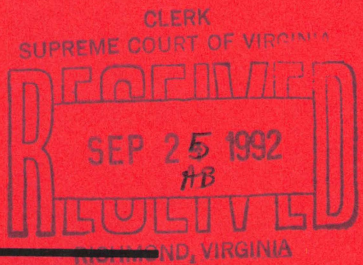


245 VA436



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IN THE  
**Supreme Court of Virginia**

AT RICHMOND

RECORD NO. 9204<sup>3</sup>~~2~~8

VIRGINIA GOULDIN ROSEBERRY,

*Appellant,*

v.

THOMAS M. MONCURE, JR., Executor of the  
Estate of Kate. G. Wood, Deceased,

*Appellee.*

---

JOINT APPENDIX

---

Richard Earle Smith  
Attorney at Law  
5905 West Broad Street  
Suite 302  
Richmond, VA 23230  
(804) 282-0088

*Counsel for Appellant*

Thomas L. Bricken  
BRICKEN & POTTER  
904 Princess Anne Street  
Fredericksburg, VA 22404-0907  
(703) 373-2504

*Counsel for Appellee*



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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR.,	)
Executor of the Estate of	)
Kate G. Woods, deceased	)
	)
Plaintiff,	)
	)
v.	)
	)
THE HEIRS, DEVISEES, and	)
SUCCESSORS IN TITLE of	)
KATE G. WOODS, who are made	)
parties defendant by the	)
general description of	)
"Parties Unknown"	)
	)
Defendants.	)

BILL OF COMPLAINT

TO: THE HONORABLE JAMES W. HALEY, JR., JUDGE

COMES NOW your plaintiff, Thomas M. Moncure, Jr., Executor, by counsel and respectfully represents as follows:

1. This is a suit for a declaratory judgment for the proper construction and interpretation of the Will of Kate G. Woods, who died testate on May 23, 1991, a copy of her Will is attached hereto as Exhibit "A".

2. The Will, dated August 29, 1989, was duly probated in the Clerk's office of this Court on May 24, 1991, and the plaintiff, duly qualified as Executor.

3. By her Will, the testatrix, Kate G. Woods, devised certain real estate to the Humane Society of the United States (HSUS), a charitable corporation. This real estate is more

particularly described in Exhibit "B".

4. By instrument dated July 23, 1991, HSUS has disclaimed this succession of the above-described real estate. A copy of this instrument is attached hereto as Exhibit "C".

5. As a result of the HSUS disclaimer, at least one of the heirs at law of Kate G. Woods, deceased, has asserted a claim to the above-described real property. A copy of this instrument is attached hereto as Exhibit "D".

6. The Will in Article Fifth further provides:

In the event that HSUS violates the above terms and conditions, or in the event that the HSUS attempts to transfer, alienate or otherwise convey any title or interest in any of the property, then I authorize my Executors, or if they be not living, a court of competent jurisdiction, to convey all of the said real property under the terms and conditions as hereinabove set forth unto any corporation, organization or institution capable and willing to maintain said property as a wildlife refuge. It is my expressed intention that all of my real property be treated as one parcel, except as otherwise specifically stated herein, regardless of source of title.

7. It is the position of the plaintiff that under the proper construction and interpretation of this Will, the testatrix intended that in the event HSUS disclaimed succession to the above-described property, that the Executor convey the real property to another institution capable and willing to maintain the property as a wild-life refuge. By its disclaimer of succession, HSUS has in fact attempted to "alienate or otherwise convey any title or interest in any of the property".

8. There does exist an actual controversy concerning the proper construction, interpretation and effect of the Will of the

late Kate G. Woods within the purview of Section 8.01-84, et seq. of the Code of Virginia of 1950, as amended.

9. There are or may be persons interested in the subject matter to be disposed of whose names are unknown, and who are made parties hereto under the general description of "PARTIES UNKNOWN".

10. WHEREFORE, the plaintiff prays that the Court will take jurisdiction of this proceeding; that the Court construe and interpret the Will of Kate G. Woods; that the Court grant guidance to the Executor in accordance with the determination of this Court; and for such other further relief as may be necessary and proper.

THOMAS M. MONCURE, JR., Executor  
of Kate G. Woods, deceased

By:   
\_\_\_\_\_

Of Counsel

Thomas L. Bricken & Assoc., P.C.  
P. O. Box 907  
Fredericksburg, Virginia 22404  
(703) 373-2504

CERTIFICATE

This is to certify that a true copy of the foregoing documents were mailed, postage prepaid this 3<sup>RD</sup> day of October, 1991, to Richard Earle Smith, counsel for unnamed heir at law of Kate G. Woods, at 5905 W. Broad Street, Suite 302, Richmond, Virginia 23230.

  
\_\_\_\_\_

Thomas L. Bricken

GOPT

LAST WILL AND TESTAMENT

OF

KATE G. WOODS

I, KATE G. WOODS, of Stafford County, Virginia, do hereby make, ordain, publish and declare this writing to be my Last Will and Testament, hereby revoking any and all other Wills and Codicils heretofore made by me.

FIRST

I direct my Executors hereinafter named to pay as a cost of the administration of my estate all of my just debts, expenses of last illnesses, funeral expenses, including the cost of a suitable marker, estate and inheritance taxes that may be due from my estate. I further direct that my Executors place a suitable marker at the grave of my uncle, Robert Hayman Gray, as a cost of my estate.

SECOND

I direct that I be buried in the family cemetery at Eastwood. I further direct that a private funeral be conducted and attended only by my close personal friends, and that the funeral service be conducted in accordance with the Book of Common Prayer of the Episcopal Church.

THIRD

I direct that all of my domestic animals be put to death, as

[PAGE ONE OF SIX PAGES]

EXHIBIT "A"

*Handwritten signature*

humanely as possible, immediately upon my death

that the cats and dogs be put to death by either Larry Witter or Alan Witter personally, that Joe Rodgers assist in capturing the animals and Gregory H. Rodgers bury them. I further direct that my Executors pay the Witters for providing said service.

#### FOURTH

I give, devise and bequeath all of my tools, automobile, machinery and firearms, and related equipment, unto Gregory H. Rodgers. I further give, devise and bequeath Fifty Thousand Dollars (\$50,000.00) worth of shares in the Jefferson National Bank (Jefferson Bankshares) unto Gregory H. Rodgers. In the event that said shares do not equal exactly Fifty Thousand Dollars (\$50,000.00), then I direct that number of shares so bequeathed equal not less than Fifty Thousand Dollars (\$50,000.00).

#### FIFTH

I give, devise and bequeath unto the Humane Society of the United States (HSUS), a charitable corporation, maintaining its headquarters in the District of Columbia at 2100 L Street, N.W., Washington D.C. 20037, the remainder of Eastwood, being further identified by reference to Tax Map 59, Parcel 69, of the land tax records of Stafford County, and the adjoining property on State Route 603, being further identified by reference to Tax Map 60, Parcel 22A, of the land tax records of Stafford County (both parcels being hereinafter referred to as Eastwood), and all of Snowden, being further identified by reference to Tax Map 63, Parcel 1 of the land tax records of Stafford County (hereinafter

[PAGE TWO OF SIX PAGES]

referred to as Snowden), and North Snowden, being further identified by reference to Tax Map 60, Parcel 35 of the land tax records of Stafford County (hereinafter referred to as North Snowden) for the purpose of establishing a permanent wildlife refuge under the following terms and conditions:

a. That no hunting, fishing or trapping will be permitted.

b. That no sightseeing or other activities will be permitted, it being my intention that the property be left in a natural state with no unnecessary interference or intrusion from human beings.

c. That no commercial lumbering will be permitted.

d. That the HSUS will preserve the property as a wildlife habitat and manage only as best practices dictate to enhance the habitat for the benefit, promotion and protection of wildlife.

e. That no activities will be permitted along the portion of the Snowden property fronting the Rappahannock River, and further that every reasonable precaution be taken to prevent trespassing from the River.

e. That Thomas M. Moncure, Jr., his wife and the heirs of his body may enter upon the Eastwood property at any time.

f. That my Executors may enter upon any of the property to assure compliance with the terms and conditions of this will.

g. That a caretaker may, subject to the provisions of Paragraph SEVENTH, occupy my home, Snowden, and its immediate curtilage. Said caretaker must meet the approval of my Executors and may be replaced at the direction of my Executors.

