224 Vol. 4

CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

4

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 800494

JACK F. THOMAS, INDIVIDUALLY
Appellant

v.

JACK F. THOMAS, AS EXECUTOR AND TRUSTEE
UNDER THE WILL OF WILLIAM THOMAS THOMAS, SR., DECEASED,

(JACK F. THOMAS, HENRY GOUYER, JR., ROBERT E. JENNINGS)
TRUSTEES OF RANDOLPH MEMORIAL BAPTIST CHURCH,

and

MARGARET P. THOMAS AND FIDELITY AMERICAN BANK, N.A.
Appellees

JOINT APPENDIX

W. Edward Meeks, III, Esquire
Circuit Court Building
Post Office Box 358
Amherst, Virginia 24521

Richard S. Pendleton, Esquire
Route 29 North
Town & Country Shopping Center
Madison Heights, Virginia 24572

Counsel for Appellant

Carroll P. Freeman
1003 Church Street
Lynchburg, Virginia 24505

D. H. Kizer, Jr.
615 Church Street
Lynchburg, Virginia 24504

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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Filed in Clerk's Office
of Amherst Circuit Court
AMHERST
FEB 7 1979
Wm. E. Sandidge
Clerk

BILL TO CONSTRUE
WILL OF WILLIAM
THOMAS THOMAS (SR.),
DECEASED

TO THE HONORABLE JUDGES OF SAID COURT:

Plaintiff, J. F. Thomas, individually and as Co-Trustee and Executor u/w of his late father, William Thomas Thomas (Sr.) respectfully represents:

4-18

(1) That during the year 1945, William Thomas Thomas (Sr.) of Amherst County, Virginia, died testate and by his last will and testament, a copy of which is hereto attached, probated May 1, 1945 in the Clerk's Office of the Circuit Court for the County of Amherst, Virginia, and of record in Will Book 30, page 540, after providing for the payment of his debts and making provision for his wife, Lizzie Ford Thomas to have a life estate in a five acre parcel of land, set forth in his will the following:

> "Third: I give, devise, and bequeath all my remaining estate, real and personal, to the Trustees hereinafter named, in trust, to hold, manage and dispose of the same as follows:
>
> (a) To divide the net income from said property equally among my wife and my two sons, William Thomas Thomas, Jr. and J. F. Thomas, until the death of my wife, Lizzie Ford Thomas.
>
> (b) Upon the death of my wife, Lizzie Ford Thomas, to divide the principal of said estate in kind equally between my two sons, William Thomas Thomas, Jr. and J. F. Thomas. I give full power and authority to said Trustees to do all things necessary or proper to make the said division and the distribution under this sub-section.
>
> (c) The last two sub-sections shall be subject, however, to the conditions that should either of my sons die leaving issue, then such of said issue, as may be living during

the period of the distribution of the income or at the time fixed for the distribution of the principal shall take per stirpes the same part of said income or of said principal as the deceased parent would have taken if living, and should either of my sons die without leaving issue, then the portion of the one so dying shall go to the surviving son."

(2) That the said Lizzie Ford Thomas died 6-15-75 intestate several years ago; that the aforesaid William Thomas Thomas, Jr. died testate December 30, 1978 (a copy of his will will be filed with the papers in this suit), and after making provisions for the payment of annual sums to his widow, the said Margaret P. Thomas married 5-27-65, devised his aforesaid estate, upon the death of his said wife, to the aforesaid Randolph Memorial Baptist Church; that the said Fidelity American Bank NA, of Lynchburg, Virginia, has qualified in the Clerk's Office of this Court as Executor and Trustee under the will of William Thomas Thomas, Jr.; that the only persons having an interest in the Estate of the said William Thomas Thomas (Sr.) are the said J. F. Thomas, Margaret P. Thomas and the Trustees of Randolph Memorial Baptist Church, and some question has arisen as to whether the residuary estate of the said William Thomas Thomas (Sr.) should now be distributed and to whom said residuary estate passed or should pass under the terms of his aforesaid will, especially under Item "Third", and especially since the aforesaid Executors and Trustees under the will of the said William Thomas Thomas (Sr.) have, since his death, continued to act as Executor and Trustee and without any final settlement of the same.

(3) Plaintiff prays that this Court construe the aforesaid Item "Third" and determine whether or not the residuary estate of the said

William Thomas Thomas (Sr.) pass to William Thomas Thomas, Jr. and J. F. Thomas prior to the death of the said William Thomas Thomas, Jr. or whether upon the death of the said William Thomas Thomas, Jr., since no distribution of the principal of said residuary estate had ever been made, pass to J. F. Thomas, and especially since said will provided in part in paragraph (c) " * * * and should either of my sons die without leaving issue, then the portion of the one so dying shall go to the surviving son"; the said William Thomas Thomas, Jr. died without leaving issue and never having any issue during his lifetime.

(4) Plaintiff prays that all things be done necessary or incidental for the construction of said will, and that the Court determine who are the present owners of the property in the estate of the late William Thomas Thomas (Sr.) and further that the Court determine whether the said J. F. Thomas as Executor and Trustee has the power to carry out the trusts and provisions set forth in said will.

(5) Plaintiff also prays that a reasonable attorney's fee be allowed Kizer, Phillips & Petty, Attorneys for representing plaintiff in this suit, and that plaintiff have all costs expended and to be expended in this suit.

Respectfully submitted,

J. F THOMAS, INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE U/W OF WILLIAM THOMAS THOMAS (SR.), DEC'D

By: D. H. Kizer

D. H. Kizer, Jr., p. q.
Kizer, Phillips & Petty
Lynchburg, Virginia

ANSWER OF MARGARET P. THOMAS AND FIDELITY AMERICAN BANK NA, EXECUTOR AND TRUSTEE U/W OF WILLIAM THOMAS THOMAS, JR.

TO THE HONORABLE JUDGES OF SAID COURT.

Your Defendants, Margaret P. Thomas and Fidelity American Bank NA, Executor and Trustee under the will of William Thomas Thomas, Jr., by counsel, submit their answer to the Bill to Construe the Will of William Thomas Thomas, Sr., deceased, in this, to-wit:

1. The allegations in paragraph 1 are admitted.

2. The allegations in paragraph 2 are admitted.

3. The Defendants pray that the Court construe the will of said decedent as giving unto William Thomas Thomas, Jr. and Jack F. Thomas, equal vested shares in the Estate of the said decedent, which shares vested upon the death of Lizzie Ford Thomas in the sons of said decedent; that the share of William Thomas Thomas, Jr. passed as a part of his estate; that the Court determine who are the present owners of the property in the estate of William Thomas Thomas, Sr., deceased, including the mansion house mentioned in said Article Second of said decedent's will; that Jack F. Thomas be relieved of of his duties as Trustee in this in view of the fact that he is a beneficiary of the estate who, under one possible construction of the will could be declared sole owner of the estate of his said father, thereby depriving these Defendants and the

Trustees of Randolph Memorial Baptist Church of any interest in the property which is the subject of this proceeding, which construction these Defendants submit would be erroneous; that an independent Trustee be appointed by the Court to carry out the trusts and provisions set forth in said will, to the end that an expeditious distribution of said property be made; that a reasonable attorney's fee be allowed counsel for these Defendants for representing Defendants in this suit; that the Court construe the terms of the testator's will in accordance with the conclusions expressed in this paragraph; and that the Court determine the extent and value of all property passing under the said decedent's will.

Margaret P. Thomas and Fidelity American Bank NA, Executor and Trustee under the will of William Thomas Thomas, Jr., deceased, by counsel.

Carroll P. Freeman, of counsel

MARTIN, TAYLOR, FRALIN & FREEMAN
P. O. Box 1177
Lynchburg, Virginia 24505

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true copy of the foregoing Answer to D. H. Kizer, Jr., 615 Church Street, Lynchburg, Virginia, 24504, attorney for J. F. Thomas, individually and as Executor and Trustee under the will of William Thomas Thomas, Sr., deceased, Jack F. Thomas, Trustee of Randolph Memorial Baptist Church, Route 29N, Madison Heights, Virginia, 24572, Henry Gouyer, Jr., Trustee of Randolph Memorial Baptist Church, 112 Royal Circle, Madison Heights, Virginia, 24572; and Robert E. Jennings, 164 Oak Grove Drive, Madison Heights, Virginia, 24572.

Carroll P. Freeman

ORDER

3830

This day came J. F. Thomas individually and as Executor and Trustee u/w of William Thomas Thomas (SR.) deceased and filed his motion to remove J. F. Thomas individually as a party plaintiff, and it appearing to the Court that said motion is for good cause, the Court doth remove the said J. F. Thomas individually as a party plaintiff ~~but doth continue~~ and does add him as party defendant individually in his own right, and ~~under the name of Jack F. Thomas and~~ leave is granted said J. F. Thomas ~~[redacted]~~ to file his answer within 10 days from date hereof.

ENTER:

R. C. Goad

Judge

10-5-79

We ask for this
Lee Phillips + Petty, P.S.
By D. W. Lingenfelter

Richard A. Bondleton
attorney for Jack F. Thomas
Individually

Carol P. Thomas, Attorney
for Margaret P. Thomas and
Fidelity American Bank NA
Exor + Trustee for W.T. Thomas, Jr, deceased.

ENTERED
Chancery Order Book
No. 47 Page 46
OCT - 5 1979

Filed in Clerk's Office
Amherst Circuit Court

OCT 15 1979

Werner E. Sandridge
Clerk

ANSWER OF
JACK F. THOMAS,
Individually

TO THE HONORABLE JUDGE OF THE SAID COURT:

Your defendant, Jack F. Thomas, individually, by counsel, submits his answer to the Bill to Construe the Will of William Thomas Thomas, Sr., deceased, in this, to-wit:

1. The allegations in paragraph 1 are admitted.

2. The allegations in paragraph 2 are admitted.

3. The Defendant, Jack F. Thomas, prays that the Court construe item "Third" of the Will as giving, devising and bequeathing all real estate, real and personal to the trustees at the death of the said William Thomas Thomas (Sr.); that upon the death of William Thomas Thomas (Sr.) that said income interest from said property vested equally in the wife of the decedent and the two sons; that the right to distribution of the principal of the said trust vested in title in William Thomas Jr. and J. F. Thomas at the death of William Thomas Thomas Sr. in fee subject to two conditions subsequent (said subsequent conditions to occur after date of vesting); that said conditions on the passage of title to the remaining estate in fee to William Thomas Jr. and J. F. Thomas, are (1) that if either son died leaving issue, then such of said issue as may be living during the period of the distribution of the income or at the time fixed for the distribution of the principal shal take per stirpes the same part of said income or of said principal as the deceased

parent would have taken if living, and (2) that if either son die at any time without leaving issue, then the portion of the one so dying shall go to the surviving son; that the first of the above said conditions did not occur and has no effect upon the ownership of the estate of William Thomas Thomas (Sr.); that William Thomas Thomas Jr. died heretofore without issue; and that the portion which would have gone to William Thomas Thomas Jr. if he had died with issue should go to the surviving son, Jack F. Thomas. Additionally, the defendant, Jack F. Thomas, individually, prays that the Court construe the will of the said decedent as designating in item "Fifth" William Thomas Thomas, Jr. and J. F. Thomas, (also known as Jack F. Thomas)

as executors of the said will and as trustees of any trust thereunder; that said will provides for the situation where one trustee remains and that that trustee is Jack F. Thomas; that Jack F. Thomas be allowed to continue as trustee under the said will for the purposes of final distribution; that Jack F. Thomas is not incapable of carrying out the office of trustee and the duties hereunder by virtue of the fact that he is a beneficiary of the trust or of the estate; and that as all conditions upon passage of legal and equitable title have failed or come to pass, as the case may be, that Jack F. Thomas be allowed to terminate said trust as trustee and distribute the same to himself individually and carrying out the full terms of the aforesaid will of William Thomas Thomas (Sr.).

