

2968

194-284

Record No. 3988

In the
Supreme Court of Appeals of Virginia
at Richmond

LENA LANDES BAKER

v.

WILLIAM E. BAKER

FROM THE CORPORATION COURT OF THE CITY OF WAYNESBORO

RULE 5:12—BRIEFS.

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

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

M. B. WATTS, Clerk.

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

194 VA 284

RULE 5:12—BRIEFS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) The opening brief of the appellant shall be filed in the clerk's office within twenty-one days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. The brief of the appellee shall be filed in the clerk's office not less than twenty-one days, and the reply brief of the appellant not less than two days, before the first day of the session at which the case is to be heard.

(b) Unless the appellant's brief is filed at least forty-two days before the beginning of the next session of the Court, the case, in the absence of stipulation of counsel, will not be called at that session of the Court; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

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

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

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

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

CLERK
SUPREME COURT OF APPEALS

MAY 20 1952

RICHMOND, VIRGINIA

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 3988

VIRGINIA :

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Thursday, the 24th day of January, 1952.

LENNA LANDES BAKER,

Appellant,

against

WILLIAM E. BAKER,

Appellee.

From the Corporation Court of the City of Waynesboro.

Upon the petition of Lenna Landes Baker an appeal and *supersedeas* is awarded her from a decree entered by the Corporation Court of the City of Waynesboro on the 8th day of December, 1951, in a certain chancery cause then therein depending wherein the said petitioner was plaintiff and William E. Baker was defendant, upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said corporation court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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Lenna Landes Baker,

v.

William E. Baker.

MEMORANDUM.

This is a divorce case. Service of the subpoena in chancery was made by substituted service by the Sheriff of Augusta County by posting the papers on the front door of his usual place of abode. Process was served on September 15th, 1951. There was no appearance by the defendant either in person or by counsel. On October 17th 1951, certain depositions were taken at the office of G. H. Branaman the caption stating "pursuant to notice duly served on the defendant." No notice is attached to the depositions, but there is found in the bill, strange as it may seem, as numbered paragraph "5" on the second page thereof the following:

"5. That the complainant hereby alleges by way of notice to the defendant that on the 17th day of October, 1951, at the offices of G. H. Branaman, Waynesboro, Virginia, between the hours of nine o'clock a. m. and twelve o'clock noon of that date, the complainant will take the depositions of herself and other witnesses to be read in evidence in this cause, and if not begun, or if begun and not completed, the taking of the said depositions will be continued from time to time at the same place and between the same hours;"

No notice of any kind is found in the papers, so the allegation contained in paragraph 5 must be the so-called notice referred to in the caption of the depositions.

Filed in the Clerk's Office of the Corporation Court of Waynesboro City, November 23, 1951.

Teste:

BETSY N. JORDAN,
Clerk

page 12 } It is the opinion of the Court that the foregoing allegation of notice, especially in a divorce case, is improper and inadequate. With experience in more than twenty jurisdictions in all parts of Virginia, the Court has observed that the recognized, proved and long established practice is to give notice by a separate paper served by the proper officer, or the service of which is accepted in a proper manner, and attached to the depositions when they are returned to the Clerk's Office. This method is so uniformly used and so long established that it is the law in such instances. Title 8, Section 307 of the Code makes it clear that the form of notice (that is the language used) or the manner of service (by officer, by acceptance of service, or stipulation of counsel) is not important so long as the purpose of the notice is clear and it is actually received by the party.

However liberal the foregoing statute is, it does not remove all the usual formalities with respect to notice by permitting the notice to be hidden in the body of another instrument. The language of the section clearly indicates a separate paper such as is usually prepared and served by the officer or accepted by the defendant. Had the Legislature meant to permit the practice which counsel has used in this case, it would certainly have been simple to have said that notice may be contained in any other papers filed in the case.

Under the new rules which became effective on February 1, 1950, the Supreme Court of Appeals undertook to provide for the service of a process in simple and understandable form, so that the people upon whom the papers were served would have some understanding of their rights. This objective has certainly been accomplished; the subpoena telling
page 13 } the party upon whom it is served that he need not appear in person, but can file such answer as he wishes within twenty-one days after service. This is all that needs to be done according to the Court's process issued by the Clerk.