[PAGE THREE OF SIX PAGES]



In the event that HSUS violates the above terms and conditions, or in the event that the HSUS attempts to transfer, alienate or otherwise convey any title or interest in any of the property, then I authorize my Executors, or if they be not living, a court of competent jurisdiction, to convey all of the said real property under the terms and conditions as hereinabove set forth unto any corporation, organization or institution capable and willing to maintain said property as a wildlife refuge. It is my expressed intention that all of my real property be treated as one parcel, except as otherwise specifically stated herein, regardless of source of title.

SIXTH

I direct that my Executors take possession of all family papers and books, and that they donate those items that they believe, in their sole discretion, to have particular historical significance unto the Virginia Historical Society.

SEVENTH

I direct that my Executors permit no person to enter my home, Snowden, except as in their sole discretion, only as necessary to conduct the affairs of my estate. I further direct that my Executors shall not be required to rent my home, and that no beneficiary of my estate look to the application of rental proceeds.

*MSD*  
I further direct that the house on North Snowden be sold and removed from the property, or dismantled and removed from the property, whichever option my Executors deem most expedient.

[PAGE FOUR OF SIX PAGES]

EIGHTH

I give, devise and bequeath all the remainder of my property, personal and mixed, owned by me at the date of my death or thereafter accruing unto my estate, unto the Humane Society of the United States, a charitable corporation, now maintaining its headquarters in the District of Columbia at 2100 L Street, N.W., Washington, D.C. 20037.

NINTH

I nominate and appoint THOMAS M. MONCURE, JR. and JOHN A. JAMISON as Executors of this my Last Will and Testament, and I request that no security be required on the bond of my said Executors. I authorize my Executors either to request or not to request the Court or Clerk to appoint appraisers for my estate as my Executors, in their sole discretion, shall deem to be in the best interest of my estate.

In administering my estate, my said Executors shall have all of the powers enumerated in Title 64.1-57 of the Code of Virginia, 1950, as amended, which powers by this reference are hereby incorporated into this Will.

I further direct that my Executors utilize the assistance of Jeanette and Richard Flipppo in the disposition of my personal property.

*KSW*  
I specifically direct that Thomas M. Moncure, Jr. serve with no fee, and I would request that John A. Jamison serve on an hourly basis as services are performed in lieu of a flat percentage of my estate.

[PAGE FIVE OF SIX PAGES]

GIVEN UNDER MY HAND this 29th c of August, 1989.

Kate G. Woods  
KATE G. WOODS

[Signature]

Witness

Tracy D. Dwyer  
Witness

[PAGE SIX OF SIX PAGES]

COMMONWEALTH OF VIRGINIA

COUNTY OF STAFFORD, to-wit:

Before me, the undersigned authority, on this day personally appeared KATE G. WOODS, Thomas M. Moncure and Tracey D. Griffith, known to me to be the Testatrix and the witnesses, respectively, whose names are signed to the attached Last Will and Testament and all of these persons being by me duly sworn, KATE G. WOODS, the Testatrix, declared to me and to the witnesses in my presence that said attachment is her Last Will and Testament and that she had willingly signed same and executed it in the presence of said witnesses as her free and voluntary act for the purposes therein expressed; that said witnesses stated before me that the attached Will was executed and acknowledged by the Testatrix as her Last Will and Testament in the presence of said witnesses, who, in her presence and at her request, and in the presence of each other, did subscribe their names thereto as attesting witnesses on the day of the date of said Will, and that the Testatrix, at the time of execution of said Will, was over the age of 18 years and of sound and disposing mind and memory.

Kate G. Woods  
KATE G. WOODS

Thomas M. Moncure  
Witness

Tracey D. Griffith  
Witness

Subscribed, sworn and acknowledged before me by KATE G. WOODS, Thomas M. Moncure and Tracey D. Griffith, witnesses, this 29th day of August, 1989.

W. Lynn Haraway  
Notary Public

My Commission Expires: 12-30-91



**VIRGINIA:**

**IN THE CIRCUIT COURT OF STAFFORD COUNTY**

---

**IN RE: Estate of Kate G. Woods, Deceased**

**DISCLAIMER OF SUCCESSION TO PROPERTY**

THE HUMANE SOCIETY OF THE UNITED STATES, headquartered in Washington, D.C., beneficiary under the Will of Kate G. Woods, who died testate on May 23, 1991, a resident of Stafford County, Virginia, and whose Will, dated November 6, 1989, was probated on May 24, 1991, before the Clerk of the Circuit Court of Stafford County, Virginia, and is recorded in said Clerk's Office in Will Book 23 at page 622, does hereby irrevocably, unqualifiedly and forever disclaim a portion of the provision made for it in said Will, namely and solely the real property devised and bequeathed by paragraph FIFTH of said Will.

The Humane Society of the United States expressly does not disclaim any property which passes to it under said Will other than the real property described above and specifically does not disclaim any and all of the remainder and residue of said estate devised and bequeathed in paragraph EIGHTH of said Will.

**EXHIBIT "C"**

This disclaimer is made within 9 months of the death of the said Kate G. Woods and a copy has been mailed to Thomas M. Moncure, Jr., Executor of the Estate of Kate G. Woods.

WITNESS my signature and seal this 23rd day of July, 1991.

Murdaugh Stuart Madden (SEAL)  
Murdaugh Stuart Madden  
Vice President, Senior Counsel  
THE HUMANE SOCIETY OF THE  
UNITED STATES

**DISTRICT OF COLUMBIA:ss**

I, the undersigned Notary Public, do hereby certify that Murdaugh Stuart Madden, whose name is signed to the foregoing Disclaimer of Succession to Property, bearing date of July 23rd, 1991, has acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand this 23rd day of July, 1991.

John Truong  
Notary Public

Attorney at Law  
5905 W. Broad Street, Suite 302  
Richmond, Virginia 23230  
Telephone (804) 282-0088  
Telefax (804) 285-9514

Richard Earle Smith

August 19, 1991

Mr. Thomas M. Moncure, Jr.  
498 Caisson Drive  
Falmouth, Virginia 22405

Re: Estate of Kate G. Woods, deceased

Dear Mr. Moncure:

I have been approached by an heir at law of Kate G. Woods, deceased, relative to the terms of her last will and testament probated on May 24, 1991, and under the probate of which you qualified as Executor.

From a reading of the will, it appears by the terms of article Fifth that the deceased's real property was devised to the Humane Society of the United States (HSUS) and I am advised that HSUS has declined the devise. A newspaper article provided to me indicates that you, as Executor, have offered the disclaimed property to an organization known as Friends of the Rappahannock to be utilized along the guidelines set forth in the will. However, that last paragraph of article Fifth states that in the event that HSUS attempts to transfer or alienate the property then, and only then, is the Executor authorized to offer the property to others willing to maintain the property as a wildlife refuge.

If, in fact, HSUS has disclaimed the devise, there can be no alienation on its part so as to give rise to a gift of the property to others.

Also, there does not appear to be a catch-all residuary clause in the will as article Eighth relates solely to personal and mixed property and not to real property.

While I have not had the opportunity at this point to research the matter fully, it does appear that the decedent may have very well died intestate as to her real property due to the HSUS disclaimer and, if so, this property may have to be passed to her heirs at law under the Virginia intestacy statutes.

I wish to have your views on this matter and ask that you be in contact with me.