Finally, the defendant, J. F. Thomas, individually, prays that the Court construe item "Fifth" of the will as granting

trusteeship to Jack F. Thomas, in so long as he basically performs the duties of his office and allow him to remain as trustee regardless of the construction of other items of the said will, the defendant pointing out that such was the express intent of the testator at the time that the said will took effect, and that said Jack F. Thomas be allowed to continue as trustee without security to be required as stated in the aforesaid will.

The Defendant, Jack F. Thomas, individually, prays that the Court grant to the said defendant's attorneys a reasonable attorney's fee for representation of the said defendant in this suit; that the Court construe the terms of the testator's will in accordance with the conclusions expressed in this paragraph; and that the Court not determine the extent and value of all property passing under the said decedent's will until the will be construed as to item "Third".

JACK F. THOMAS, individually

By Richard S. Pendleton
Counsel

RICHARD S. PENDLETON
Attorney for Jack F. Thomas, Individually
Town & Country Shopping Center
Madison Heights, Virginia 24572

W. EDWARD MEEKS, III
Attorney for Jack F. Thomas, Individually
Main Street
Amherst, Virginia 24521

C E R T I F I C A T E

I hereby certify that on the 15th day of October, 1979, I mailed or delivered a true copy of the foregoing Answer of Jack F. Thomas, Individually to all counsel of record herein pursuant to the provisions of Rule 1:12 of the Rules of the Supreme Court of Virginia.

Richard S. Pendleton

RICHARD S. PENDLETON
Counsel for Jack F. Thomas,
Individually

FINAL DECREE

3830

This cause came on to be heard upon the Bill of Complaint filed on behalf of the Executor of the Estate of W. T. Thomas, Sr., praying for the construction of subparagraph (c) of the third item of the will of W. T. Thomas, Sr.; upon the Answer thereto by the widow of W. T. Thomas, Jr. and the Executor of the Estate of W. T. Thomas, Jr.; upon the Answer of the Defendant, Jack F. Thomas; upon extrinsic evidence surrounding the circumstances at the time of the execution of the will of W. T. Thomas, Sr., presented by the Defendant, Jack F. Thomas, heard ore tenus by the Court on November 16, 1979; upon the memoranda filed and the oral argument of counsel for the Complainant, the Defendants, Margaret P. Thomas and Fidelity American Bank NA, Executor of the Estate of W. T. Thomas, Jr., and the Defendant, Jack F. Thomas, heard on December 21, 1979, the Defendant Trustees of Randolph Memorial Baptist Church having failed to plead or otherwise appear.

It appearing to the Court that W. T. Thomas, Sr. died testate on April 18, 1945, survived by his widow, Lizzie Ford Thomas, and his two sons, W. T. Thomas, Jr. and Jack F. Thomas; that Lizzie Ford Thomas died intestate on June 15, 1975; that W. T. Thomas, Jr. died testate on December 30, 1978; that subparagraph (c) of the third item of the will of W. T. Thomas, Sr. is ambiguous and lawfully subject to construction by this Court; that the

manifest intent of the testator, W. T. Thomas, Sr., appearing from a reading of his entire will, was to provide that each of his sons become indefeasibly vested in and to one-half of the remainder of his estate upon the condition that each of them survive the testator's widow, Lizzie Ford Thomas, and that if either son failed to survive said widow, the share of the income and principal of the deceased son would be distributed to his issue, per stirpes, if he left issue then living, and if either son failed to survive said widow leaving no issue then living, the share of the income and principal of the deceased son would be distributed to the surviving son; the Court as to all of which doth so decide.

It is therefore ADJUDGED and DECREED that the testator, W. T. Thomas, Sr. intended by subparagraph (c) of the third item of his will to provide as follows: Notwithstanding the provisions of subparagraphs (a) and (b) of this third item of my will, should either of my aforesaid sons predecease my said wife leaving issue then living, the share of the income and principal of said son shall be distributed to such issue, per stirpes; should either of my aforesaid sons predecease my said wife, leaving no issue then living, the share of the income and principal of said son shall be distributed to my surviving son.

It is further ORDERED that Jack F. Thomas, Sole Acting Executor and Trustee of the Estate of W. T. Thomas, Sr., forthwith file all accountings due by said Estate with the Commissioner of Accounts of this Court in accordance with law; that he forthwith distribute any income and principal cash due the Estate of W. T. Thomas, Jr. to the Executor of the Estate of W. T. Thomas, Jr.; and that he expeditiously distribute in kind the remaining principal of the Estate of W. T. Thomas, Sr. in equal shares,

the one to Jack F. Thomas and the other to the beneficiaries of the Estate of W. T. Thomas, Jr., as their interests may lawfully appear, and the real estate shall be conveyed to the owners as tenants in common, as their interests may lawfully appear.

It appearing to the Court that the objects of this cause have been fully accomplished, its is ORDERED stricken from the docket. To all of which actions of the Court the Defendant, Jack F. Thomas, individually, objects and excepts.

I ASK FOR THIS:

Carroll P. Freeman

Carroll P. Freeman, Counsel for the Defendants, Margaret P. Thomas, and Fidelity American Bank NA, Executor of the Estate of W. T. Thomas, Jr.

SEEN AND OBJECTED TO AND REQUEST HEARING PRIOR TO ENTRY.

W. Edward Meeks

W. Edward Meeks, III, Counsel for the Defendant, Jack F. Thomas, individually

Richard S. Pendleton

Richard S. Pendleton, Counsel for the Defendant, Jack F. Thomas, individually

D. H. Kizer, Jr., Counsel for the Complainant, Jack F. Thomas, Sole Acting Executor and Trustee of the Estate of W. T. Thomas, Sr.

Enter
1-11-80
R. C. Good,
Judge

ENTERED
Chancery Order Book
No. 47 Page 272
JAN 11 1980

Filed in Clerk's Office
Amherst Circuit Court

JAN 29 1980

MOTION TO SET ASIDE FINAL DECREE

Comes now the defendant Jack F. Thomas, individually and Moves the Honorable Court to set aside its verdict and judgment as embodied in its Final Decree in the above-styled cause entered on January 11, 1980 for the following reasons:

1. The Court found that subparagraph (c) of the third item of the will of W. T. Thomas Sr. was ambiguous; such finding necessitates a determination that the phrase "die without issue" means die without issue at any time. Therefore, the verdict and judgment of the Court should be set aside as contrary to the law and evidence.

2. The facts and circumstances surrounding the testator at the time he drew the will demonstrate that the testator wished for the phrase "die without issue" to mean die without issue at any time because it is shown that he was a businessman and a family man and that he was not disposed to have the accumulations of a lifetime fall into the hands of a son's spouse but for the property to, as nearly as possible, pass along bloodlines. Therefore the Court should set aside the verdict and judgment as being contrary to the law and evidence and contrary to the intent of the testator.

3. The manner in which the parties to the action and their precessors in interest should have been taken into consideration in determining the intent of the testator. The 2 sons of the testator dealt with the property as if its ultimate ownership would not be determined until one or the other of them died with or without issue. Therefore, the verdict and judgment of the Court should be set aside as contrary to the law and evidence and contrary to the intent of the testator as defined by the beneficiaries of the testator's beneficience.

4. The arguments and authorities embodied in defendant Jack F. Thomas' Memorandum of Law and Supplemental Memorandum of Law are incorporated herein, and for those reasons the verdict and judgment of the Court should be set aside.

JACK F. THOMAS

by W. Edward Meeks
Counsel

W. Edward Meeks, III, p.d.
P. O. Box 358
Amherst, Virginia

and

Richard S. Pendleton, p.d.
Rt. 29 N.
Madison Heights, Virginia

I, W. Edward Meeks, III, do certify that I have delivered copies of the foregoing to Carroll P. Freeman, Esq. at the Co-operative Building & Loan Association Building, Lynchburg, Virginia, and D. H. Kizer, Jr. 615 Church Street, Lynchburg, Virginia, this 29th day of January, 1980.

W. Edward Meeks

ENTERED
Chancery Order Book
No. 47 Page 314
JAN 29 1980

DECREE DENYING MOTION

3830

Came this day the parties in the above-styled cause and their respective counsel upon the Motion of defendant Jack F. Thomas to set aside the Final Decree upon the Grounds set forth therein. After hearing the representations of counsel and reviewing the Final Decree the Court overrules the Motion of defendant Jack F. Thomas to Set Aside the Final Decree, to all of which the defendant Jack F. Thomas did object and except.

Enter this 29th day of January, 1980

R. C. Goad

R. C. Goad, Judge

~~I ASK FOR THIS.~~

Seen:

Carroll P. Freeman

Carroll P. Freeman, Counsel for the Defendants, Margaret P. Thomas, and Fidelity American Bank, NA, Executor of the Estate of W. T. Thomas, Jr.

SEEN:

D. H. Kizer

D. H. Kizer, Jr., Counsel for the Complainant

SEEN AND OBJECTED TO:

W. Edward Meeks

W. Edward Meeks, III, Counsel for the Defendant Jack F. Thomas, individually

Richard S. Pendleton

Richard S. Pendleton, Counsel for the Defendant Jack F. Thomas, individually.

ASSIGNMENTS OF ERROR

The following assignments of error are noted:

1. That the Circuit Court of Amherst County did err, after finding the subparagraph (c) of the third item of the Will of W. T. Thomas, Sr. was ambiguous; by finding that the phrase "die without issue" means other than die without issue at any time.

