust Company, Charlottesville, Virginia, for the benefit of her children, Fletcher D. Woodward, Jr. and Malcolm P. Woodward, and their children, now born and as yet unborn, upon such conditions as are therein set forth.

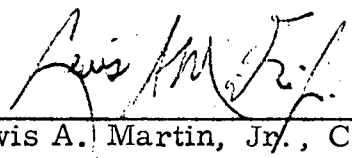
(4) That under paragraph three of ARTICLE EIGHT of said will the funds established by said ARTICLE EIGHT are to be distributed as therein provided when the youngest living child of each son of the testatrix has reached twenty-five years of age.

(5) That the provisions of ARTICLE EIGHT of said will violate the rule against perpetuities and are, therefore, null and void and of no effect, as a consequence of which the testatrix died intestate as to her residuary estate which should be distributed in equal shares to her surviving children, the said Anne Mutter Woodward Hagemann, Fletcher D. Woodward, Jr. and Malcolm P. Woodward.

WHEREFORE, your Complainants pray that National Bank and Trust Company, Administrator, c.t.a., Malcolm P. Woodward and the infant defendants now born or as yet unborn be made parties defendant to this bill and be required to answer the same, but answer under oath is hereby waived; that a guardian ad litem be appointed for said infant defendants; that the will of Mildred Hart Woodward be construed, that ARTICLE EIGHT thereof be declared null and void and of no effect as violating the rule against perpetuities, and that as a consequence thereof it be declared that the testatrix died intestate as to her residuary estate which should be distributed in equal shares to her surviving children, Anne Mutter Woodward Hagemann, Fletcher D. Woodward, Jr. and Malcolm P. Woodward; and that your Complainants may have such further and general relief as the nature of their case may require.

ANNE MUTTER WOODWARD HAGEMANN
FLETCHER D. WOODWARD, JR.

By Counsel



Lewis A. Martin, Jr., Counsel for
Complainants
415 Fourth Street, N. E.
Charlottesville, Virginia 22901

FILED February 11, 1972
CARL E. HENNRICH, CLERK

S A. MARTIN, Jr.
ORNEY AT LAW

EXHIBIT A

LAST WILL AND TESTAMENT

I, MILDRED HART WOODWARD, of Charlottesville, Virginia, do hereby make, publish and declare this to be my last will and testament, and I hereby revoke any and all testamentary writings by me at any time heretofore made.

ARTICLE ONE

All inheritance, estate and succession taxes payable by reason of my death shall be paid out of and charged generally against the principal of my residuary estate, without reimbursement or contribution from any beneficiary, or from any other person.

ARTICLE TWO

A. I give unto my employee, STUART KENNY, if he shall survive me, the sum of $200.00.

B. I give unto CHRIST EPISCOPAL CHURCH, Charlottesville, Virginia, the sum of $500.00.

C. I give unto my friend, HERBERT A. DONOVAN, the sum of $500.00. If he does not survive me, I give the same unto his wife, MARION K. DONOVAN, and if she does not survive me, equally unto their children.

D. I give unto WILLIE LILIA RAGLAND, if she shall survive me, the sum of $300.00.

ARTICLE THREE

I have lodged with this will lists of certain tangible personal property together with the names of the persons to whom I leave the same. These lists are in existence at the time of the execution of this will and I give unto the persons included on said lists the articles listed, respectively, thereon. I expressly incorporate said lists in this will by reference.

ARTICLE FOUR

I give unto each of my children the right to select and to take articles of tangible personal property from my home to the value of $10,000.00, based upon the appraisal made for estate tax purposes. If more than one child selects any one piece, my executors shall decide the issue by lot. If, after the provisions made in ARTICLE THREE hereof, the remaining tangible personal property does not appraise for as much as $30,000.00, my children shall divide the same as nearly equally as may be practicable.

ARTICLE FIVE

A. As soon as practicable after my death, my executors shall dispose of my remaining tangible personal property at a private auction to which only such persons as my executors shall select shall be invited.