To say that an allegation of notice to take depositions made a part of the bill of complainant and contained in the body thereof is good notice, would be a contradiction of the clear language of the Court subpoena, and could easily mislead a layman and the unwary lawyer as well.

The proposed decree tendered in this case has initialed on it "Seen C. R. A." No attorney had thus far appeared and been marked as counsel in the case, nor had there been any appearance at the taking of the depositions either by the party defendant or his attorney. So far as the record is concerned, the attorney who marked the proposed decree "Seen"

is unknown in the case. If this step is taken in an effort to cure the lack of notice, it could not have that effect, certainly in a divorce case as this would surely constitute collusion; and even in any other case the fact that some attorney has marked a decree "Seen" unless it appears in the record whom he represents, such action is of no effect.

Following the submission of the case to the Court a separate paper was filed in the Clerk's Office in the nature of a motion requesting the tendered decree. At the end of this paper it is stated that a copy was served on Carter Allen, who is there alleged to be counsel for the defendant, but this allegation is made by the plaintiff's counsel. This step has no effect upon the invalidity of the depositions sought to be read as evidence in this case.

Close inspection of the rules of the Court as amended does not disclose any permitted deviation from the approved practice of giving notice in divorce cases. Accordingly, the decree in this case must be denied.

C. G. Q.,
Judge

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DECREE.

This cause came on this day to be heard upon the bill, the exhibit therein filed, upon process duly executed upon the defendant, along with the copy of the bill thereto attached as a part of the subpoena, upon the taking and filing of depositions herein, upon motion to enter the decree submitted, as well as upon the argument of counsel.

On consideration whereof, the Court is of the opinion that " * * * the decree in this case must be denied." for reasons stated in writing and filed as a part of the record, to which action the complainant excepts and nothing further remaining to be done in this cause the same is dismissed as ended.

Enter.

C. G. QUESENBERRY,
Judge

December 8th, 1951.

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* * * * *

NOTICE OF APPEAL.

FIRST: Notice is hereby given that the complainant, Lenna Landes Baker, will make application for an appeal to the final judgment entered by the Corporation Court for the City of Waynesboro, Virginia, on the 8th day of December, 1951, to the Supreme Court of Appeals of Virginia.

ASSIGNMENTS OF ERROR.

SECOND: The Corporation Court of said City erred in the following particulars:

1. In refusing to enter the decree submitted, granting the complainant the divorce prayed for and in dismissing the suit as ended;

2. In refusing to read and consider the depositions taken and filed pursuant to notice served on the defendant by the Sheriff of Augusta County; and

3. In ruling that paragraph designated "5" in the bill "That the complainant hereby alleges by way of notice to the defendant that on the 17th day of October, 1951, at the offices of G. H. Branaman, Waynesboro, Virginia, between the hours of nine o'clock a. m. and twelve o'clock noon of that date, the complainant will take the depositions of herself and other witnesses to be read in evidence in this cause, and if not begun, or if begun and not completed, the taking
page 17 } of the said depositions will be continued from time to time at the same place and between the same hours." was not notice or was inadequate notice to take depositions, although served as a part of the subpoena.

Respectfully,

L. ENNA LANDES BAKER
By G. H. BRANAMAN

Counsel

G. H. BRANAMAN
Attorney at Law
Waynesboro, Virginia

Eva Mae Landes.

Copies of the foregoing notice of appeal and assignments of error were mailed to William E. Baker, c/o L. G. Dunsmore, Verona, Virginia and to his attorney, Carter R. Allen, at Waynesboro, Virginia, on the 13th day of December, 1951, prior to the filing of this notice in the Clerk's Office of the Corporation Court for the City of Waynesboro, Virginia.

G. H. BRANAMAN
Attorney

* * * * *

DEPOSITIONS.

The depositions of Lenna Landes Baker, and others, taken at the law offices of G. H. Branaman, Waynesboro, Virginia, on Wednesday, October 17, 1951, pursuant to notice, duly served on the defendant, to be read in evidence in a certain chancery suit now pending in the Corporation Court for the City of Waynesboro.

Present: Lenna Landes Baker, the complainant, in person.
G. H. Branaman, Attorney for the complainant.
Eva Mae Landes, a witness.
Lucille Arnold, a witness.