2. In view of the facts and circumstances surrounding the Testator at the time he drew the will,when viewed in correlation with the wording of the will, the trial court erred in construing the intention of the testator as creating a limitation which would cease to operate at the death of his wife, Lizzie Ford Thomas, instead of construing the intent of the Testator as creating a limitation which would cease to operate at the death of either of the two sons without issue.

3. The trial court erred in failing to take into consideration the actions of the parties and their predecessors in interest with respect to their dealings with the property after the death of the Testator.

I, William Thomas Thomas, of Amherst County, 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 my just debts to be paid. And I do give full power and authority to my executors or executor hereinafter named to sell and convey my real estate for the purpose of paying my debts, and without any liability on the purchaser to see to the proper application of the purchase money.

Second: I give, devise, and bequeath unto my wife, Lizzie Ford Thomas, my mansion house in the County of Amherst, Virginia, with all the plate and household furniture and goods of every description therein, together with five (5) acres of land annexed thereto (the said five (5) acres of land not to include the tract on which my store is situated) to have and to hold the same, which I give her in absolute property, for and during her life. And I do hereby declare that this and subsequent provisions made herein for my wife, shall be in lieu of her dower and distributitive share in my estate.

Third: I give, devise, and bequeath all my remaining estate, real and personal, to the Trustees hereinafter named, in trust, to hold, manage and dispose of the same as follows:

(a) To divide the net income from said property equally among my wife and my two sons, William Thomas Thomas, Jr. and J. F. Thomas, until the death of my wife, Lizzie Ford Thomas.

(b) Upon the death of my wife, Lizzie Ford Thomas, to divide the principal of said estate in kind equally between my two sons, William Thomas Thomas, Jr. and J. F. Thomas. I give full power and authority to said Trustees to do all things necessary or proper to make the said division and the distribution under this sub-section.

P Exh. 1

(c) The last two sub-sections shall be subject, however, to the conditions that should either of my sons die leaving issue, then such of said issue, as may be living during the period of the distribution of the income or at the time fixed for the distribution of the principal shall take per stirpes the same part of said income or of said principal as the deceased parent would have taken if living, and should either of my sons die without leaving issue, then the portion of the one so dying shall go to the surviving son.

Fourth: If my said wife or either of my sons should be in need of funds for their proper maintenance and support, at any time before the principal of said estate is distributable as herein provided, I give full power and discretion to the said Trustees to pay over to my said wife, or to or for my said sons, such parts of the principal of said estate as to the said Trustees shall seem proper; and the said Trustees may thereafter charge against the share of the income and of the principal of the person receiving the benefit of any such payment, either the amount required by law, or such lesser amount as in their opinion is just and equitable.

Fifth: I appoint my said sons, William Thomas Thomas, Jr. and J. F. Thomas, as the executors of this my last will and testament, and also as the Trustees to carry out the trust and provisions hereof; and I direct that no security be required of my said sons as executors or Trustees.

Sixth: I give full power and discretion to the said executors and to the said Trustees to continue my business or to sell the same, to rent and care for my real estate, to retain any investments which may be received or to sell the same, and from time to time to sell and convey my property, real and personal, and invest the proceeds therefrom

in other property, real or personal, or both, and from time to time to resell and convey the property so purchased, and to change investments, and the said executors and Trustees alone, and not the purchaser, shall be required to see to the proper application of the purchase money.

In case there should be but one executor or but one Trustee in office at any time, the one executor or the one Trustee shall have and may exercise all the rights, powers, and discretion given by this, my last will, to the two executors or to the two Trustees.

Given under my hand and seal this 15th day of Dec 15th, 1940.

W. Sellemer (SEAL)

The above signature of the testator was made and the foregoing will was acknowledged to be his last will and testament by the said testator in the presence of us, three competent witnesses, present at the same time, and we, the said witnesses, as attesting witnesses hereunto subscribe the said will on the date last above written in the presence of the said testator and each other, at the request of the said testator who was then of sound mind and over the age of twenty-one years.

A. H. Davidson

David Gower

E. P. Querstret

VIRGINIA:

In the Clerk's Office of the Circuit Court of the County of Amherst, on the 1st day of May, 1945.

A paper writing, bearing date the 15th day of December, 1940, purporting to be the last will and testament of W. T. Thomas, deceased, late of Madison Heights, Route 2, Amherst County, Virginia, was this day produced before me in said office by William Thomas Thomas, Jr., one of the Executors and Trustees therein named, and offered for probate. And the said paper writing being duly proved by the oaths of A. H. Davidson and E. P. Overstreet, two subscribing witnesses thereto, to have been duly executed according to law, is admitted to probate and ordered to be recorded as the true last will and testament of the said W. T.Thomas, deceased.

And on motion of the said William Thomas Thomas, Jr., and J. F.Thomas, who are appointed by said will as Executors and Trustees thereof, and who made oath thereto as required by law, and enteredinto and acknowledged a bond in the penalty of Eighty Thousand Dollars ($80,000.00), without security, (security being waived by said will),conditioned and payable as the law directs, which bond is ordered to be recorded, certificate is granted them for obtaining a probate of the said last will and testament of the said W. T.Thomas, deceased, in due form.

And H. C.Robertson, H. G. Evans, Howard Arthur, W. E, Terry and Mrs. W.L. Terry, any three or more of whom may act,are appointed appraisers of the estate of the said W. T.Thomas,deceased.

Teste: Wm. E. Sandidge, Clerk.

A Copy, Teste: Wm E. Sandidge, Clerk.

THIS DISTRIBUTION AGREEMENT, made this 4th day of April, 1977, by and between WILLIAM THOMAS THOMAS, JR. and J. F. THOMAS, EXECUTORS AND TRUSTEES U/W WILLIAM THOMAS THOMAS, DECEASED, DATED DECEMBER 15, 1940, OF RECORD IN THE CLERK'S OFFICE OF THE CIRCUIT COURT FOR THE COUNTY OF AMHERST, VIRGINIA, IN WILL BOOK 30, PAGE 540, parties of the first part; JACK F. THOMAS, party of the second part; WILLIAM THOMAS THOMAS, JR., party of the third part; VIRGINIA T. THOMAS, wife of Jack F. Thomas, party of the fourth part; and MARGARET P. THOMAS, wife of William Thomas Thomas, Jr., party of the fifth part:

WHEREAS, in said will, certain provisions were made for the benefit of Lizzie Ford Thomas, widow of said testator, William Thomas Thomas. However, the said Lizzie Ford Thomas has since died and in said will it was provided that the said trustees "upon the death of my wife, Lizzie Ford Thomas to divide the principal of said estate in kind equally between my two sons, William Thomas Thomas, Jr and J. F.Thomas. I give full power and authority to said trustees to do all things necessary or proper to make the said division and the distribution under this sub-section"; and

WHEREAS, the parties of the first part have been acting as trustees and executors under said will, and in order to carry out the provisions of said will, and especially the provision hereinabove quoted, the parties of the first part, trustees and executors as aforesaid, do hereby make division of all of the estate of the late William Thomas Thomas, deceased, and do divide the same as follows: To William Thomas Thomas, Jr., a one-half

 P Exh. 2

undivided interest; to Jack F. Thomas a one-half undivided interest in all of the real and personal estate now remaining and formerly a part of the estate of the said William Thomas Thomas, deceased; said personal estate in part being composed of furniture situate in the former residence of the said William Thomas Thomas, deceased and Lizzie Ford Thomas, deceased, consisting in part of household furniture for five bedrooms, household furniture for two living rooms, household furniture for kitchen and halls, 1 full length mink coat, 1 four-skin mink stole, 1 1942 Buick automobile, 1 diamond ring and all other household furniture and contents.

(2) Real estate situate in the County of Amherst, Virginia - Lots 5 and 6 on Route 29; lot on Route 29 near Thomas Store; lot 132' x 270' near Thomas Store; 1.56 acres near Thomas Store; .80 acre near Thomas Store; lot U. S. Route 29 near Thomas Store, .61 acre; 3.74 acres Thomas Road, with improvements thereon; 18.77 acres near Thomas Store, with all improvements thereon; 3.89 acres near Thomas Store, with all improvements thereon; and all other real estate formerly a part of the estate of William Thomas Thomas, deceased.

(3) All leases now held by the parties of the first part.

It being the intention of all parties hereto that this division of the aforesaid estate of William Thomas Thomas vests title to all of the estate, real, personal and mixed, and wheresoever located of the land of William Thomas Thomas, deceased, a one-half undivided interest in Jack F. Thomas and the other one-half undivided interest in William Thomas Thomas, Jr., and the parties of the fourth and fifth parts hereto, as is evidenced by their

signatures hereto, do agree with the aforesaid division of said estate, and a copy of this agreement shall be filed in the Clerk's Office of the Circuit Court for the County of Amherst, Virginia, showing that the parties hereto have made a division of the estate of the late William Thomas Thomas, as provided for in his aforesaid will.

WITNESS the following signatures and seals:

_____(SEAL)
William Thomas Thomas, Jr., Executor
and Trustee u/w William Thomas Thomas

_____(SEAL)
J. F. Thomas, Executor and Trustee
u/w William Thomas Thomas

_____(SEAL)
William Thomas Thomas, Jr.

_____(SEAL)
Jack F. Thomas

_____(SEAL)
Margaret P. Thomas

_____(SEAL)
Virginia T. Thomas

STATE OF VIRGINIA,
TO-WIT:
CITY OF LYNCHBURG.

The foregoing instrument was acknowledged before me this _____ day of April, 1977, by William Thomas Thomas, Jr. and J. F. Thomas, Executors and Trustees u/w William Thomas Thomas, William Thomas Thomas, Jr., Jack F. Thomas, Margaret P. Thomas and Virginia T. Thomas.

My commission expires _____.

_____
Notary Public

KIZER, PHILLIPS & PETTY
ATTORNEYS AT LAW
LYNCHBURG, VA. 24504
615 CHURCH STREET

D. H. K. JR.
THOMAS PHILLIPS
DAVID T. PETTY, JR.
J. SAMUEL JOHNSTON, JR.

LYNCHBURG
FEDERAL SAVINGS AND LOAN
ASSOCIATION BUILDING

TELEPHONE 846-5255

September 16, 1976

Mr. William M. McClenny
McClenny Associates
Attorneys at Law
Amherst, Virginia

Re: Estate of W. T. Thomas

Dear Pete:

I am writing on behalf of Mr. Jack F. Thomas and he agrees that the estate should be divided between himself and W. T. Thomas, Jr.