Yours very truly,

  
Richard Earle Smith

RES:fb

13

EXHIBIT "D"

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR., )  
Executor of the Estate of )  
Kate G. Woods, deceased, )  
Plaintiff )

v. )

CHANCERY NO: \_\_\_\_\_

THE HEIRS, DEVISEES, and )  
SUCCESSORS IN TITLE of )  
KATE G. WOODS, who are made )  
parties defendant by the )  
general description of )  
"Parties Unknown", )  
Defendants )

ANSWER

TO THE HONORABLE JUDGE OF THE AFORESAID COURT:

Comes now, Virginia Gouldin Roseberry, by counsel, and  
for her Answer to the Bill of Complaint filed herein, states  
as follows:

1. That she is the niece of Kate G. Woods, deceased.
2. That Jack Leeland Gouldin and Julia Gray Gouldin,  
both deceased, were the father and mother of Kate G. Woods,  
William Hayman Gouldin, and Robert Edward Gouldin.
3. That Robert Edward Gouldin is deceased without issue.
4. That William Hayman Gouldin is deceased and his sole  
issue is Virginia Gouldin Roseberry.
5. That Virginia Gouldin Roseberry is an heir at law of  
Kate G. Woods, deceased, and a proper defendant herein.
6. As a defendant herein, she admits the allegations  
contained in paragraphs 1, 2, 3, 4, 5, and 6 of the Bill of  
Complaint.



7. The defendant admits the allegation contained in Paragraph 7 of the Bill of Complaint as it relates to the expressed intention of the testatrix, but denies the allegation that the HSUS disclaimer has the effect of alienating or otherwise conveying any title or interest in any of the real property.

8. The defendant agrees with the allegation contained in paragraph 8 of the Bill of Complaint and affirmatively states that the actual controversy concerning the construction and interpretation of the Will of Kate G. Woods is within the purview of Section 8.01-184, Code of Virginia, 1950, as amended.

9. The defendant agrees with the allegation contained in paragraph 9 of the Bill of Complaint to the extent that there may be other persons interested in the subject matter of this suit whose names and relationship to the testatrix are unknown to defendant.

#### CROSS-BILL

And now by way of affirmative relief, your defendant files this Cross-Bill against plaintiff and represents as follows:

10. That your defendant adopts the allegation contained in paragraphs 1, 2, 3, 4, 5, and 6 of the Bill of Complaint.

11. That an actual controversy exists and that the Will of Kate G. Woods be construed and interpreted within the purview of Section 8.01-184, Code of Virginia, 1950, as amended.

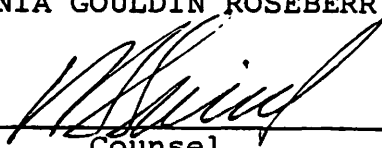
12. It is your defendant's position that the devise set forth in Article FIFTH of said last Will is invalid as it denies any alienation of the real property by any devisee, named or unnamed, and as a result thereof the devise is repugnant to

the estate devised. The disclaimer by the Humane Society of the United States (HSUS), duly recorded in accordance with Section 64.1-188, Code of Virginia, 1950, as amended, does not create an alienation by it, nor does it otherwise convey any title or interest in any of the real property. The devise set forth in Article FIFTH being void, the decedent died intestate as to her real property as the residuary clause in said Will set forth in Article EIGHTH deals solely with personal property.

WHEREFORE, your defendant prays that this Court take jurisdiction of this proceeding and that the rights of the parties hereto, and the rights of parties unknown, in the net Estate of Kate G. Woods, deceased, be determined; that this Court construe and interpret said Will and grant guidance to the Executor in the distribution of the net estate in accordance with the determination of this Court.

VIRGINIA GOULDIN ROSEBERRY


By

  
Counsel

Richard Earle Smith  
Counsel for Virginia  
Gouldin Roseberry  
5905 West Broad Street, Suite 302  
Richmond, Virginia 23230  
(804) 282-0088

CERTIFICATE

I certify that a true and exact copy of the foregoing Answer was mailed, postage prepaid, this 17<sup>th</sup> day of October, 1991, to Thomas L. Bricken, Esquire, Thomas L. Bricken & Associates, P.C., P.O. Box 907, Fredericksburg, Virginia 22404, counsel for plaintiff.

  
\_\_\_\_\_  
Richard Earle Smith

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR., )  
Executor of the Estate of )  
Kate G. Woods, deceased, )

Plaintiff )

v. )

THE HEIRS, DEVISEES, and )  
SUCCESSORS in TITLE of )  
KATE G. WOODS, )

Defendants )

MEMORANDUM OF FACTS AND LAW OF DEFENDANT  
VIRGINIA GOULDIN ROSEBERRY, HEIR AT LAW

---



III. DISCUSSION

A. ARTICLE FIFTH OF THE LAST WILL OF KATE G. WOODS IS VOID.

The right of alienation of real property is an inherent and inseparable quality of an estate in fee simple. A devise of land in fee simple, therefore, that contains a condition against all alienation is void as being repugnant to the estate devised. Carneal v. Kendig, 196 Va. 605, 85 S.E. 2d 235 (1955).

Article FIFTH of the will attempts a devise of land to HSUS, but subject to the proviso that if HSUS violates any of the enumerated conditions, "... or in the event that the HSUS attempts to transfer, alienate or otherwise convey any title or interest in any of the (real) property, then I authorize my Executors, or if they be not living, a court of competent jurisdiction, to convey all of the said real property under the terms and conditions as hereinabove set forth unto any corporation, organization or institution capable and willing to maintain said property as a wildlife preserve."

(Emphasis added).

It is obvious that the language of Article FIFTH sets forth the clear intention of the testator to preserve the real property owned by her at her death for a wildlife refuge. It is equally clear that the conditions underlying the devise of the property, including, but not limited to the non-alienation of the whole, is an expression of clear intent by the testator to place restraints on the devise in perpetuity.

The court, in Dunlop v. Dunlop's Ex'rs, 144 Va. 297, 132 S.E. 351 (1926), addressed the issue of whether a testator in a will may endeavor to impose upon a donee any condition incompatible with the usual and necessary incidents accompanying

a fee simple estate. The court quoted language from Hutchinson v. Maxwell, 100 Va. 169, 175, 40 S.E. 657 (1902): "It is well settled in this country and in England, from which country we derived the principles of our jurisprudence, that a gift or grant of a beneficial estate, in fee or absolutely, whether legal or equitable, has certain legal incidents of which the estate cannot be divested, and all conditions adopted for that purpose are necessarily repugnant and void. Among those incidents are the donee's or grantee's power of alienating such estate...". The court in Hutchinson went on to say: " The reason for this doctrine or principal (ie, the power of alienation) is the repugnancy of such restraints upon the ordinary rights of property, and that property would thereby be withdrawn from the ordinary rules and channels of commerce and trade".

**B. A DISCLAIMER OF A TESTAMENTARY DEVISE DOES NOT RESULT IN AN ALIENATION OR CONVEYANCE OF TITLE OR INTEREST IN PROPERTY.**

An exception to the rule that conditions prohibiting the alienation of a vested fee simple estate or requiring a forfeiture upon alienation is void in that conditions prohibiting alienation of land to corporate entities for their special purposes are valid. Edwards v. Bradley, 227 Va. 224, S.E. 2d (1984); 1 Minor Sec. 557.

Assuming that a special purpose of the Humane Society of the United States (HSUS) is to operate and maintain wildlife sanctuaries then, upon this hypothesis, it would fall within the exception to the rule. But, HSUS, upon its own volition, decided that it did not wish to accept the property devised to it under

Article FIFTH of the will and it filed a disclaimer of the devise with the court.

The plaintiff takes the position that by its disclaimer of succession to the real property, HSUS has attempted to alienate or otherwise convey any title or interest in any of the property, and by such alienation opens the door for a subsequent devise of the property. We disagree. The effect of a disclaimer passing under a testamentary instrument is controlled by statute in Virginia. Section 64.1-190 A, Code of Virginia, states that unless the decedent has otherwise provided by his will, the property or part thereof or interest therein disclaimed shall descend or be distributed as if the disclaimant had predeceased the decedent. Logic, dictates that if a disclaimant has predeceased the testator, the one disclaiming would hardly be in the position to "alienate or otherwise convey any title or interest in any of the property."