B. My executors shall sell at public or private sale, as soon as practicable after my death, any and all real estate which I may own at the time of my death.

The proceeds of such sales shall be added to my residuary estate.

ARTICLE SIX

I direct my executors as soon after my death as may be practicable, to make arrangements for the marking of and for the perpetual care and maintenance of the graves of my grandfather and grandmother, Thomas Joseph Macon and Anna H. Macon, in Hollywood Cemetery, Richmond, Virginia, as they in their discretion, may determine.

ARTICLE SEVEN

A. I give unto National Bank and Trust Company, Charlottesville, Virginia, the sum of Ten Thousand Dollars ($10,000.00) in trust for the benefit of the children of my daughter, Anne Mutter Woodward Hagerman, as follows:

(1) The income of the trust shall be paid to my said daughter. Should she die before the trust is terminated, the income shall be paid equally to such of her children as have not reached the age of 21.

(2) On the 21st birthday of my grandson, Andrew G. Hagerman, the trustee shall distribute unto him four tenths (4/10) of the principal of the fund as then constituted, in fee simple. Upon the 21st birthday of my granddaughter, Sarah D. Hagerman, the trustee shall distribute unto her one-half of the principal of the fund as then constituted, and upon the 21st birthday of my grandson, Christian D. Hagerman, the trustee shall distribute unto him the balance of the fund. Should any of said grandchildren die before reaching the age of 21, his or her portion shall be continued in trust or divided (as the case may be) between the others, in the above proportions.

ARTICLE EIGHT

I give, devise and bequeath all the rest, residue and remainder of the property of which I may die seised and possessed or to which I may be entitled in any way at the time of my death, including lapsed and void legacies, if any, unto National Bank and Trust Company, Charlottesville, Virginia, to be divided into two equal funds, one for my son, FLETCHER D. WOODWARD, JR., and the other for my son, MALCOLM P. WOODWARD. Each such fund shall be held and disposed of as follows:

1. While either son of mine has living children under the age of twenty-five years, the trustee shall pay the income of that fund to such son of mine, or, if such son of mine is not living, the trustee shall use so much of the income of his fund for the reasonable support, comfort and education of his surviving wife and children and in such proportions as the trustee determines to be required for those purposes.

2. Whenever the trustee determines that the income of any income beneficiary from all sources known to the trustee is not sufficient for his reasonable support, comfort and education, the trustee shall pay to him, or use for his benefit, so much of the principal of the fund from which his income is derived as the trustee determines to be required for those purposes.

3. When the youngest living child of such son of mine has reached age twenty-five years, that trust shall end and the fund shall be divided one-third to such son of mine and two-thirds equally to his then living descendants, per stirpes. Should such son of mine not then be living, the whole of the fund shall go to his then living descendants, per stirpes.

4. Should any son of mine have no children who reach the age of twenty-five years, that son's share shall, upon the death of his last surviving child, go in fee simple to such son of mine, or if he is not then living, shall be added to the other fund established in this Article and held and distributed as provided herein.

5. Should either son of mine predecease me, the trustee shall distribute his fund to his then living descendants, per stirpes.

6. Notwithstanding anything in this instrument to the contrary, if any descendant of mine is under the age of twenty-one years when the trustee is directed in the foregoing provisions of this instrument to distribute to him any portion of the principal of the trust property, his portion shall immediately vest in interest in him indefeasibly, but the trustee may, in its discretion, withhold possession of it and hold it in trust for his benefit until he attains that age. In the meantime, the trustee shall use so much of the income and principal for his reasonable support, comfort and education as the trustee determines to be required for those purposes.

7. The trustee shall not be required to make any actual physical division of the trust funds except when necessary for distributions of principal, but may, in its discretion, keep the trusts in one or more consolidated funds.