There are several possibilities: One a deed from the Executors conveying to Jack F. and W. T. Thomas a one-half interest in the real estate and an Assignment by the Executors to J. F. and W. T., individually of the leases. This would pass title from the estate to the individuals and I think would comply with the terms of Mr. Thomas' will.

Another alternative would be a division in kind of some or all of the real estate among W. T. and Jack F., and of course they would have to agree as to the value, plus an assignment to each of one-half of the lease values, and a division of any money.

I understand that Fidelity Bank has a deed of trust loan on the Revco building in the shopping center. It is a 5-1/2% loan and the Bank informed Mr. Jack Thomas that if this loan is assumed, it will require re-negotiating and a current interest rate. Of course this would add substantially to the monthly payments. I think that if this loan was left on the property and unless the deed of trust provides otherwise that maybe a deed could be executed conveying one-half to W. T. and one-half to Jack. This will require further investigation. Could you advise W. T.'s wishes in the matter. In any event, I think we could work it out and I suggest a conference between you, W. T. Jack and myself, and in the meantime W. T. and Jack should prepare a list of the assets of the estate, which we could review and then try to work out things with the greatest savings to Jack and W. T. Jack is agreeable to any fair division among them and I think a meeting between all of us will be necessary to get the views of

D Exh. A
RCG (2 pp)

everybody concerned.

Please let me hear from you about this.

Yours very truly,

D. H. Kizer, Jr.

DHK,Jr:c

McCLENNY ASSOCIATES
LAW OFFICES
P. O. BOX 369 MAIN STREET
AMHERST, VIRGINIA 24521
PHONE: 946-7471

WM. M. McCLENNY

WM. M. McCLENNY, JR.

MARSHALL R. WILLIAMS

August 18, 1976

Mr. Jack F. Thomas
Rt. 29 North
Madison Heights, Virginia

Dear Jack:

I have been consulted by your brother, W. T. Thomas, Jr. concerning the estate left under the Will of W. T. Thomas (Sr.).

W.T. feels and I have advised a division of the remaining estate between you and W.T.

In discussing the matter with W.T. I find that he is willing to have the estate appraised and division be made in kind or if preferable to you to make sale of the estate and divide the funds arising therefrom.

It is our thinking that it would be far less expensive if you and W.T. could agree on such a procedure and carry it out without the necessity of any legal court proceedings which are tiresome, expensive and at time exasperating.

I hope that I may hear from you in this connection within the next few days. If you to not choose to act together then I assume a court proceeding will have to follow.

Sincerely,

McClenny Associates

By Wm. M. McClenny

WMM/b

cc: Mr. W. T. Thomas, Jr.
100 Dillard Road
Madison Heights, Virginia

D Exh. B
RCG 027

VIRGINIA:

IN THE CIRCUIT COURT OF AMHERST COUNTY.

Filed in Clerk's Office
Amherst Circuit Court
NOV 30 1979
Wm. E. Sandidge
Clerk

J. F. THOMAS, INDIVIDUALLY AND AS EXECUTOR AND TRUSTEE U/W OF WILLIAM THOMAS THOMAS (SR.), DECEASED, Plaintiff.	
-v-	T R I A L:
MARGARET P. THOMAS, ET ALS., Defendants.	

A stenographic report of all evidence and other incidents of trial adduced in the trial of the above styled case in the Circuit Court for the County of Amherst, at Amherst, Virginia, on the 16th day of November, 1979, before Honorable Robert C. Goad, Judge.

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REGISTERED PROFESSIONAL REPORTER
CULLEN, VIRGINIA
PHONE: 542-5465

1

I N D E X:

2

3

4

WITNESS:	E X A M I N A T I O N S:	
	Direct:	Cross:
Jack F. Thomas	14-Kizer	
	34-Meeks	44-Freeman
	70-Meeks	71-Freeman
(Re-called)	79-Meeks	
D. Hampton Kizer, Jr.	73-Meeks	74-Freeman
	77-Meeks	
William M. McClenny	80-Freeman	82-Kizer

5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24

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1 THE COURT: All right, now; call your
2 first witness.
3 MR. KIZER: Your Honor, may I mention one
4 more thing I forgot to say? One of the points in
5 contention under that Item 3-C, which says that
6 items, that that sub-section C, it starts out saying
7 that the matter set forth in sub-sections A and B are
8 subject to the provisions of C. The conditions-------
9 that condition was plural, and that raises some
10 questions. It seems to be two conditions in that 3.
11 One, if either son died with issue, and then there is
12 another condition, that if either son died without
13 issue. That's one of the things we're asking the
14 Court to determine; the effect of those two conditions
15 The word "condition" is plural there.
16 THE COURT: All right, sir; call your
17 first witness.
18
19
20 JACK F. THOMAS, being first duly sworn,
21 testifies as follows:
22
23 DIRECT EXAMINATION
24 BY MR. KIZER:

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1 Q. You're Mr. Jack F. Thomas?
2 A. Yes, sir.
3 Q. A son of the late W. T. Thomas, Sr.?
4 A. Right.
5 Q. You are also a trustee and executor under your
6 father's will?
7 A. That's right.
8 Q. When did your father die?
9 A. In 1945, April 15th, I believe. He was born in
10 1874.
11 Q. When did your mother die?
12 A. She died in June of 1975.
13 Q. Was it June 15th?
14 A. June 15th, right.
15 Q. Your brother, W. T. Thomas, Jr.; when did he die?
16 A. I believe it was December 30, 1978.
17 Q. Was your brother survived by any children or
18 issue?
19 A. Not to my knowledge.
20 Q. Were there any members of your family other than
21 your father, your mother and your brother, W. T. Thomas, Jr.?
22 A. Of my immediate family, no.
23 Q. Do you have children?
24 A. I have one daughter.

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1 Q. As trustee and executor under your father's will,
2 did you and your brother, W. T. Thomas, Jr., ever make any
3 division of the properties in your father's estate?
4 A. No.
5 Q. How have you operated since your father's death?
6 A. On the same condition that my brother and I
7 operated before his death. It operated as an estate; and we
8 carried on the business as we did during his life.
9 Q. Did you and your brother as executors and
10 trustees from time to time buy, sell or encumber any real estate?
11 A. We did that all the time. Thatwas one of the
12 things we did regular.
13 Q. Did you do that in your individual names or the
14 name of the estate?
15 A. We did it in the name of the estate of W. T.
16 Thomas, Sr.
17 Q. Has the estate enhanced in value since your
18 father's death? Has the value of the estate enhanced?
19 A. Oh, yes; sure.
20 Q. Are there any encumbrances, liens or mortgages
21 against any of the real estate in the estate?
22 A. There is one against the Fidelity Bank; it was in
23 force before my brother's death and has continued on; and is
24 a monthly payment on that. Would you like the amount of the

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payment?

Q. Is it on the shopping center?

A. Known as the Town and Country Shopping Center. The balance at the bank at this time is a little over a hundred thousand ($100,000) dollars, and monthly payments are $1,685.10 which is automatically taken off Fidelity National Bank each month off the checking account. It's not required to even write a check for that. It's automatically withdrawn.

Q. I hand you a unexecuted copy of a distribution agreement dated April 4, 1977 between William Thomas Thomas, Jr. and J. F. Thomas, Executors and Trustees under the will of William Thomas Thomas, deceased, purporting to make a division of the properties in your father's estate between you and your brother, William Thomas Thomas, Jr. It also provides that it's to be signed by your wife and Mrs. Margaret P. Thomas, wife of Mr. William Thomas Thomas, Jr. Did you ever see the original of that agreement or have it?

A. Yes, I've seen the original, and I have a copy of it in my file. As a matter of fact, I believe I have it with me.

Q. Would you introduce that as your exhibit Number 1?

A. Yes; I have a copy of it.

MR. KIZER: Could we introduce that, if

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1 A. No, sir.

2

3 THE COURT: All right, go ahead.

4

5 BY MR. KIZER:

6 Q. Were you using the money generated from the rents

7 and things to pay the mortgage and keep the estate

8 property in shape?

9 A. It was used; yes, sir. In other words, we

10 operated. The money, all collections from rentals was all put

11 in the estate checking account, W. T. Thomas checking account.

12 And executors, my brother and I------and we both were-------wrote

13 checks on the checking account and deposits were made on that,

14 which I'm continuing to do now, make deposits on that; and that

15 is kept separate from my individual business that we operate

16 ourselves.

17 Q. Do you leave the money in the checking account, or

18 are you drawing it out? I mean, have you been leaving the money

19 in the checking account in the name of the estate, or have you

20 been drawing it out?

21 A. After the sale of a portion that's owned, known

22 as Dillard Road, it was more than I felt like was necessary to

23 stay in the checking account, and I withdrew $3,000.00, and

24 after checking with attorneys on that-----and I believe the Bank

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1 was executor of my brother's estate and were advised of that
2 and I was advised to keep his portion in the checking account,
3 but I could take my half out and do what I wished with it.
4 Q. Was that property owned by your mother or your
5 father that you're talking about now?
6 A. Well, that is in the estate; that was in the
7 estate, W. T. Thomas estate.
8 Q. With reference to the purported distribution
9 agreement which you had and His Honor now has, was it ever
10 signed by you and your brother and your wives?
11 A. I understand that Mrs. Thomas, my brother's widow,
12 requested that that be drawn up, and I went with you, Mr. Kizer,
13 who was the attorney for the estate, to the residence of my
14 brother and my sister-in-law with the agreement. But my
15 brother would not sign it. I'd agreed to sign it if he would.
16 I was reluctant to do it, but if that was his wishes I would.
17 But meantime, when we got to him, he would not sign it, and
18 I understand it was the advice of his attorney, Mr. Pete
19 McClenny at the time. I think that's correct.
20 Q. In other words, it was never signed?
21 A. No, I've never signed it, and, of course, I've
22 never seen a copy that he ever signed.
23 Q. On the last item of your father's will which
24 refers to the contingency of there being but one executor or

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1 trustee in office at any one time, that the other be permitted
2 to carry on in their names; will you tell the Court your wish
3 on that?
4 A. That whether I wished to continue as my brother and
5 I had operated the estate?
6 Q. Yes.
7 A. Yes, that was my wishes, and that is what I've
8 continued to do since his death, is to carry it on as an estate.
9 We both handled it as executors of the estate, and at times
10 when one wasn't available on minor things, we would, each one
11 would handle it individually. The more important larger
12 transactions, of course, we always got together, and we would
13 either carry them through if we agreed, or if we did not agree,
14 we did not carry them through.
15 Q. Will you tell the Court whether or not you wish
16 to continue as sole executor and trustee, or whether you want
17 someone else with you? Tell the Court what you want.
18 A. Well, I feel like that my background in handling
19 the estate with my brother until the time of his death, and
20 getting maintenance work done and so forth and handling the
21 rental of the property, that my knowledge of it, I can do it
22 better by myself. Because if two administrators, one that is
23 not available to me from time to time, and emergency jobs come
24 up------and at times we have had difficulty on that, because we

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1 Q. Did you ever have any net income over and above
2 the debt?
3 A. From time to time if we sold a piece of property,
4 say it was more than we felt like to carry in the bank balance,
5 we would divide that; and on several occasions we have had to put
6 it back into the account, a portion of it, because of some
7 unexpected expense that came up, and then in turn we wrote a
8 personal check back into the estate account. But mainly-------
9 Q. When your mother was living, and she got a third
10 of whatever------
11 A. Well, when my mother was living, as you spoke
12 of, Your Honor, a few minutes ago, the motor lodge, the motor
13 lodge was sold. Of course, then, shortly after that my mother
14 was taken with a long illness and lasted up until her death, and
15 she had tremendous medical expense; nursing home and doctors,
16 medical bills and so forth, and that practically ate everything
17 up. I don't have those figures now available. As a matter of
18 fact, my brother tended to those most of the time, wrote those
19 checks for that; and so far I have not received any of those
20 bills and papers. But I was aware that her expenses were being
21 paid out of the estate, which amounted to many thousand dollars
22 until her death. Of course, we had never questioned anything
23 about any expense that came up for her. We just wrote a check
24 for it.