The weight of authority in this country supports the view that title does not pass until the devisee accepts the gift, and a renunciation of a gift relates back to the time the will took effect. 80 Am Jur 2d, Wills, Sec. 1606.

In this case, we have a disclaimer (renunciation) of an entire devise of real property that was made by a devisee (HSUS) in proper form, properly recorded, and within nine months after the death of the testator as provided in Section 64.1-189, Code of Virginia. It is the defendant's position that we have a lapsed devise of the property, and the general rule is that the disclaimed property will pass under the residuary clause



in the will.

C. ARTICLE EIGHTH OF THE WILL IS THE SOLE RESIDUARY CLAUSE.

Article EIGHTH of the will of Kate G. Woods provides:

I give, devise and bequeath all the remainder of my property, personal and mixed, owned by me at the date of my death or thereafter accruing unto my estate, unto the Humane Society of the United States, a charitable corporation, now maintaining its headquarters in the District of Columbia at 2100 L Street, N.W., Washington, D.C. 20037

Article EIGHTH is the sole residuary clause in the will and relates solely to personal property of the decedent owned by her at the time of her death.

As previously stated, the HSUS disclaimer of the property devised under Article FIFTH operates as a lapsed devise of real property that should pass under the residuary clause in the will, if applicable. However, the sole residuary clause in the will (Article EIGHTH) relates solely to personal property remaining in the estate after specific bequests and devises have been made. A lapsed devise of real property cannot pass under a residuary clause dealing solely with personal property. The logic is extended by the wording of the HSUS disclaimer. In its disclaimer, HSUS irrevocably, unqualifiedly and forever disclaimed a portion of the provision made for it in the will, namely and solely the real property devised and bequeathed by paragraph FIFTH. However, HSUS did not disclaim any property passing to it under Article EIGHTH of the will (the residuary clause). Certainly, HSUS would not disclaim the devise of real property if it expected the real property would pass to it under

the residuary clause.

The sole purpose of the HSUS disclaimer is to reject the devise of real property, but to accept the bequest of any personal property that might remain in the estate. Had the testator intended that real property would pass under her residuary clause, she would have affirmatively stated that the residue included real property, and this she did not do.

D. ARTICLE FIFTH OF THE WILL VIOLATES THE RULE  
AGAINST PERPETUITIES.

By definition, a perpetuity which is not to vest within the period fixed by law is void. The rule against perpetuties "is a rule adopted in furtherance of public policy to prevent excessive restraints or limitations upon the alienation of an estate".

Burruss v. Baldwin, 199 Va. 883, 103 S.E. 2d 249 (1958);

White v. National Bank, 212 Va. 568, S.E. 2d (1972).

"The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied". Gray, The Rule Against Perpetuities, Sec. 629 (4th ed. 1942).

Applying the rule to the present case, we must first, we think, review the intention of the testator as expressed by her in her will. In Article FIFTH it is clear that she intended to devise the property to the Humane Society subject to certain

enumerated conditions and the additional condition, contained on page Four of the will, that absolutely restricts HSUS from transferring, alienating or otherwise conveying any title or interest in any of the property. Simply stated, fee simple title could never vest in HSUS owing to the announced intention of the testator that in the event that HSUS ever attempted to convey any of the property, the devise would revert to the executor, or a court, to convey the property to an unnamed third party. Likewise, a conveyance to such a third party could not constitute a fee simple conveyance because the testator stipulated that such conveyance would be subject to the same 'terms and conditions' as was the devise to HSUS, ie, that there could never be a transfer, alienation or other conveyance of the property. By the terms of Article FIFTH, no person, corporation, organization or institution would ever obtain a fee simple title to the property. The failure of vesting of title within the time limitations prescribed results in the devise being squarely within the command of the rule against perpetuities.

Section 55.13.3, Code of Virginia, provides guidance in applying the rule against perpetuities. Subsection A. provides that a transfer of an interest in property fails if the interest does not vest, if it ever vests, within the period of the rule against perpetuities (lives in being plus 21 years and 10 months).

Application of this code section to the factual situation created by the testator's will, it can readily be seen that, owing to the prohibition against alienation or transfer of interest in the real property, the interest intended to be

devised can never vest, ie, become a fee simple estate. If ever the devisee sought to transfer or convey as little as one acre, the devise would revert to the executor or the court. Clearly, the devise violates the rule.

The test by which to ascertain whether a limitation over is void for remoteness does not depend on the character or nature of the contingency or event upon which it is to take effect, but it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law within which the gift ever must take effect. 28 Am. Jur. 2d, Estates, Sec. 339.

The clear intention of Kate G. Woods, as expressed in her will, is to perpetually enjoin any devisee of her real property from ever alienating, conveying or transferring the real property upon the condition that if such alienation, etc., ever is attempted by the devisee, named or unnamed, the property is to revert to the executor or the courts. Vesting of the estate is therefore totally remote and in violation of the rule against perpetuities.

#### IV. CONCLUSION

There is no question that the testator intended to devise her real property in order that a wildlife refuge would be established on her property. In attempting to accomplish this result, however, she attached a condition to the devise which prevents any devisee from alienating, conveying or otherwise transferring title to the property in perpetuity. Simply stated, it was her intention to withdraw the property from the normal

channels of commerce for all time.

The devisee, the Humane Society of the United States, decided, following probate, to disclaim the devise, but to retain the bequest of personal property that was included in the will's residuary clause.

The executor contends in his bill of complaint that the disclaimer of the devise by HSUS is tantamount to an attempted alienation or conveyance of the property and, presumably therefore, he can name a third party as taker of the devise. Section 64.1-190, Virginia Code, clearly states that when an interest in property passing under a testamentary instrument is disclaimed, the property so disclaimed shall descend or be distributed as if the disclaimant had predeceased the decedent. Clearly, one who is deemed by the act of disclaimer to have predeceased the testator is in no position to alienate or convey any interest in the property that would have been taken if not disclaimed.

In this case HSUS disclaimed, in proper form duly recorded, the devise of the real property, but reserved unto itself the bequest of personal property prescribed in Article EIGHTH of the will. As Article EIGHTH addresses only personal and mixed property remaining in the estate, it is clear that the clause cannot be extended to include real property.

A careful reading of Article FIFTH reveals that the real property may be devised to an unnamed third party when and if HSUS ever attempts to transfer, alienate or otherwise convey any title or interest in any of the property. It would indeed be a

non sequitur to say that a disclaimant of property, who under statute is presumed to have predeceased the maker of the gift, has by disclaiming the property attempted a transfer, alienation or conveyance of title or interest in the property.

The sole rationale that can be employed is that the real property devise has been disclaimed by the named devisee in the will and as there is no devise over, except upon the condition stated, the attempted devise must fail. Any and all property belonging to a decedent at his death but which for some reason does not pass under a will left by him descends and is distributed as intestate property under the statute of descent and distribution, 23 Am. Jur. 2d, Descent and Distribution, Sec. 25.

For the sake of argument, even if it were determined that HSUS had, by its disclaimer, alienated the property, the devise must fail on the grounds that (i) any gift of property that totally denies alienation is repugnant to the estate given, and (ii) as the will clause totally prohibits any alienation of the property sought to be devised, a fee simple estate can never be achieved thus violating the rule against perpetuities. Where an intended devise fails by reason of some positive rule of law, the property involved becomes intestate property unless absorbed by an alternative provision or by a residuary clause in the will. 23 Am. Jur. 2d, Descent and Distribution, Sec. 25, supra.

Here, Article EIGHTH deals solely with personal property and cannot save the void devise of real property.

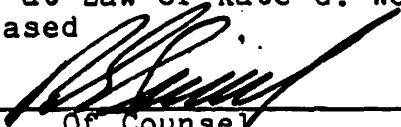
It is the defendant's contention that the attempted devise contained in Article FIFTH of the will of Kate G. Woods is void

and that the property is intestate property belonging to the heirs  
at law of Kate G. Woods.