8. Notwithstanding the foregoing, if any portion of my estate is in any contingency capable of being held in trust for a longer period than is permitted by the law of the state of my domicile, or if in any such contingency the vesting of any interest hereunder may occur after the expiration of such permissive period, then upon the happening of any such contingency such portion of my estate shall not be held in further trust, but shall rather be paid over absolutely to the person or persons to whom, and in the proportions in which, such portion would ultimately go under the provisions hereof.

ARTICLE NINE

A. If at any time any person to whom the trustee is directed in this instrument to pay any income is under legal disability or is in the opinion of the trustee incapable of properly managing his affairs, the trustee may use so much of such income for his support and comfort as the trustee determines to be required for those purposes.

B. The trustee may either expend directly any income or principal which it is authorized in this instrument to use for the benefit of any person, or may pay it over to him or for his use to his parent, guardian, or to any person with whom he is residing, without responsibility for its expenditure. The trustee shall withhold any such income not so used and, in its discretion, add it to principal.

ARTICLE TEN

The trustee shall, in addition to all other powers granted by law, have all the powers which are set forth in Section 64.1-57 of the Code of Virginia as the same now exists, and such additional powers as may be included in any subsequent amendment thereto, and said Code section is incorporated herein in whole by reference.

ARTICLE ELEVEN

A. I nominate, constitute and appoint my sons, FLETCHER D. WOODWARD, JR. and MALCOLM P. WOODWARD, executors of this will.

B. During the administration of my estate, my executors shall have all the powers and discretions which are herein conferred upon the trustee.

C. Should either son for any reason fail or cease to act, the other shall act alone with all the powers and discretions which are conferred upon them jointly.

D. My said sons by their joint act shall have the right at any time, and from time to time, to change the trustee by giving the acting trustee thirty days notice in writing, and to appoint a successor corporate trustee.

E. The trustee shall be entitled to and shall pay unto itself commissions based upon its standard rates of compensation which are in effect at the times, respectively, of payment.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal to this, my last will and testament, this 15th day of January, 1971.

Mildred Hart Woodward (SEAL)

Mildred Hart Woodward

Signed, sealed, published and declared as and for her last will and testament by the testatrix, MILDRED HART WOODWARD, in our presence, and we, in her presence and in the presence of each other and at her request have hereunto subscribed our names as attesting witnesses the day, month and year last above written.

ANNE MUTTER WOODWARD HAGEMANN
and
FLETCHER D. WOODWARD, JR.,

Complainants

v. FINAL DECREE

NATIONAL BANK & TRUST COMPANY,
Administrator, c.t.a. of the
Estate of Mildred Hart Woodward,
deceased, and Trustee, u/w Mildred
Hart Woodward, deceased,

MALCOLM P. WOODWARD,
KATHERINE D. WOODWARD,
and
INFANT BENEFICIARIES, now born or
as yet unborn, under ARTICLE EIGHT
of the will of Mildred Hart Woodward,

Defendants

This cause came to be heard on the complainants' bill to construe the will of Mildred Hart Woodward, the joint answer of National Bank & Trust Company and Malcolm P. Woodward, the answer of Katherine D. Woodward, and the answer of the infant children of Fletcher T. Woodward, Jr. and Malcolm P. Woodward by their guardian ad litem, and on the memoranda filed by counsel and was argued by counsel.

Upon consideration of all of which it appears to the Court that Article VIII of the will of Mildred Hart Woodward, which is spread in the Clerk's Office of the Circuit Court of the City of Charlottesville, Virginia, in Will Book 15, page 61, provides for the division of her residuary estate into two separate trust funds, one for each of her two sons, Fletcher D. Woodward, Jr. and Malcolm P. Woodward, and their respective children; and that Paragraph 3 of Article VIII provides for the distribution and vesting of the corpus of the respective

trust funds when the youngest living child of each son reaches the age of twenty-five years; and that Paragraph 8 of Article VIII states as follows:

> 8. Notwithstanding the foregoing, if any portion of my estate is any contingency capable of being held in trust for a longer period than is permitted by the law of the state of my domicile, or if any such contigency the vesting of any interest hereunder may occur after the expiration of such permissive period, then upon the happening of any such contingency such portion of my estate shall not be held in further trust, but shall rather be paid over absolutely to the person or persons to whom, and in the proportions in which, such portion would ultimately go under the provisions hereof.