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1 Q. When have you filed an accounting as executor and
2 trustee?
3 A. We have a bookkeeper, which we had, Mr. George
4 Richardson, who my brother and I both used on the estate; and
5 he has continued to handle the books monthly. I turned it-----
6 Q. I mean when have you filed an accounting?
7 A. I've furnished it, turned the income and paid bills
8 over to this bookkeeper, Mr.Richardson, and he in turn is filing
9 with Fidelity National Bank, as I understand it; he turns it
10 over to them.
11 Q. When have you filed an accounting with the Court
12 or the Commissioner of Accounts?
13 A. Not to the Court as far as I know; but he does
14 file it with Fidelity National Bank; not to the Court. I didn't
15 know we were required. As far as I know, we're not required to
16 file it with the Court. I believe as Mr. Meeks pointed out,
17 we're not, under the clause of the will, required to post bond.
18
19 THE COURT: All right; go ahead. Any
20 further questions, Mr. Kizer?
21
22 BY MR. KIZER:
23 Q. Under Sub-section C of your father's will, there is
24 some possible ambiguity, or may be. I believe you said that the

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1 members of your father's family were you, your mother and your
2 brother?
3 A. Right.
4 Q. Under Item 3-C, there are two contingencies
5 mentioned. One, the death of either son with issue; the other,
6 the death of either son without issue. Do you know whether or
7 not anything was done or said about the deaths with issue or
8 without issue?
9
10 MR. FREEMAN: If Your Honor pleases, I
11 object to that. I think that would be hearsay.
12 THE COURT: Who are you asking; you mean
13 done or said?
14 MR. KIZER: I'm asking about the circum-
15 stances; if he knows the circumstances surrounding
16 the time his father executed the will, and about
17 whether there was anything that happened that would
18 throw light on what those words in 3-C mean with
19 reference to the death of either child?
20 THE COURT: I can't let any evidence come
21 in as to a statement by the father as to what he
22 intended in his own will. But I'm going to let him
23 testify------it's a hearing before the Court and no
24 jury is involved-----and he can testify about anything

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1 he knows about the surrounding facts and circumstances,
2 but not as to what his father said about what he
3 intended in his own will. That can't come in.
4
5 BY MR. KIZER:
6 Q. You can answer the question by saying anything
7 that happened at the time that your father wrote the will, but
8 do not say what your father said he intended; but anything else.
9 Can you answer that? Were you aware that your father had drawn
10 a will?
11 A. Yes, I was aware that my father had drawn a will.
12 And he called my brother and I together down at the old store,
13 which he operated up until prior to his death. He retired, and
14 my brother and I started operating it. When he got the attorneys
15 to draw the will, I recall that he got my brother and I with him
16 and showed us the will, and he wanted us to see it and see if
17 it was what-----and he told us what he wanted in the will-----
18 and asked us about it. We agreed on that. And I recall at the
19 old store there and the time he drew the will up, that he wanted
20 us to look it over and see what he had done and if it was
21 agreeable with us; to see the will. And we did that. And what,
22 I think we've tried to do, I've tried, and I'm sure my brother
23 did, since that time; to carry out what he said at the time even
24 before his death, after he'd drawn up the will and before his

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1 death. We did that, and, of course, he was overseeing it at
2 the time, but he left the business to us. Then when his health
3 was bad and he was no longer very active in the business, then
4 my brother and I continued to carry, or I thought we were carrying
5 out his wishes under the will under the estate.
6
7 BY THE COURT:
8 Q. Where was the old store?
9 A. The old store is just north of where the motor
10 lodge is today. It was between that and the home place. And,
11 of course, that was torn down.
12 Q. I'm just trying to remember.
13 A. Right; well, that was torn down in 1951, and in
14 the meantime, then my brother and I were still operating as the
15 estate, and we purchased the land across the highway where the
16 Town and Country Shopping Center is now, after my father's
17 death. But we bought that in the estate's name, and we developed
18 that in the estate's name over there, the shopping center.
19
20 BY MR. KIZER:
21 Q. Well, you said that you wanted to do what your
22 father wanted. Do you know what he wanted you all to do?
23 A. Well, it's my understanding that, from what he was
24 trying to convey to us, that he wanted to keep it as an estate,

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1. and whoever survived, the two of us, was to continue on with
2 his properties or whatever we had developed out of the estate,
3 what was left. And that's what we tried to continue on. And
4 I believe it's been brought out here, that if I had children or
5 he had children, the children will in turn share in the estate
6 at the time of his or my death.
7 Q. But if there were no children?
8 A. Then it was to go to the sole survivor which would
9 be he or I. And I think when this agreement, which was presented
10 a few minutes ago here, and my thinking at the time was that
11 he wanted, my brother wanted to continue on that basis, to carry
12 it on as an estate, and whoever survived, rather than close it
13 out, would divide it up if it could be done under that agreement
14 at that time. But he did not want to sign it, and he did not
15 sign it, and I didnot sign it.
16
17 BY THE COURT:
18 Q. Do you know the approximate value of the estate?
19 A. It's been an appraisal made. Mr. Paul McBride, who
20 is now deceased; Mr. Coleman made an appraisal on it. I believe
21 those figures, Your Honor------I don't know whether you have
22 those or not-------but the tax tickets, that is supposed to be
23 the true value today.
24

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1 MR. KIZER: At the end of my memorandum------
2 WITNESS: I believe the Amherst County
3 Assessors' value is supposed to be somewhere near
4 the true value.
5 MR. FREEMAN: Your Honor, I don't have a
6 copy of that exhibit. If I could just be apprised
7 of what value that is.
8 THE COURT: Well, Mr. Kizer attached it to
9 his memorandum.
10 MR. FREEMAN: But, in the copy I got, I
11 didn't get that.
12
13 BY MR. KIZER:
14 Q. There is one item marked Golden in pencil. Is
15 that property still in the estate, or was any property sold?
16 A. It was approximately 1.4 acres; a portion of that
17 faced Dillard Road and then continued on down Thomas Road.
18 THE COURT: Assessed at almost $300,000.00.
19 WITNESS: The county assessment, you mean;
20 the county assessment?
21 THE COURT: Yes; that's real estate. No,
22 it's more than that.
23 MR. KIZER: About $795,000.00.
24 WITNESS: That's right.

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1 THE COURT: Almost $300,000.00 worth of
2 land, and then the buildings are about-------
3 WITNESS: And improvements.
4 MR. MEEKS: Judge, if my math is right, it
5 totals out $795,600.00.
6 THE COURT: What is the total?
7 MR. MEEKS: $795,600.00; Your Honor.
8 THE COURT: About $300,000.00 in land and
9 $500,000.00 in buildings.
10
11 BY MR. KIZER:
12 Q. Well, Dr. Golden, marked up here by the top of
13 one of these tickets, property on Dillard Road, Route 4, with a
14 $25,000.00 total assessment; is all of that property in the
15 estate, or was some of it sold to Golden? Did you sell anything
16 to Golden?
17 A. That 1.40, if I recall, was sold to Dr. Golden.
18 Q. How much was left?
19 A. Well, that came off of this tract that I described
20 a few moments ago; that the home place faced 29 and going back
21 down Thomas Road and back behind the motor lodge, my residence,
22 and on up behind Fidelity National Bank; that came off of that
23 tract. It was two or three tracts that separate deeds were on,
24 and then on Thomas Road---------

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1 getting cheaper, I suppose the values would be going up. But
2 I would say that would be a reasonable value to put on it.
3
4 MR. KIZER: That's all now, Your Honor.
5 THE COURT: Do you have any questions, Mr.
6 Meeks?
7 MR. MEEKS: Yes, Your Honor, I do.
8
9 BY MR. MEEKS:
10 Q. Jack, back when, at the time your father drew
11 the will, I believe that was in December of 1940, is that
12 correct?
13 A. December of 1940.
14 Q. How old were you and your brother at that time?
15 A. I was born in 1911, February, 1911.
16 Q. Who was older, you or your brother?
17 A. My brother was older.
18 Q. How much older was he than you?
19 A. He was about three and a half years older than I,
20 I believe. He was born in 1908.
21 Q. All right; now, were both you and your brother still
22 living near your father here in the Amherst community at that
23 time?
24 A. We lived on the home place prior. Prior to my

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1 father's death, my father gave me a lot facing 29 across from
2 Town and Country Shopping Center, and also my brother a lot
3 adjoining mine. I had built a home on my property and was still
4 a part of the home place, and I was living on there at the time
5 of his death. I was living in my home.
6 Q. All right; at the time the will was drawn, were
7 either you or your brother married?
8 A. I was married. I was married in 1933.
9 Q. You had been married about seven (7) years?
10 A. October, 1933; October 16, 1933.
11 Q. Your brother was not married?
12 A. He was not married.
13 Q. And he had not been married previously, is that
14 correct?
15 A. That's right.
16 Q. Did you have any children, or was your wife
17 pregnant?
18 A. I had one daugher, and she was born August 3,1941.
19 Q. So your wife was in the early stages of pregnancy
20 when the will was drawn; is that correct?
21 A. Yes.
22 Q. Now, was the family unit a close unit?
23 A. Oh, very close; very close.
24 Q. What type of business was your father in?