Respectfully submitted,

Virginia Gouldin Roseberry,  
Heir at Law of Kate G. Woods,  
deceased

By

  
Of Counsel

Richard Earle Smith  
5905 West Broad Street, Suite 302  
Richmond, Virginia 23230  
(804) 282-0088

CERTIFICATE

I certify that a true copy of the foregoing Memorandum of Facts and Law of defendant, Virginia Gouldin Roseberry, was mailed, postage prepaid, this 31<sup>st</sup> day of December, 1991, to Thomas L. Bricken, Esquire, BRICKEN & POTTER, P.C., P.O. Box 907, Fredericksburg, Virginia 22404-0907, counsel for Thomas M. Moncure, Jr., Executor.

  
Richard Earle Smith



VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR.,                     )  
Executor of the Estate of                     )  
Kate G. Woods, deceased                     )

Plaintiff,                     )  
   )

v.   )  
   )

THE HEIRS, DEVISEES, and                     )  
SUCCESSORS IN TITLE of                     )  
KATE G. WOODS, who are made                     )  
parties defendant by the                     )  
general description of                     )  
"Parties Unknown"                     )

Defendants.                     )

Plaintiff's Memorandum of Facts and Law

Statement of the Facts

---

The plaintiff filed a bill of complaint seeking a declaratory

judgment for the proper construction and interpretation of this Will. It was the stated position of the plaintiff that the HSUS disclaimer was in fact an "attempt to alienate or otherwise convey any title to the property", which triggered the provision requiring the Executor to convey the real property to another organization.

The defendant by her answer and cross-bill admitted the allegations contained in paragraphs 1 through 6 and paragraph 8 of the bill of complaint. The defendant denied the plaintiff's interpretation of the HSUS disclaimer, and took the position that Article FIFTH of the will was void. The defendant then joined the plaintiff in asking the Court's guidance in interpreting the Will.

#### ARGUMENT

DOES THE DISCLAIMER BY THE HUMANE SOCIETY OF THE UNITED STATES (HSUS) ALLOW THE EXECUTOR TO NOW CONVEY THIS REAL ESTATE TO ANOTHER ORGANIZATION CAPABLE AND WILLING TO MAINTAIN THE PROPERTY AS A WILDLIFE REFUGE?

A careful interpretation of the Will of Kate G. Woods yields but one answer: Yes, because it was the intent of Kate Woods that in the event HSUS did anything that would prevent it from carrying out her desire to establish a permanent wildlife refuge, her Executor should step in and convey the property to another organization.

The courts in Virginia have stated many times that no two wills are alike, consequently, seeking historical case precedent can be somewhat futile. However, there are some very well established guidelines upon which the Court should rely, such as:

Construction in the law of wills is the ascertaining and determining of the testator's intention as expressed in his will and its application to the existing facts and circumstances with which said intention deals. (emphasis added)

Three things appear to be essential as part of this definition: First, the intention of the testator controls; Second, that intention must be expressed in the will; and Third, the expressed intention must be applicable to the existing facts and circumstances. Harrison on Wills, Section 255 (1985).

As stated another way in a recent case before the Virginia Supreme Court, "The intention of the testator must control. When this intention, which is the guiding star, is ascertained and can be made effective, the quest is ended and all other rules become immaterial." Picot v. Picot, 237 Va. 686, 379 S.E.2d 364 (1989).

In this case we need look no further than the testatrix's intent. It is absolutely clear from the language of Article FIFTH of the Will that it was the intention of Kate Woods to preserve the real property owned by her at her death for a permanent wildlife refuge. Unfortunately, for whatever reason, the Humane Society of the United States felt it could not maintain a wildlife refuge in Stafford County, and it disclaimed this devise of real property.

The language of Article FIFTH, when read as a whole, makes it abundantly clear that in the event HSUS violated any terms of this Article, including not accepting title to the real property, that Kate Woods intended for her Executor to appoint another organization "capable and willing to maintain said property as a wildlife refuge."

The stated position of the defendant would not only thwart the

intent of Kate Woods, but would also result in a portion of the will being invalid, which would cause partial intestacy. Neither of these results is favored under Virginia law, and numerous cases have so held. A 1954 case said it best: "Where the language used in a will is reasonably susceptible of two different constructions, one which will defeat and the other sustain the provisions, the doubt is to be resolved in favor of the construction which will give affect to the will, rather than the one which will defeat it". Owens v. Bank of Glen Spring, 195 Va. 1138, 181 S.E.2nd 565 (1954) (emphasis added)

There is no need to resort to tortured rules of construction when the intent of the will is clear. The intent of the will of Kate G. Woods is abundantly clear. She intended that her real property be maintained as a permanent wildlife refuge, and that the Humane Society of the United States was to be the Fiduciary to carry out this purpose. If HSUS could not, or would not, carry out her intent, then she wanted her Executor to appoint another organization who was capable and willing to carry out her intent. The Executor stands ready to carry out this duty.

Respectfully submitted,

THOMAS M. MONCURE, JR.,  
Executor of Kate G. Woods,  
deceased

By: 

Of Counsel

Thomas L. Bricken  
Bricken & Potter, P.C.  
P. O. Box 907  
Fredericksburg, VA 22404  
(703) 373-2504

CERTIFICATE

This is to certify that a true copy of the foregoing documents were faxed and mailed, postage prepaid this 16<sup>TH</sup> day of December, 1991, to Richard Earle Smith, counsel for Virginia Gouldin Roseberry at 5905 W. Broad Street, Suite 302, Richmond, Virginia 23230.

A handwritten signature in black ink, appearing to read 'Thomas L. Bricken', written over a horizontal line.

Thomas L. Bricken

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR.,     )  
Executor of the Estate of    )  
Kate G. Woods, deceased,    )  
                                  )  
                          Plaintiff    )  
v.                                    )  
                                  )  
THE HEIRS, DEVISEES, and     )  
SUCCESSORS in TITLE of       )  
KATE G. WOODS,                 )  
                                  )  
                          Defendants    )

DEFENDANT'S REPLY MEMORANDUM

The plaintiff's memorandum of facts and law having been received, the defendant, Virginia Gouldin Roseberry, by counsel, is obliged to offer a reply to the legal conclusions stated in plaintiff's memorandum.

THE INTENTION OF A TESTATOR, EVEN WHEN  
CLEARLY ASCERTAINABLE, MUST YIELD TO  
RULES OF LAW OR PUBLIC POLICY IN  
CONFLICT THEREWITH.

A reading of Article FIFTH of the testator's will provides a clear and unmistakeable expression of the intent to devise her real property for the maintenance of a wildlife preserve. It is not her clear intent, however, that is at issue. The question is by the depositive language she employed whether rules of law and/or of public policy are violated?

" On settled principles, the wishes of a testator, as gathered from the will itself, are to be followed, if they

violate no public policy or no positive rule of law."

Hester v. Sammons, 171 Va. 142, 198 S.E. 466 (1938), 118 A.L.R. 554, 80 Am Jur 2d, Wills, Sec. 1141.

Plaintiff, in his memorandum of law draws a direct quote from Picot v. Picot, 237 Va. 686. But, one searches the decision in this case in vain for the quotation attributable to it. What the court in Picot said is : " All rules with reference to wills, however, are subject to this, that the underlying principle is that in the construction of wills the intention of the testator, if it is legal and can be determined, is controlling."Emphasis added.

The defendant's contention is not that there is a question of testamentary intent, rather that the language of Article FIFTH violates positive rules of law and public policy by failure to devise a vested estate on the one hand, and violating the rule against perpetuities on the other hand.

HSUS DID NOT VIOLATE THE TERMS OF ARTICLE FIFTH.

Plaintiff, in his memorandum, states that if HSUS violated any of the terms of Article FIFTH "... including not accepting title to the real property..." then the Executor may appoint another organization to presumedly take title.

First, as set forth in our original memorandum, no organization could ever take fee simple title to the property due to the restraints placed on the attempted devise by the testator.