EVA MAE LANDES,

a witness of law age, first being duly sworn, does, upon her oath, depose and say as follows:

Q. State your name, age, residence and occupation.

A. Eva Mae Landes, age 52, 353 Maple Avenue, Waynesboro, and I am a housewife.

Q. Do you know Mr. and Mrs. William E. Baker?

A. Yes.

Q. How long have you known them?

A. I have known Lenna all her life, but I have known Bill only about seven or eight years.

Q. Are you a kinsman to Mrs. Baker?

A. Yes, she is my daughter.

Q. When was she married and to whom?

page 2 } A. She was married on the 14th day of April,
1945, to William E. Baker, at Waynesboro, Virginia.

Lucille Arnold.

Q. Are they living together as husband and wife now?

A. No. He left his wife on the 2nd day of July, 1951. They were then living together at 353 Maple Avenue, Waynesboro, Virginia, and they have never lived together since. He lives at Verona and he works at Celanese.

Q. Did his wife give him any occasion to leave her?

A. No. None that I know of.

Q. Is the wife, Lenna Landes Baker, a resident of Virginia.

A. Yes. She has lived in Virginia all her life, and they last lived together as husband and wife at the Maple Avenue address in the City of Waynesboro.

Q. When this deposition is transcribed, do you authorize the notary to sign your name to it?

A. Yes.

EVA MAE LANDES
By ANITA M. COURTNEY
Notary Public

LUCILLE ARNOLD,

another witness of lawful age, first being duly sworn, does, upon her oath, depose and says as follows:

Q. What is your name?

A. Lucille Arnold.

Q. Where do you live?

A. 612 Alpha Street, Waynesboro, Virginia.

Q. Do you know Mrs. Lenna Landes Baker?

A. Yes.

Q. How long have you known her?

A. Since her birth in 1920.

Q. Do you know her husband, William E. Baker?

A. Yes.

Q. Where is he now? Do you know?

page 3 } A. No. I cannot tell you where he is at this time.

He left his wife in July of this year. They were then living together on Maple Avenue. I have been told that he is living in Verona and works at Celanese.

Q. Do you know whether he has abandoned and deserted his wife?

A. Yes, he left her and they have not lived together since and from what I know they will never live together again.

Supreme Court of Appeals of Virginia.

Lenna Landes Baker.

Q. When this deposition is transcribed, do you authorize the notary to sign your name to it?

A. Yes.

LUCILLE ARNOLD
By ANITA M. COURTNEY
Notary Public

LENNA LANDES BAKER,
the complainant, of lawful age, first being duly sworn, does,
upon her oath, depose and say as follows:

Q. State your name, age, residence and occupation.

A. Lenna Landes Baker, age 31, 353 Maple Avenue, Waynesboro, Virginia, Chief Clerk at The Virginia Gas Distribution Corporation.

Q. When and to whom were you married?

A. On April 14, 1945, I was married to William E. Baker at Waynesboro, Virginia.

Q. After the marriage where did you and your husband live together?

A. We lived at 352 Pine Avenue, Waynesboro, Virginia, until sometime in 1948 and then we moved to 353 Maple Avenue, Waynesboro, Virginia, and we lived there as husband and wife until July 2, 1951, when he left. We have never lived together since and never will, as the marriage has broken down. He is at Verona, so I am told, has a room there and works at Cclanese.

page 4 } Q. Have you always been a resident of Virginia?

A. Yes, always.

Q. Were there any children born to the marriage?

A. No, none.

Q. Is there any prospect of reconciliation between you and your husband?

A. None whatsoever. I am through with him.

Q. Did you give your husband any occasion for him to leave?

A. No. His manner of life, the way he lived and did brought on the disruption of our marriage.

Q. When this deposition is transcribed, do you authorize the notary to sign your name to it?

A. Yes, I do.

LENNA LANDES BAKER
By ANITA M. COURTNEY
Notary Public

State of Virginia,
City of Waynesboro, to-wit:

I, Anita M. Courtney, a Notary Public in and for the City of Waynesboro, in the State of Virginia, do hereby certify that Eva Mae Landes, Lucille Arnold, and Lenna Landes Baker, personally appeared before me at the time and place in the caption mentioned, were duly sworn and testified as recorded in the foregoing depositions, and that their names have been signed to the same by me as authorized.

My term of office expires on the 18th day of September, 1955.

Given under my hand this the 17th day of October, 1951.

ANITA M. COURTNEY
Notary Public

A Copy—Teste:

M. B. WATTS, C. C.