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1 A. General merchandise, and he also dealt with real
2 estate.
3 Q. Did he have any partners?
4 A. Well, he had; his father-in-law was partner in
5 some of the properties, and he had some other business and other
6 stores at one time that he did have other partners in;but the
7 home place store was his.
8 Q. At the time he drew the will, he just had you two
9 boys working with him; is that correct?
10 A. Yes; he had another store in Monroe at the time,
11 which he had a partner in that; a man that operated it and
12 managed it; was partner in that business.
13 Q. Had you and your brother been working in the
14 family business along at that time?
15 A. We grew up in it, during elementary school and
16 high school. Of course, my brother went away to college. I
17 was still living at home. I went to Lynchburg College. I was
18 living at home. Because my brother during the time he was away
19 at college, that's the only time he did not live at home.
20 Q. Now, you said you were married and had a child on
21 the way. Was your brother engaged to anyone?
22 A. Not to my knowledge.
23 Q. Do you know if at that time he was planning to
24 become married?

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24 become married?

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A. No, not to my knowing.

Q. Did he have any social patterns or social habits at that time that weren't known to the family?

MR. FREEMAN: If Your Honor pleases; I think that calls for a conclusion on the part of this witness.

THE COURT: Lay the proper foundation.

BY MR.MEEKS:

Q. Do you know what your brother's social life was like at that time, and if your father was aware of it?

A. Yes, I think so, pretty well.

Q. Can you describe that to the Court?

A. Well, you mean as far as his friends?

Q. Dating habits and that sort of thing?

A. Well, of course, he never did bring any dates home. He did say he was going out on dates. He did go out as a young man. He went out. He had friends down-town, in business down-town. For example; Trenton Theater was owned by Buffy Trent, I believe; and one of his best friends was his son, Jack Trent. And, of course, they were together most every night, I believe.

Q. He would go out almost every night with his friends?

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1 A. Right.

2 Q. Now, this old Trenton Theater, did this have a

3 stage show as well as a movie and show girls?

4 A. Yes, I believe they called them road shows.

5 Q. Was he dating the girls in the shows there?

6 A. Oh, yes; he dated them.

7 Q. Well, were you and your brother both working at the

8 store at that time?

9 A. Well, we worked, as I say; we grew up in the store,

10 and, of course, we worked after school hours. He didn't

11 require us to do but so much. Of course, as we got older, we

12 did begin to work in the store more and more.

13 Q. About this time when you all were working in the

14 store and he was dating the show girls, did you ever have to come

15 in early and cover for him? Was that made known to your father?

16 Did he come in late?

17 A. My father-------Of course, he was living at the

18 home place which was next to the store; of course, he was aware

19 of his goings and comings; all of our goings and comings.

20

21 MR. FREEMAN: If Your Honor pleases, I have

22 to object unless the relevance of this line of

23 questioning becomes apparent.

24 THE COURT: I assume Mr. Meeks is going to

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1 connect it, make it relevant in some way. It seems
2 he's getting a little far.
3
4 BY MR. MEEKS:
5 Q. All right; was the family affiliated with any
6 church in particular at that time?
7 A. At that time we were members of College Hill
8 Baptist Church. The reason for going back to College Hill
9 Baptist Church, my brother being a member of the local church,
10 the family grew up in that one, my father lived in Campbell
11 County, and then he operated the business on Fort Avenue; and
12 he and his family and also on my mother's side of the family,
13 attended College Hill Baptist Church.
14 Q. Did the family, meaning your mother and your
15 father and your brother or your wife and yourself, attend
16 church together or regularly?
17 A. Oh, yes; we did.
18 Q. Did your brother go with you all each week?
19 A. He did sometimes. He wasn't quite as regular as
20 some.
21 Q. Did you and your wife spend much time with your
22 father at his home place?
23 A. Well, my wife's family lived next door to my
24 family. And, of course, my wife and her mother and father and

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1 other relatives were visiting, and my relatives visited back
2 and forth. They were very close.
3
4 MR. MEEKS: If I may just have a moment
5 with my notes, Judge.
6
7 Continuing:
8 Q. Jack, changing the time frame of the questions
9 I've been asking; I'll come back again to this purported agree-
10 ment. You, yourself, did not dictate what the wording of that
11 agreement would be, did you?
12 A. I had no part in that.
13 Q. I believe your attorney at that time was Mr.
14 Kizer?
15 A. Mr. Kizer; I believe at the time that Mr. Kizer
16 was contacted by Margaret, and I don't know just who said what
17 they wanted in the agreement or how the wording was, but Mr.
18 Kizer contacted me and discussed it, and then he drew it up.
19 And so then he and I went to my brother's home with the agree-
20 ment to see whether he was willing to sign it or wanted to sign
21 it. But he would not sign it.
22 Q. All right; one other question back about the time
23 your father wrote his will. Was he ill at that time or having
24 any health problems?

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1 A. He had had bad health for a number of years.

2 Q. Do you know what the nature of that health problem

3 was?

4 A. He had a blood pressure condition, a combination

5 of things. One of the things he became very concerned about was

6 diet. He was going to a number of doctors, and they almost

7 made him afraid to eat; and he later developed pellagra because

8 of the deficient diet.

9 Q. What is pellagra?

10 A. I think that's a nutrition problem, failing to eat

11 the proper diet, and he did that because the doctors said not

12 to eat this and that.

13 Q. Jumping back up again to this purported agreement,

14 when you took it to your brother; was he ill or well?

15 A. At that time he had had surgery, at that time.

16 Q. Didn't he have cancer of the throat?

17 A. Right.

18 Q. Had he had what's referred to as a tracheotomy?

19 A. Right, and he had a tube in his throat, in his

20 chest, I believe. Of course, he had a speech problem.

21

22 BY THE COURT:

23 Q. When your mother died in 1975, did you and your

24 brother agree, or did you agree or realize you were supposed to

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1 divide the property and end the estate or not?

2 A. To divide it; you mean as far as some type of

3 agreement like that?

4 Q. I mean, you knew the will said upon the death of

5 my wife, Lizzie Ford Thomas, the trustees are to divide the

6 principal of the estate equally between my two sons and give

7 full power and authority of the trustees to do all things

8 proper. Didn't you realize that was the end of the estate, and

9 you all should go ahead and divide it up?

10 A. My thinking, and I think his was too, that whoever

11 survived was to get the balance of the estate, and that was my

12 understanding. I think that's what my father's wishes were when

13 he drew it up, and that's the reason, I think, I'm thinking that

14 he didn't sign it for that reason. And we continued on as an

15 estate, and whoever survived would get the balance of the estate.

16 Q. Well, if both of you had children it would go to

17 the children?

18 A. Right.

19 Q. So it wouldn't go to the survivor in that case?

20 A. Right. I assume he knew I had the advantage

21 there, but he still wouldn't sign the agreement as to divide it.

22 Q. But you were willing to sign the agreement?

23 A. As long as he wanted it, I agreed to go along with

24 it and do it. See, we always agreed. Sometimes we'd have our

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disagreements, but one would give in to the other for one reason or the other to keep peace in the family. And that's more or less the way we operated. One would give in to the other. If one felt very strongly about an issue, then the other would give into it.

Q. You had a good brother relationship?

A. Very; I'll say we had a disagreement, but nothing serious at all.

THE COURT: Go ahead.

BY MR. MEEKS:

Q. One or two other questions, Your Honor. With response to the questions that the Judge just asked, you were agreeable to sign that agreement, I believe you said. You did not, however, if I understand, believe that that stated the intent of your father?

A. Right; to keep peace in the family I was willing to go along with him as we'd done on other decisions; but for that reason only, is the only reason I was willing to sign it if he had.

Q. To be accomodating with your brother?

A. That's right.

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1 BY THE COURT:

2 Q. When did your brother get married; do you know the

3 date?

4 A. I don't have that date.

5

6 MRS. W. T. THOMAS, JR.: 1965.

7 THE COURT: What was the date?

8 MRS. THOMAS: May 27th.

9 THE COURT: 1965.

10 Any further questions?

11 MR. MEEKS: No, Your Honor. That's all

12 the questions I have.

13 THE COURT: Mr. Freeman?

14

15 CROSS-EXAMINATION

16 BY MR. FREEMAN:

17 Q. Mr. Thomas, you've indicated that your recollec-

18 tion is that you never filed any accountings on the estate or

19 the trust created under the will of your father with the Court;

20 is that correct?

21 A. I've never filed any.

22 Q. Did you ever file any estate income tax returns

23 with the Internal Revenue Service?

24 A. All incomes and payments were turned over to the

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1 Q. You don't know whether you have in your possession
2 any copies of those returns or not?
3 A. I have some copies. I don't know whether I have
4 them complete from year to year or not; but I do have some
5 copies.
6 Q. Now, during the period of the administration of
7 the trust, I believe you indicated you acquired property from
8 time to time in addition to selling property and in addition to
9 encumbering?
10 A. That's correct.
11 Q. Did you acquire any property after the death of
12 your mother?
13 A. I don't recall. No, we've sold some property; no,
14 we didn't acquire any.
15 Q. Now, I believe you indicated when you sold
16 pieces of property from time to time you would just divide the
17 proceeds; is that correct?
18 A. Not necessarily. Most times we would leave it in
19 the estate, but after the estate accumulated more than we felt
20 like was needed in there, we would each take out a given amount.
21 And then, as I told Your Honor a few minutes ago, from time to
22 time when something unexpected would come up, emergencies,
23 we'd have to put it back, and we'd put equal amounts back into
24 the estate.

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1 Q. So, you didn't necessarily on the date of the
2 closing of a particular transaction distribute principal to
3 yourself, but you might from time to time thereafter that had
4 been deposited to the estate checking account, you would just
5 agree to draw, withdraw whatever amount you would mutually
6 agree to at that time?
7 A. That's right.
8 Q. When was the mortgage put on the property that you
9 referred to, I believe the mortgage payable to Fidelity American
10 Bank?
11 A. When was that put on?
12 Q. Yes.
13 A. Well, of course, the first one was put on it
14 even before the construction was started, when the first lease
15 was signed. And, then, of course, it was paid off; just like
16 the motor lodge; that was sold, paid off when we sold the
17 property. When we added new buildings, then I believe this last
18 one, which is still being paid now monthly, on the shopping
19 center, be on the east side; it's not against any other property.
20 It's on that, which is to say that's still the amount I stated
21 a while ago.
22 Q. But, I mean, when was it presented, the currently
23 outstanding indebtedness, when was the mortgage securing that
24 indebtedness placed upon the estate property?