Second, there is no language anywhere in the will that declares a disclaimer to be a violation of the conditions, or restraints, placed on the devise. Had the testator intended to

make disclaimed property a violation of her enumerated conditions, she would have, in plain and simple language, said so. Plaintiff is reading into Article FIFTH language that was never employed and most probably not contemplated.

### CONCLUSION

The expressed intent of a testator is indeed the very first issue that a court will address when the construction or interpretation of a will is brought before it. In this case, the intention of the testator is clear and unequivocal. But, intention is not the only matter that need be questioned. One needs to look further to see whether the expressed intention is violative of positive rules of law or of public policy.

Here we have a testator who wishes to have all of her real property set aside as a pure wildlife preserve. This wish, viewed by some, is laudable. In attempting to achieve this goal, however, she attaches numerous strings to the gift chief among which is that the beneficiary may never transfer, alienate or otherwise convey any title or interest in any of the property. The beneficiary, post probate, says 'no thank you' and files a disclaimer. At that point, the devise lapses. This is so because the beneficiary -at no time- attempted to transfer, alienate or otherwise convey title.

Even if we were to accept an argument that a disclaimer by some fiction acts as a conveyance of the property disclaimed, no devisee of this property could ever obtain fee simple title to the property owing to the restrictive conditions in the will and this lack of vesting violates the rule against perpetuities.



Respectfully submitted,

Virginia Gouldin Roseberry,  
Heir at Law of Kate G. Woods,  
deceased

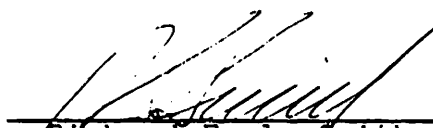
By

  
Of Counsel

Richard Earle Smith  
5905 West Broad Street, Suite 302  
Richmond, Virginia 23230  
(804) 282-0088

CERTIFICATE

I certify that a true copy of the foregoing Defendant's  
Reply Memorandum was mailed, postage prepaid, this 20th  
day of December, 1991, to Thomas L. Bricken, Esquire, Bricken &  
Potter, P.C., P.O. Box 907, Fredericksburg, Virginia 22404-0907.

  
Richard Earle Smith

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR.,	)
Executor of the Estate of	)
Kate G. Woods, deceased	)
	)
Plaintiff,	)
	)
v.	)
	)
THE HEIRS, DEVISEES, and	)
SUCCESSORS IN TITLE of	)
KATE G. WOODS, who are made	)
parties defendant by the	)
general description of	)
"Parties Unknown"	)
	)
Defendants.	)

Plaintiff's Reply Memorandum

In response to the Memorandum of Facts and Law of Defendant, the plaintiff submits the following memorandum.

I. A DEVISE FOR A "WILDLIFE REFUGE" IS NOT VOID BECAUSE OF A RESTRAINT ON ALIENATION, NOR DOES IT VIOLATE THE RULE AGAINST PERPETUITIES.

Both the plaintiff and the defendant agree that it was "the clear intention of the testatrix to preserve the real property owned by her at her death for a wildlife refuge". Consequently, the intent of Kate G. Woods is not in dispute.

After agreeing that the intent of Kate G. Woods is clear, the defendant in her memorandum of law takes the position that the devise to the Humane Society of the United States (HSUS), is void

because it contains a restraint on alienation and because it violates the rule against perpetuities. However, the defendant fails to recognize that this devise by its precatory language created a "charitable trust" with HSUS as the trustee. This gift by Kate G. Woods was to a charitable organization for the charitable purpose of benefiting all of the wildlife in this immediate area.

Charitable trusts, because they contained gifts for charitable purposes, have been given favored treatment in almost all cases.

... the majority of the apposite cases generally indicate that an express provision or condition against alienation in a gift to a charitable trust or to a charitable corporation is an exception to the operation of the rule against restraints on alienation and constitutes a valid restraint. Stated in another way, a condition in a will that real estate devised thereby to a charity shall not be alienated creates no perpetuity in the sense forbidden by law, but only a perpetuity which the law permits and which will be allowed by equity in the case of charitable trust". 15 AM JUR 2d, CHARITIES, Section 24

The defendant goes on to take the position that because HSUS, or any other entity, is prohibited from "transferring, alienating or otherwise conveying any title or interest in any other property", that fee simple title can never vest, and consequently, the rule against perpetuities is violated. When applied to a charitable trust this reasoning is unsound. As stated above, a perpetuity of this nature is allowed, and Virginia cases have so held: "... the Rule against Perpetuities does not apply to charitable trusts" Maquire v. Loyd, 193 Va. 138, 67 S.E.2d 885

(1951). Clearly, a devise for a charitable purpose such as a wildlife refuge is not void.

## II. THE DISCLAIMER BY HSUS DOES NOT CAUSE THE DEVISE TO LAPSE.

Section 64.1-190(a) of the Code of Virginia states: "Unless the decedent has otherwise provided by his will, the property disclaimed shall descend as if the disclaimant had predeceased the decedent...". It remains the position of the plaintiff that Kate G. Woods clearly intended to otherwise provide in her will when she provided an alternative triggered by HSUS violating the terms of Article FIFTH. In this situation, she intended for the Executor to appoint another organization "capable and willing to maintain said property as a wildlife refuge".

Even if the Court finds that Kate G. Woods did not otherwise provide, Section 55-29 of the Code of Virginia would then control. This section provides impertinent part that: "when any will is recorded and the trustee refuses to act, the circuit court of the county in which the will is recorded may appoint one or more trustees to carry the same into execution".

## CONCLUSION


The intent of Kate G. Woods is clear. She intended to create a permanent wildlife refuge. In doing so, she created a charitable trust. A charitable trust such as this can contain a restraint on alienation, and does not violate the Rule against Perpetuities.

The disclaimer by HSUS does not cause this devise to lapse

because Kate G. Woods provided for the appointment of an alternative fiduciary to administer this charitable trust.

Respectfully submitted,


THOMAS M. MONCURE, JR.,  
Executor of Kate G. Woods,  
deceased

By:   
Of Counsel

THOMAS L. BRICKEN  
Bricken & Potter, P.C.  
P. O. Box 907  
Fredericksburg, VA 22404  
(703) 373-2504

CERTIFICATE

This is to certify that a true copy of the foregoing documents were faxed and mailed, postage prepaid this 23<sup>rd</sup> day of December, 1991, to Richard Earle Smith, counsel for Virginia Gouldin Roseberry at 5905 W. Broad Street, Suite 302, Richmond, Virginia 23230.

  
Thomas L. Bricken

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR.,  
Executor of the Estate of  
Kate G. Woods, deceased,  
  
Plaintiff

v.

THE HEIRS, DEVISEES, and  
SUCCESSORS in TITLE of  
KATE G. WOODS,  
  
Defendants

DECREE

THIS CAUSE came to be heard upon the Plaintiff's Bill of Complaint; upon the Answer and Cross-Bill of Defendant Virginia Gouldin Roseberry; and the Answer of Defendants Jane Carver and Eleanor Smith; upon the memoranda of authorities filed by counsel for both parties; and was argued by counsel.

UPON CAREFUL CONSIDERATION, it appears to the Court, and the Court so finds, that under the proper construction of the will of Kate G. Woods:

1. The devise of real property under Article FIFTH created a charitable trust for the establishment of a wildlife refuge; and
2. The rule against perpetuities does not apply to this devise; and
3. The restraint on alienation placed on this devise does not void Article FIFTH of the will; and
4. It was the intent of the testatrix to otherwise provide for the disposition of her real property in the

event the Humane Society of the United States disclaimed the devise.

It is therefore, ADJUDGED, ORDERED AND DECREED that the Executor under this will, Thomas M. Moncure, Jr., is hereby authorized to convey all the real property described in Article FIFTH of this will, under the terms and conditions contained therein, to any corporation, organization, or institution capable and willing to maintain this property as a wildlife refuge, <sup>according to the terms of the will,</sup> and he is further authorized to execute any documents necessary to carry out the provisions of this Decree.