And it further appears to the Court that the provisions in Article VIII that the corpus be held in trust until the youngest living child of each son reaches twenty-five years of age, when the corpus would vest, may result in the corpus being held in trust in excess of the period which is legally permissible and therefore Paragraphs 1 through 7 of Article VIII are modified by the provisions of Paragraph 8, the Court does ADJUDGE, ORDER and DECREE that Article VIII of the will of Mildred Hart Woodward be and hereby is construed to provide that the trust for Fletcher D. Woodward, Jr. shall continue until his then youngest living child reaches the age of twenty-one years, at which time the trust will terminate and the corpus will vest absolutely as of that date, and that the trust for Malcolm P. Woodward shall continue until his then youngest living child reaches the age of twenty-one years, at which time the trust will terminate and the corpus will vest absolutely as of that date.

And it further appearing that Article VIII of the will of Mildred Hart Woodward as construed by this Court does not violate the rule against perpetuitites, the Court does ADJUDGE and DECREE that the Complainants' prayer that the Court declare Article VIII invalid as violating the rule against perpetuities and to declare that Mildred Hart Woodward died intestate as to her residuary estate is hereby denied.

And it further appearing that Harold R. Bailes has rendered valuable services as the guardian ad litem of the infant beneficiaries, the Court does ORDER that Harold R. Bailes be allowed a fee of $750.00.

The complainants respectfully except to the foregoing decree as being contrary to the law and the evidence in that:

(1) It is not a valid interpretation of the will, but has the effect of rewriting the will contrary to the clear, express and unambiguous language and intent of the testatrix.

(2) The will does not state with the required certainty an intent by the testatrix that all interests should be construed to vest within the legally permissible period of the rule against perpetuities.

(3) The purported savings clause, Paragraph 8 of Article VIII, does not state what will be done with the property if the interest is invalid.

(4) A mere statement that the rule against perpetuitites will not apply is not sufficient to save a violation of the rule.

(5) There is no legal basis to construe Paragraph 8 of Article VIII as being obviously intended to cure the admitted defect in Paragraph 3 of Article VIII.

(6) The case of White v. National Bank does not apply in this case as there was no violation of the rule against perpetuities in the White case, and it was conceded in this case that the rule was violaged in Article VIII.

(7) The interest of the ultimate beneficiaries is applied at the effective date of the will and is valid then or void then.

(8) Void legacies pass through the residuary clause, but since Article VIII in this case is the residuary clause and is void because it violates the rule against perpetuities, the residuary estate of Mildred Woodward passes by intestacy to her heirs and distributees at law.

(9) Paragraph 8 fails to save a violation of the rule against perpetuities since it merely reiterates that the termination of the trust occurs only as directed by Paragraph 3, which is conceded to be in violation of the rule.

(10) The dictum in Driskill v. Carwile applies to this case and is not inapplicable as in the White case, since in this case it is conceded the rule does apply, while in the White case it was held that this rule against perpetuities did not apply.

And the objects for which this suit was brought having been fully accomplished and nothing further remaining to be done herein, it is ordered that this cause be stricken from the docket and the papers placed among the ended causes, properly indexed.