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1 Book 54, page _____. This particular deed of
2 trust is recorded and the parties to it are W. T.
3 Thomas, Jr. and his wife, Margaret, and Jack F.
4 Thomas and his wife, Virginia, and Lizzie Ford
5 Thomas.
6 WITNESS: As far as my personal property
7 or home, it was nothing brought into it.
8 THE COURT: You say they were parties.
9 Was the estate a party, or were they just endorsers?
10 MR. FREEMAN: I'm referring to the deed
11 of trust, and we have it captioned here in our notes,
12 and it says executors and trustees under the will of
13 W. T. Thomas, deceased; W. T. Thomas, Jr. and wife,
14 Margaret; and Jack F. Thomas and wife, Virginia,
15 and Lizzie Ford Thomas.
16 MR. MEEKS: If we have the records available,
17 I think it might be the best thing to have the copies
18 submitted.
19 THE COURT: If any of the counsel wish to
20 file these deeds, copies of them, they may file them
21 as an exhibit.
22
23 BY MR. FREEMAN:
24 Q You have talked about this proposed agreement of

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1 division of the estate. About when---------

2 MR. FREEMAN: I have not seen a copy,

3 if Your Honor pleases. Could I inspect that while

4 I question?

5 THE COURT: Yes; the 4th day of April, '77.

6

7 BY MR. FREEMAN:

8 Q. Now, I believe it was your testimony that Mrs.

9 Margaret P. Thomas requested Mr. Hamp Kizer to draw that

10 agreement?

11 A. That was my understanding.

12 Q. Did she ever tell you that?

13 A. No.

14 Q. Who told you that?

15 A. I believe that Mr. Kizer, the attorney, told me.

16 Q. Now, you also indicated, I believe, that Mr. Kizer

17 was your attorney; is that correct?

18 A. Well, he was the attorney for the estate. You

19 mean my individual attorney?

20 Q. Yes.

21 A. I didn't have any individual attorney at the time.

22 In other words, Mr. Kizer was acting as attorney for the estate.

23 Q. Did you have any conversation with Mr. Kizer in

24 the preparation or the formulation of this particular agreement?

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A. None whatsoever; none whatsoever.

Q. So you never told him what properties were in the estate?

A. He told me what, that he had drawn this up, and I was informed that he had drawn it up, and he said that he wanted to take it up to W. T. and Margaret to see whether they were willing to sign it or not; and then we made an appointment and went up to see if he would sign it.

Q. So, the first you knew about this agreement, one day you got a telephone call from Mr. Kizer saying, "I've got a proposed distribution agreement to divide the estate; would you be willing to sign it"?

A. Well, he told me, I don't remember whether it was a telephone call or whether I was by his office personally, but I was informed that this request had been made that it be drawn up, and he gave me the general outline of what was to be in the agreement. And so he drew it up, and then I was informed what was in it, and then we made the appointment to go up and see if he was willing to sign it.

Q. Did you indicate any objection to Mr. Kizer at the time he told you he was preparing this agreement for execution to divide the estate?

A. As I stated a few minutes ago, that I preferred not to do it, but again----------

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1 Q. My question was did you tell him?

2

3 MR. MEEKS: Your Honor, he's answering the

4 question. He ought to be entitled to finish his

5 answer.

6 THE COURT: I think he allowed him to. Go

7 ahead, Mr. Thomas. Repeat your question, Mr. Freeman.

8

9 BY MR. FREEMAN:

10 Q. My question was, did you ever tell Mr. Kizer that

11 you objected to a division of the estate during the joint life

12 times of you and your brother?

13 A. Well, I made it clear to him, which I'm sure he

14 understood, and my thinking was as I stated before, that I

15 wanted to continue it on as it was from the time of my father's

16 death, but if this is what my brother wanted, I had agreed to

17 go along with it. And as I stated to Your Honor a few minutes

18 ago, I was willing to go along with it rather than cause

19 problems in the family.

20 Q. Did you tell Mr. Kizer that?

21 A. I told him; oh, yes, I believe I stated that

22 before; that rather than go under what had previously been

23 operating under, the agreement we had been operating under, to

24 continue that; but if my brother wanted that, that I would go along

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1 with it.

2 Q. Now, when you and Mr. Kizer went up to meet W. T.

3 Jr., where did that take place?

4 A. In his home.

5 Q. Had you conferred with Mr. Kizer about this

6 agreement before you went to see W. T., Jr.?

7 A. Well, I believe I stated that before; that he

8 told me what was in it and what he thought that W. T. wanted,

9 my brother wanted; and he drew it up according to his wishes.

10 Q. And you went along for the purpose of encouraging

11 your brother, or at least acquiescing in the distribution that

12 was proposed?

13 A. Yes; not encouraging, but just, again repeating,

14 that just to keep peace in the family, that I would go along

15 with it; which it wasn't my thinking that I wanted it to be

16 done that way, but if that's the way he wanted it, I would go

17 along with it.

18 Q. Well, how do you think your brother wanted it?

19 A. As Mr. Kizer drew it up.

20 Q. As he drew it up? Well, was it your impression

21 that he changed his mind?

22 A. That who changed his mind?

23 Q. Your brother, W. T.?

24 A. I never knew he had his mind made up to do it.

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1 I hadn't been told by him that he had made up his mind to do it.
2 My only contact was through Mr. Kizer, and he never had told
3 me that he wanted such an agreement drawn up, and Mr. Kizer
4 told me he had been called by Margaret requesting that it be
5 drawn up. And my brother had not told me that he wanted it to
6 be drawn up. He hadn't talked with me about it.
7 Q. Well, you just stated, I believe, that the agree-
8 ment was drawn up according to what W. T. had requested it be
9 drawn?
10 A. Well, W. T. was through Margaret, I think; what
11 she conveyed to Mr. Kizer. I was thinking that she was convey-
12 ing what W. T. said.
13 Q. Are you suggesting that Mr. Kizer drew it up
14 according to what Margaret wanted, and you were going to look
15 at it together that day?
16 A. Well, I think he drew it up according to what he
17 thought my brother, had been conveyed to him what my brother
18 wanted drawn up; and he had drawn it up in those conditions; I
19 think.
20 Q. So, your impression was, he drew it up according
21 to what he thought W. T. had said he wanted?
22 A. Well, I don't know whether he said it, because at
23 the time his speech, he wasn't able to talk, to mitigate with
24 him what his thinking was. I don't know how he got his

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1 information, but he assumed that's what he wanted; and in the
2 meantime, when we made the appointment and went up there to
3 him, he read it over and he saw it, but he would not sign it.
4 Q. Now, I believe you indicated that Mr. W. T. Thomas,
5 Jr. indicated he wanted to have his attorney review the agree-
6 ment. Is that right?
7 A. Well, he wouldn't sign it; I don't know; he never
8 did come back with anything later to ask to sign it; never did
9 ask for any changes or anything with another agreement. I
10 don't recall him ever contacting or making any effort to contact
11 me, mention to me that he wanted a different agreement from
12 that. He never mentioned anything to me after that that he
13 wanted anything different from that. He didn't want that,
14 apparently, and didn't want anything different. He never
15 mentioned it or requested that I sign another agreement with
16 different wordings from that.
17 Q. He affirmatively indicated he would sign the
18 agreement the day you and Mr. Kizer were in his home?
19 A. No, I hadn't talked with him about it.
20 Q. I mean that day, what did he say? Did he say,
21 "I'm not going to sign it"?
22 A. That day when it was presented to him, he just
23 didn't sign it. That was the only indication; he just wouldn't
24 sign it.

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1 Q. Did you indicate that day that you would sign it?

2 A. I wasn't going to sign it if he didn't sign it.

3 Q. Did you indicate you would go along if he did?

4 A. Yes; he knew I wouldn't have gone up there with

5 it if it hadn't been a space on there for me to sign it. It

6 wouldn't be any point for me going up there except to sign it.

7 Q. So you went up there to sign it?

8 A. If that's what he wanted; but not thinking it was

9 under my father's will, and apparently my brother didn't want

10 it, because he didn't sign it.

11

12 BY THE COURT:

13 Q. Did he state any reason why he wouldn't sign it;

14 your brother?

15 A. Well, Your Honor; at the time, of course, he had

16 this communication, speech problem; but he just wouldn't sign

17 it. He just shook his head, no.

18 Q. Did he communicate with you in any manner through

19 another person or through writing? Could he write?

20 A. Yes, he could write.

21 Q. Why he didn't sign it?

22 A. No; no reason; I never did get a reason that came

23 to me why he didn't sign it; but I assumed because he didn't

24 want to do it that way. He didn't say he didn't disagree with

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1 any particular paragraph or anything in it; just would not sign
2 it. I figured, I was thinking that he was in total disagreement
3 with it. He didn't want to sign anything at all. He didn't
4 point out to any particular paragraph.
5 Q. Did he read it in your presence?
6 A. Oh, yes; he read it.
7
8 BY MR. FREEMAN:
9 Q. So, in spite of your strong feeling that your
10 father intended that you get the entire estate if you should
11 survive W. T., you were willing to sign the agreement?
12 A. That's right; and I also stated when my father
13 drew the will up that it would have been the same thing if one
14 of us had left one year later or ten years later, before I had
15 a daughter, and even after my daughter was born. He wanted to
16 continue on. I never did press him, and he never did press me
17 about drawing up anything else.
18 Q. So, in spite of the fact that you believed you
19 were in effect divesting your daughter's interest eventually
20 of one-half of your father's estate; that that one half was
21 going to go to W. T. Jr.'s widow in your so doing, you were
22 willing to do it?
23 A. Well, I never did think too much about how much
24 my daughter or I am going to get. I was thinking about paying

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1 this loan, and I'm still today amortizing this loan, and I
2 wasn't thinking too much about what was going to be left;
3 just building up the estate and never given too much thought
4 about what would be divided up and where it would go; but I was
5 just going along with it from day to day and paying this
6 indebtedness off and carrying on the business. But as far as
7 thinking about what the future, what my daughter would inherit,
8 I wasn't concerned about that. Naturally I was concerned about
9 her, but that wasn't my thinking.
10
11 BY THE COURT:
12 Q. How many children do you have?
13 A. I have just one daughter; one child; one daughter.
14 Q. How old is she?
15 A. She was born; she was born in 1941.
16
17 BY MR. FREEMAN:
18 Q. It was your impression that Mr.Kizer was repre-
19 senting the estate in preparing that agreement?
20 A. Yes.
21 Q. Was he compensated from the estate for the
22 preparation of that agreement?
23 A. I haven't paid him anything personally for it.
24 Q. So you think interest has been running for a long