This cause shall stricken from the docket and the papers placed among the ended chancery causes.

Entered this 9 day of January, 1992.

William H. Ledbetter, Jr.  
William H. Ledbetter, Jr., Judge

I ASK FOR THIS:

Thomas L. Bricken  
Thomas L. Bricken,  
Counsel for the Plaintiff

SEEN AND OBJECTED TO:

Richard Earle Smith  
Richard Earle Smith, Counsel for  
Virginia Gouldin Roseberry

Deborah M. Steeves  
Deborah M. Steeves, Counsel for  
Jane Carver and Eleanor Smith

A COPY TESTE:  
Thomas M. Moncure, Jr.  
By: Maria J. Schlegel, D.C.

V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR.,	)
Executor of the Estate of	)
Kate G. Woods, deceased,	)
	)
Plaintiff	)
	)
v.	)
	)
THE HEIRS, DEVISEES and	)
SUCCESSORS in TITLE of	)
KATE G. WOODS,	)
	)
Defendants	)

STATEMENT OF FACTS

Pursuant to Rule 5:11(c), Rules of the Supreme Court of Virginia, this statement of facts for the above-styled case is respectfully submitted.

Kate G. Woods, a resident of Stafford County, Virginia, died testate on May 23, 1991. The plaintiff, Thomas M. Moncure, Jr., qualified as Executor of the decedent's estate in the Clerk's Office, Circuit Court, Stafford County, Virginia, on May 24, 1991.

On July 23, 1991, the Humane Society of the United States filed a disclaimer to succession of certain real property devised to it under Article FIFTH of the decedent's will which disclaimer was recorded in the Clerk's Office, Circuit Court, Stafford County, Virginia, on July 25, 1991, in Deed Book 798, page 508.

On August 19, 1991, Richard Earle Smith, attorney for an heir-at-law of the decedent, wrote to the testator's executor advising that he had been approached by the heir-at-law, and owing to the disclaimer filed by the Humane Society of the United



States, the executor had announced that he was transferring the real property to another organization. As the disclaimer did not cause an alienation of or an attempt to convey the property, it was suggested that the testator may have died intestate as the real property.

On or about October 3, 1991, a bill of complaint was filed by the Executor of the Estate of Kate G. Woods against the Heirs, Devisees and Successors in Title of Kate G. Woods as "Parties Unknown". Filed with the bill were four exhibits: the last will of Kate G. Woods; a listing of the real property of Kate G. Woods; the disclaimer of succession to property; and, the letter of August 19, 1991, from Richard Earle Smith to the executor. Filed also was an affidavit of due diligence executed by the executor, and an order of publication.

The bill of complaint filed herein sought the construction and interpretation of the will of Kate G. Woods, deceased, and particularly Article FIFTH thereof, pursuant to §8.01-84 (§8.01-184), Code of Virginia. Paragraph 7 of the bill stated the position of the plaintiff that by its disclaimer, the Humane Society of the United States (HSUS) alienated or otherwise attempted to convey title or interest in the real property devised to it as the sole issue requiring interpretation.

On or about October 17, 1991, Virginia Gouldin Roseberry, an heir-at-law of the decedent, by counsel, filed an answer to the bill and a cross bill. In her answer, the defendant denied the allegation that the HSUS disclaimer had the effect of alienating or otherwise conveying an interest in the property. In her cross bill, the defendant alleged that the devise set forth in Article FIFTH of the will is invalid as it denied alienation of the property by any devisee and, as a result, the devise was repugnant to the estate devised and, therefore, void.

An answer to the cross bill was not filed.

On November 19, 1991, counsel for the defendant was advised by counsel for the plaintiff that the Judge of the Stafford County Circuit Court had recused himself and that William H. Ledbetter, Jr., Judge, Spotsylvania Circuit Court had agreed to hear the case, ore tenus, on December 30, 1991. A schedule for the filing of memoranda of facts and law was established.

On December 13, 1991, the defendant filed her memorandum arguing that Article FIFTH of the will of the decedent is void in that it contains a condition prohibiting any alienation of the property attempted to be devised. Citing Virginia authority, the defendant stated that a gift of a beneficial estate, in fee or absolutely, whether legal or equitable, has certain legal incidents of which the estate cannot be divested, among which is the grantee's power of alienating the estate.

As for the HSUS disclaimer, the defendant argued that §64.1-190, Virginia Code, states that unless the decedent has otherwise stated or provided in the will, the property disclaimed shall descend or be distributed as if the disclaimant had predeceased the testator. The defendant's position was that the devise lapsed and that disclaimed property passes under the residuary clause. The residuary clause in the Woods' will provides only for the disposition of personal property.

The defendant argued further that the attempted devise, whether to HSUS, or unnamed third parties, violates the Rule against Perpetuities due to the language in Article FIFTH preventing any devisee from ever alienating the property, or any part of it.

The plaintiff filed a memorandum of facts and law on December 16, 1991, arguing that the HSUS disclaimer allowed the Executor to convey the real property to a third party on

the theory that if HSUS did any act that would prevent it from carrying-out the testator's intent to provide a wildlife refuge, the Executor could step in and convey the property to another organization willing to so maintain the property. The intent of the testator it was argued, is controlling and all other rules of law are immaterial once the intent has been established.

The plaintiff argued further that partial intestacy is not favored in Virginia and where a will is capable of two different constructions, doubt is to be resolved in favor of construction that will give effect to the will.

The defendant filed a reply memorandum under date of December 20, 1991, and took issue with the plaintiff's memorandum of law stating that in the construction of wills the intention of the testator is controlling if the intention is legal. The defendant argued that it is not a matter of testamentary intent that is at issue, rather whether positive rules of law and public policy were violated by failure to devise a vested estate on the one hand, and violating the Rule against Perpetuities on the other hand. There is no language in the will that declares a disclaimer of a devise to be a violation of the conditions of Article FIFTH and had the testator intended such, she would have plainly and simply said so.

The plaintiff filed a reply memorandum under date of December 23, 1991, arguing that the precatory language in the will created a "charitable trust" and, under Virginia law, any restraint on alienation and the Rule against Perpetuities were inapplicable to a charitable trust.

The cause came to be heard ore tenus on December 30, 1991, in the Circuit Court, Spotsylvania County, Virginia, Judge William H. Ledbetter, Jr., presiding.

Counsel for the plaintiff presented a plat of real property,

the subject matter of the suit, showing plots of land fronting on either side of State Route 3 (King's Highway) consisting of approximately 500 acres and located several miles east of the City of Fredericksburg.

Judge Ledbetter advised that a motion to file a late answer to the bill of complaint had been filed by Deborah M. Steeves, counsel for Jane Carver and Eleanor Smith, heirs-at-law of Kate G. Woods, deceased, and that an answer accompanied the motion. No objection being raised by counsel, the motion was sustained and the answer filed with the papers in the cause.

Thomas L. Bricken, counsel for the plaintiff, argued on behalf of the plaintiff:

1. That the sole issue before the Court was whether the disclaimer to succession of the real property under Article FIFTH of the last will of Kate G. Woods was an alienation of or a conveyance of an interest in the property. It is clear, he stated, that the intention of the testator was to create a wildlife refuge on the property and that counsel for the defendant had agreed that this was her intention. Any act by HSUS that would prevent it from carrying-out the testator's intent would amount to an alienation of the property by it thereby permitting the Executor to step in and convey the property to any organization willing and capable of establishing such a refuge. The act of disclaiming the gift resulted in an alienation of the property by HSUS.

2. The devise of real property under Article FIFTH created a charitable trust with HSUS as the trustee. By its disclaimer, HSUS alienated the property and the Executor is free to name another trustee to carry out the terms of the charitable trust. It being a charitable devise, the rules pertaining to alienation of property and the Rule against Perpetuities do not apply.