ENTER: George M. Coco
Judge

Date: Feb. 13, 1976

We ask for this:

PAXSON, SMITH, BOYD, GILLIAM & GOULDMAN, P. C.
Counsel for National Bank & Trust Company and
Malcolm P. Woodward
500 Citizens Commonwealth Center
P. O. Box 1151
Charlottesville, Virginia 22902

By: _____
Francis L. Buck

_____
Harold R. Bailes
Guardian ad litem
400 Court Square
Charlottesville, Virginia 22901

Seen and exceptions noted:

_____
Lewis A. Martin, Jr.
Counsel for Anne Mutter Woodward Hagemann
and Fletcher D. Woodward, Jr.
415 Fourth Street, N.E.
Charlottesville, Virginia 22901

ANNE MUTTER WOODWARD HAGEMANN FLETCHER D. WOODWARD, JR., Complainants v. NATIONAL BANK AND TRUST COMPANY, Administrator, c.t.a. of the Estate of Mildred Hart Woodward, deceased and Trustee u/w Mildred Hart Woodward, deceased MALCOLM P. WOODWARD KATHERINE D. WOODWARD Infant Beneficiaries, now born or as yet unborn, under ARTICLE EIGHT of the will of Mildred Hart Woodward, Defendants	)	NOTICE OF APPEAL and ASSIGNMENTS OF ERROR

To: Carl E. Hennrich, Clerk of the Circuit Court of the City of Charlottesville, Virginia:

NOTICE OF APPEAL

Notice is hereby given that Anne Mutter Woodward Hagemann and Fletcher D. Woodward, Jr. appeal from a final decree entered in the above-styled cause on February 13, 1976 and announce their intention of presenting a Petition for Appeal to the Supreme Court of Appeals of Virginia for a writ of error.

ASSIGNMENTS OF ERROR

(1) The Trial Court erred in holding that paragraphs 1 through 7 of ARTICLE EIGHT of the will of Mildred Hart Woodward, deceased, are modified by the provisions of paragraph 8 of ARTICLE EIGHT.

(2) The Court erred in holding that the trust for Fletcher D. Woodward, Jr. shall continue until his then youngest living child reaches the age of twenty-one (21) years, at which time the trust will terminate and the

EWIS A. MARTIN, Jr.
ATTORNEY AT LAW
HARLOTTESVILLE, VA.

corpus will vest absolutely as of that date.

(3) The Court erred in holding that the trust for Malcolm P. Woodward shall continue until his then youngest living child reaches the age of twenty-one (21) years, at which time the trust will terminate and the corpus will vest absolutely as of that date.

(4) The Court erred in ruling that ARTICLE EIGHT of the will of Mildred Hart Woodward, deceased, does not violate the rule against perpetuities.

(5) The Court erred in refusing to declare that Mildred Hart Woodward died intestate as to her residuary estate.

Complainants will hereafter file a statement of facts and other incidents of the case.

Given under my hand this 11th day of March, 1976.

ANNE MUTTER WOODWARD HAGEMANN
FLETCHER D. WOODWARD, JR.

By _____
Counsel for Complainants

Lewis A. Martin, Jr.
415 Fourth Street, N. E.
Charlottesville, Virginia 22901
Counsel for Anne Mutter Woodward Hagemann
and Fletcher D. Woodward, Jr.

CERTIFICATE

This is to certify that the foregoing notice of appeal and assignments of error in the above-styled case was served upon National Bank and Trust Company and Malcolm P. Woodward, Defendants, by mailing a true copy thereof to Paxson, Smith, Boyd, Gilliam & Gouldman, P.C., 500 Citizens Commonwealth Building, P. O. Box 1151, Charlottesville, Virginia, 22902; upon the Infant Beneficiaries, now born or as yet unborn, under ARTICLE EIGHT of the will of Mildred Hart Woodward, deceased, by mailing a true copy thereof to Harold R. Bailes, Guardian ad litem, 400 Court Square, Charlottesville, Virginia, 22901; and upon Katherine D. Woodward, Defendant, by mailing a true copy thereof to her at 809 S. W. Eighteenth Court, Ft. Lauderdale, Florida, 33312, on this the 11th day of March, 1976.

Counsel for Complainants

VIS A. MARTIN, Jr.
TTORNEY AT LAW
RLOTTESVILLE, VA.
22901

FILED March 11, 1976
CARL E. HENDRICH, CLERK