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1 Q. When you paid the principal out, did you and W. T.
2 always pay it out equally?
3 A. You mean in dividing it up when we had more
4 funds than were needed?
5 Q. Right.
6 A. Oh, yes; sure.
7 Q. Did you discuss with each other whether the princi-
8 pal being distributed was needed for your maintenance and
9 support?
10 A. Well, my recollection is because it was idle
11 money that was in a checking account,which Fidelity wasn't paying
12 interest on checking accounts, and to get that money working.
13 Q. So you were distributing principal irrespective
14 or any concern whether it was needed for your maintenance and
15 support as beneficiaries under the trust?
16 A. Well, we could always use it when we got it,
17 but it wasn't necessarily a time we had a demand note or anything.
18 Q. More a matter of convenience as to when it suited?
19 A. Well, just a matter of it being there and just
20 putting it to work. And many times we had to put it back in
21 the estate because something would come up. If money was
22 needed back in the estate we'd have to write our personal check
23 and put it back in the estate.
24

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1 D. HAMPTON KIZER, Jr., being first duly
2 sworn, testifies as follows:
3
4 DIRECT EXAMINATION
5 BY MR. MEEKS:
6 Q. Mr. Kizer, you've already heard the testimony
7 around this purported agreement. Do you recall who contacted
8 you about the agreement and the circumstances of that contact?
9 A. Yes.
10 Q. Would you explain that, please?
11 A. My recollection is that, I think it was about the
12 time they were having some problems with tenants over there, and
13 that Mrs. Margaret Thomas called me and asked me about the will
14 of Mr. Thomas with reference to the part about if one died or
15 something like that. It was something about that; I didn't
16 have a copy of the will. I told her I would get it. I got a
17 copy. And from my conversation with her-------I don't remember
18 every word-------either I suggested it or she, I don't know; it
19 could have been me; that I thought there were some serious
20 problems that could be raised about that will; that if they made
21 a division, that it would put it to rest.
22 My recollection is that I made it, I drew it; I think
23 I sent Jack a copy, and I think I turned the original over to
24 Mrs. Thomas. My recollection also is that it was not signed.

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1 Q. But the contact to draw the agreement came from
2 Mrs. Thomas; is that correct?
3 A. She's the one that talked to me first about it,
4 yes; the only one that really originated it, as I remember.
5
6 MR. MEEKS: That's the only questions I
7 have of MR. Kizer.
8
9 CROSS-EXAMINATION
10 BY MR. FREEMAN:
11 Q. Mr. Kizer, did you ordinarily confer with Mrs.
12 Thomas in your capacity as representing the estate? did you
13 confer with her from time to time?
14 A. I didn't have all of that dealing. Now, what we
15 were talking about, at that time they had had some problems with
16 tenants in the shopping center, and that was the only thing that
17 I know that I was doing for the estate at that time.
18 Q. I have a copy of a letter which was sent over your
19 letterhead on September 16, 1976, which I would like to introduce
20 as defendant's Fidelity and Margaret P. Thomas's exhibit.
21
22 THE COURT: Defendants' Exhibit A.
23 MR. MEEKS: We merely ask that the proper
24 foundation be laid; as this is a photostatic copy; we

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1 ask that proper foundation be laid as respective to
2 the best evidence rule.
3
4 BY MR. FREEMAN:
5 Q. Is that in fact a copy of a letter that you sent to
6 Mr. Pete McClenny?
7 A. Yes, it is.
8 Q. Would you read that letter, or at least the first
9 couple of paragraphs of that letter aloud so that everyone can
10 hear?
11 A. Now, I can explain it very clearly. I am writing,
12 I wrote to Pete McClenny.
13 Q. Would you first read the first two paragraphs?
14 A. That's what I'm trying to do. It's addressed to
15 Mr. McClenny, dated September 16, 1976. Dear Pete; re: Estate
16 of W. T. Thomas. "I am writing on behalf of Mr. Jack F. Thomas,
17 and he agrees that the estate should be divided between himself
18 and W. T. Thomas, Jr. There are several possibilities; one, a
19 deed from the executors conveying to Jack F. and W. T. Thomas a
20 one-half interest in the real estate, and an assignment by the
21 executors to J. F. and W. T. individually. This will pass from
22 the estate to the individuals, and I think would comply with the
23 terms of Mr. Thomas's will."
24 May I have the date on that agreement?

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1 THE COURT: April of '77.

2 MR. MEEKS: April 4, '77, I believe.

3

4 MR. FREEMAN:

5 Q. If you wish to summarize what was----------

6 A. The letter speaks for itself. What happened at

7 that time, if Your Honor pleases, Mr. McClenny had communicated

8 with me; was representing Mr. W. T. Thomas, Jr.; he had talked

9 about selling the property, our getting it appraised and so

10 forth; and we talked about whether Jack would buy it. At that

11 time we went to the Fidelity Bank to see if that loan could be

12 assumed. As I recall, Mr. McClenny checked the records over

13 here and found it could not be assumed, and that if Jack bought

14 it, he'd have to negotiate another loan at a higher interest

15 rate. Those things were in an effort to settle it; but as I

16 recall what Mr. McClenny was asking me was, he wanted to see

17 about selling it.

18 Q. Were you in the preparation of that agreement

19 representing the estate, or were you representing Jack or----

20 I'm not clear-----In your letter it says, "I'm writing on behalf

21 of Jack"?

22 A. That's way before. Look at the dates there, now.

23 That letter is much earlier. That agreement was later.

24 Q. That was in September of '76, and the agreement

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1 was dated April of '77.

2 A. On that agreement, Mrs. Margaret Thomas called me

3 about it. That originated, the process by which it was drawn,

4 I can't remember every word, but we talked about it. We talked

5 about the will. I think I told her that some questions could

6 come up on that will. I may have suggested it to her. I was

7 dealing with Mrs. Thomas at that time originally. I also

8 communicated with Mr. Jack Thomas. I sent him a copy so he would

9 know about it.

10 Q. All right; was it your impression then that Jack

11 Thomas was in agreement with the terms of that particular agree-

12 ment?

13 A. My recollection is somewhat like what he testified

14 to today; that he would have signed it if his brother had signed

15 it. But when Mr. W. T. didn't sign it, that ended it.

16 And the rest of the thing, the only other thing I

17 know that I dealt with was with Mr. McClenny.

18

19 MR. FREEMAN: That's all the questions I

20 have.

21

22 REDIRECT EXAMINATION

23 BY MR. MEEKS:

24 Q. Just a couple, Mr. Kizer. With respect to the

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1 letter you just mentioned, one dated September 16th, did I
2 understand you correctly to say this was written with a view
3 to Jack purchasing the property, all of the property, itself?
4 A. I think it grew out of my negotiations with Mr.
5 McClenny and others. The question was, I think, that Mr. Mc-
6 Clenny wanted to get it sold. The other question was, was Jack
7 interested in buying it; and if so, was it a possibility of
8 their getting together. And that's when we checked the deeds
9 of trust and things to see if the loan could be assumed.
10 Q. All right.
11 A. Jack went to the bank. If I remember, Pete came
12 over here and looked in the records and found out that it could
13 not be assumed.
14
15 MR. MEEKS: All right; that's all the
16 questions I have.
17 THE COURT: All right; you may step down.
18
19 THE WITNESS STANDS ASIDE:
20
21 THE COURT: Do you want to call Mr. Thomas
22 back?
23 MR. MEEKS: I want to call Mr. Thomas back
24 for two or three questions.

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1 checking account, we would divide whatever income or principal
2 or whatever was in there.
3 Q. You were dealing with dollars; you didn't lable it?
4 A. We were dealing with dollars; that's all.
5
6 MR. MEEKS: That's all I have of Mr. Thomas.
7 MR. FREEMAN: I don't have anything further.
8 MR. MEEKS: We don't have any other
9 witnesses, Your Honor.
10
11 THE WITNESS STANDS ASIDE:
12
13
14
15 WILLIAM M. MCCLENNY, being first duly
16 sworn, testifies as follows:
17
18 DIRECT EXAMINATION
19 BY MR. FREEMAN:
20 Q. Mr. McClenny, I'm going to show you a copy of a
21 letter that I'm going to request the Court to indicate as
22 Defendants' Exhibit B.
23
24 MR. MEEKS: Your Honor, with respect to any

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1 representation in the letter as to what W. T. Thomas
2 says, feels or indicates, that would be hearsay, and
3 we object to any material in that letter by Mr.
4 McClenny stating what W. T.'s opinion would be. And
5 we object to that as hearsay.
6 THE COURT: Let me see the letter just a
7 minute.
8 MR. FREEMAN: All right, sir; (Handing
9 letter to The Court)
10 THE COURT: THis is Defendants' Exhibit B;
11 letter from Mr. McClenny to Mr. Jack F. Thomas,
12 dated August, 1977. I don't think it's anything
13 objectionable about that. It's already been proved,
14 Mr. Meeks.
15 MR. MEEKS: We respectfully would like to
16 save the point.
17 THE COURT: I don't think it's anything in
18 there that could be prejudicial. Mr. Jack Thomas
19 agreed to it, and I don't think it's anything
20 possible that could be prejudicial in it.
21
22 BY MR. FREEMAN:
23 Q. Mr. McClenny, did you in fact prepare the letter,
24 a copy of which you have in your hand there?

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A. Yes, sir.

Q. And did you do it in your capacity as an attorney representing Mr. W. T. Thomas, Jr.?

A. Yes, sir.

MR. FREEMAN: That's all the questions I have.

CROSS-EXAMINATION

BY MR. KIZER:

Q. That letter, I believe, was written when you and I were trying to work out a possible compromise, division of the estate, wasn't it?

A. That might have been my first letter to Jack about it; I'm not sure. But I know you and I tried to see if we couldn't work it out.

Q. We were trying to see, your client wanted to sell it and divide it, is that correct?

A. My client wanted a division by sale or by partition if we could get it either way. But it was proposed a sale, because they felt like that might be the best method.

Q. And didn't you come and check the records over here in the clerk's office to see if that loan could be assumed?

A. That's my recollection; that there was something

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1 against it's being assumed at that rate. I don't recall the
2 exact terms.
3 Q. And you found it couldn 't be assumed at that
4 rate; they'd have to negotiate a new loan?
5 A. That's my recollection.
6
7 MR. KIZER: That's all.
8 THE COURT: All right, sir; you may step
9 down.
10
11 THE WITNESS STANDS ASIDE:
12
13 THE COURT: Any further evidence, gentlemen?
14 Does the defense have any evidence?
15 MR. FREEMAN: No, sir.
16 THE COURT: Gentlemen, we're getting a
17 little close to the, in fact we've already passed
18 the time for the next case on the docket today.
19 We're going to have to come back one more time,
20 because I want to study the briefs. I haven't had a
21 chance to even read them at all, and I want to study
22 the will and file a little more than I did today.
23 What I'd like to do is set a date on which
24 I will hear arguments, if you wish to make oral

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