Richard Earle Smith counsel for the defendant, heir-at-law, Virginia Gouldin Roseberry, argued as follows:

1. That the sole issue raised in the bill of complaint was whether the disclaimer filed by HSUS created an alienation of the property. §64.1-190, Code of Virginia, states that when one disclaims a testamentary gift, it shall be deemed that the disclaimant predeceased the testator. We would be dealing in a non-sequitur to say to a disclaimant, you have predeceased the testator and you cannot enjoy the fruits of the gift, but by the act of predeceasing the testator, you have alienated or conveyed an interest in the property. The general established rule is that disclaimed property passes under the residuary clause in a will and the sole residuary clause in the Woods' will is Article EIGHTH which provides solely for the disposition of personal property. Therefore, the disclaimed gift should be treated as having lapsed and is intestate property.

2. The matter of the creation of a charitable trust was never averred in the bill of complaint, but raised for the first time in a reply memorandum which prevented the defendant from offering legal argument on the point. In his memorandum the plaintiff states that the precatory language in Article FIFTH of the will creates a charitable trust. We find no precatory language in that article - there is no request, entreaty, recommendation or advice, nor an expression of a wish relative to the property. The language employed is a positive, a command as to how the property is to be held and maintained.

The case of Shenandoah Valley Nat'l Bk. v. Taylor, 192 Va. 135 (1951), provides insight into whether a charitable trust is created in a will. The Court said that there is a fundamental

distinction between a charitable trust and one that is devoted to mere benevolence, the former being public in nature and valid, the latter is private and offends the Rule against Perpetuities. Charitable purposes, the Court said, are a. the relief of poverty; b. the advancement of education; c. the advancement of religion; d. the advancement of health; e. governmental or municipal purposes; and f. other purposes the accomplishment of which is beneficial to the community.

With these purposes in mind, it can be said that the devise would not relieve poverty, advance education or religion, promote health, or be for a governmental purpose. It is difficult to see how the community would be benefited from the devise when, by the terms of Article FIFTH only the Executor, his wife and heirs, and a caretaker would be permitted generally on the property. At best, we have a testamentary scheme to control the use of property for all time and, as such, it clearly violates the Rule against Perpetuities. If a trust is created, it is an express trust, not one for a charitable purpose.

Thomas L. Bricken, counsel for the plaintiff, argued in reply:

That §55-26.1, et seq., of the Virginia Code makes it clear that a devise, such as the one in this case, is a valid charitable gift and that the community as a whole will benefit in the knowledge that wildlife is being protected on the property.

Deborah M. Steeves, counsel for Jane Carver and Eleanor Smith, declined to make argument.

Judge Ledbetter thanked counsel for the memoranda of law filed and announced his bench decision as follows:

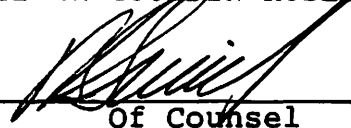
1. That the Rule against Perpetuities does not apply to this case;
2. That a charitable trust was created by the will of Kate G. Woods in setting aside land for a wildlife refuge;
3. That the restraint on alienation placed on the devise does not void Article FIFTH of the will.
4. That it was the intent of the testator to otherwise provide for the disposition of the property in the event that the Humane Society of the United States disclaimed its interest in the property.

Judge Ledbetter stated that the defendant's objection to his ruling would be noted. He then asked plaintiff's counsel to prepare a final decree, distribute among counsel for endorsement, and file it with the Court for entry.

The hearing was adjourned.

VIRGINIA GOULDIN ROSEBERRY

By

  
Of Counsel

Richard Earle Smith  
Counsel for Virginia Gouldin Roseberry  
5905 West Broad Street, Suite 302  
Richmond, Virginia 23230  
(804) 282-0088

V I R G I N I A:

IN THE CIRCUIT COURT OF STAFFORD COUNTY

THOMAS M. MONCURE, JR., Executor of the  
Estate of Kate G. Woods, deceased

Plaintiff

v.

Chancery #753-91

THE HEIRS, DEVISEES, and SUCCESSORS IN  
TITLE of Kate G. Woods, etc.

Defendants

Statement of Corrections by the Trial Judge  
to Statement of Facts Filed Herein  
by Virginia Gouldin Roseberry

Deeming it necessary to make certain corrections to the Statement of Facts filed herein by Virginia Gouldin Roseberry, the court certifies the accuracy of the statements set forth therein SUBJECT to the following:

1. Objection #2 of the Executor is well taken and should be sustained. Arguments of counsel in their respective memoranda speak for themselves, and summaries of such memoranda in the Statement of Facts are inappropriate.

2. Objection #3 of the Executor is not well taken. First, the appellant's summary of each counsel's oral argument on December 20, 1991, appears to be a fair summary. Second, the Executor's contention that "it is impossible to recall precisely what was said" is not a proper objection under Rule 5:11(d) without some basis being given for it.



V I R G I N I A:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS M. MONCURE, JR.,  
Executor of the Estate of  
Kate G. Woods, deceased,

Plaintiff

v.

THE HEIRS, DEVISEES and  
SUCCESSORS in TITLE of  
KATE G. WOODS,

Defendants

ORDER

On this day came the defendant, Virginia Gouldin Roseberry,  
by counsel, and moved for entry of the Statement of Facts  
supplied pursuant to Rule 5:11(c), Rules of the Supreme Court  
of Virginia.

UPON CONSIDERATION WHEREOF, the court finds that the State-  
ment of Facts fairly represents the facts in the above-styled  
Subject to the Statement of Corrections filed herein,  
case, ~~and there being no objection thereto,~~ it is

and Statement of Corrections,  
ORDERED that the Statement of Facts ~~be~~ and the same ~~are~~  
entered as a part of the record of the above-styled case.

3, 10, 92  
ENTER: W. S. Dutton  
Judge

I Ask For This:

Richard Earle Smith  
Richard Earle Smith, p.d.  
5905 West Broad Street, Suite 302  
Richmond, Virginia 23230  
(804-282-0088)

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

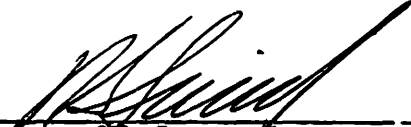
THOMAS M. MONCURE, JR.,     )  
Executor of the Estate of    )  
Kate G. Woods, deceased,    )  
                                )  
                                Plaintiff    )  
v.                                )  
                                )  
THE HEIRS, DEVISEES and     )  
SUCCESSORS in TITLE of     )  
KATE G. WOODS,                )  
                                )  
                                Defendants    )

NOTICE OF APPEAL

The defendant, Virginia Gouldin Roseberry, heir at law of Kate G. Woods, deceased, hereby gives notice of appeal from the decree of this Court entered on January 9, 1992. A statement of facts will be filed with the Court.

VIRGINIA GOULDIN ROSEBERRY

By

  
\_\_\_\_\_  
Of Counsel

Richard Earle Smith  
Counsel for Appellant  
5905 West Broad Street, Suite 302  
Richmond, Virginia 23230  
(804) 282-0088

CERTIFICATE

I certify that a true copy of the foregoing Notice of Appeal was mailed, postage prepaid, this 21st day, of January, 1992, to Thomas L. Bricken, Esquire, Bricken & Potter, P.C., P.O. Box 907, Fredericksburg, Virginia 22404-0907, counsel for plaintiff/appellee and Deborah M. Steeves, Esquire, P.O. Box 874, Montross, Virginia 22520, counsel for Jane Carver and Eleanor Smith.

  
\_\_\_\_\_  
Richard Earle Smith

### ASSIGNMENTS OF ERROR

The trial court erred in its holding that the last will and testament of Kate G. Woods, deceased, created a charitable trust, and that the testatrix intended to provide for disposition of her real property in the event of a disclaimer thereto being filed because:

1. The bill of complaint did not seek relief based on any allegation that a charitable trust had been created in the will;
2. A disclaimer of a testamentary devise does not result in an alienation or conveyance of an interest in the property disclaimed;
3. The criteria for establishment of a charitable trust in Virginia were not met.