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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2019-001732

Kathleen A. Grant, Dylan T. Grant,
Devin D. Grant, and Andrea J. Grant,

Appellants,

v.

Nationstar Mortgage, LLC,

Respondent.

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellants Kathleen A. Grant, Dylan T. Grant, Devin D. Grant, and Andrea J. Grant, through their undersigned attorneys, hereby petition this Honorable Court for a rehearing in connection with the unpublished opinion issued in this case, filed on July 12, 2023 and attached hereto (Opinion No. 2023-UP-264). Appellants respectfully submit that the following points have been overlooked or misapprehended by the Court:

I. The Court properly determined that the instant action was an action in equity, but then failed to apply and/or address any equitable issues, principles, and/or maxims in its analysis. The Court correctly determined that the instant action was an action in equity because Appellants' main purpose in bringing it was to obtain a declaratory judgment as to whether the mortgage

placed on the subject property was valid and enforceable against the innocent remaindermen who were never notified by Countrywide that it was placing a \$625,000.00 encumbrance on the property¹. However, despite modifying the lower court's order, the Court erred in failing to apply and/or address any equitable issues, principles, and/or maxims in its analysis of the case or to remand the matter back to the lower court for an equitable determination.

It has long been acknowledged that "Courts [in this State] have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 310 S.E.2d 440, 442, 279 S.C. 592, 595 (Ct. App. 1983) In exercising these inherent equitable powers, at least four equitable maxims recognized as equitable guidelines by South Carolina case law should apply: 1) Equity will not suffer a wrong without a remedy, 2) Equity abhors a forfeiture, 3) Equity regards as done what ought to be done, and 4) Good guys should win and bad guys should lose. *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421 at n.1, 746 S.E.d 35 at n.1 (2013), *Bank v. Wingard Properties Inc.*, 394 S.C. 241, 715 S.E.2d 348, 353 (Ct. App. 2011); *See also* Roger Young and Stephen Spitz, *Suem—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. Rev 175, 188 (Fall 2003).

Here, the Court's unpublished opinion errs in failing to apply and/or address any of the equitable issues, maxims, and/or principles raised by Appellants, and by allowing Countrywide to misconstrue and hide behind Roberta Grant's Last Will and Testament—a **Will which Countrywide knew about, but never even bothered to read in the first place**. As set forth in Appellant's Final Brief, Countrywide was put on notice by the closing attorney that David Grant

¹ As set forth in the Appeal, Respondent Nationstar Mortgage, LLC is the successor-in-interest to Countrywide Home Loans, Inc.

held a life interest in the property *by virtue of Roberta's Will* and that Roberta's children held the remainder interest. (App. Final Brief, p. 10). Countrywide, having received notice, should have exercised minimal due diligence and requested a copy of Roberta's Will as part of its evaluation of the mortgage application and—at the very least—contacted the Remaindermen about its intent to encumber the property and divest them of their fee simple interest. (Trial Tr., R. p. 180, line 15 to p. 181, line 5). It did neither.

Instead, Countrywide ignored the existence of Roberta's Will and the limitations set forth therein. The Mortgage did not even make reference to the existence of David's life estate in the Property. (Mortgage, R. p. 450; Trial Tr., R. p. 308, lines 21-25) At trial, the closing attorney testified that if Countrywide had chosen to review Roberta's Will and read the limitations, that based on the totality of the circumstances, Countrywide might have "changed their mind". (Trial Tr., R. p. 181, line 14 to p. 182, line 6). It might not have issued the mortgage. (Trial Tr., R. p. 182, lines 4- 6.)

Countrywide deliberately turned a blind eye to the express limitations left by Roberta in her Will: It ignored that "David **shall not in any event** be entitled, directly or indirectly, to consume or otherwise retain any principal of this estate absolutely as his own, or have or possess any substantially equivalent powers or rights." (Will, R. p. 431). It ignored Roberta's instructions that the provisions of Article V **and the Will in general** (including any purported testamentary trust language) shall be construed in accordance with this express limitation. (Will, R. p. 431). It ignored that David could only mortgage the Property **in furtherance of** his obligation to protect the Remaindermen taking after him. (Will, R. pp. 431-432). Countrywide, who according to Nationstar had "suffered a black eye" and went out of business due to its

business practices, **never contacted any of the Remaindermen about placing a \$625,000.00 mortgage on the Property.**

The Court's unpublished opinion, like the lower court's order, errs in finding that Countrywide and its successor-in-interest, Nationstar, had no duties that inure to the benefit of the completely innocent Remaindermen. (Order, R. p. 20) The trial court had based its analysis on the tenuous premise that banks and mortgage lenders only have duties to their customers and not third parties. (Order, R. pp. 18-19) This is incorrect. As noted by *Wachovia v. Coffey*, sophisticated financial institutions that prepare mortgages have a duty to third parties so as to protect all pertinent interest.

Respectfully, Appellants do not decontextualize the South Carolina Supreme Court's finding in *Wachovia Bank, N.A. v. Coffey*, which states:

We stress that sophisticated financial institutions that prepare mortgages purporting to encumber a customer's property must ensure that the customer in fact holds a legal interest in that property **so as to protect all pertinent interests**. Concomitantly, **South Carolina courts should not stretch equitable principles to unfairly place fault on parties who did not contribute to the underlying transaction**. See, e.g., McClintock on Equity, at 320 [...] We earnestly appreciate the dissent's concerns. However, **we would be more concerned with an equitable doctrine so broad as to allow lenders to ameliorate their complete failure to exercise proper due diligence at the expense of third parties**.

[Emphasis added]

Wachovia Bank, N.A. v. Coffey, 404 S.C. 421 at n.1, 746 S.E.2d 35 at n.1 (2013)

The Court's decision in *Wachovia* is consistent with and supported by longstanding South Carolina precedent protecting the rights of the remaindermen. See *Kirkham v. First Nat. Bank*, 149, S.C. 545, 147 S.E. 648, 649 (1929), cited by the Remaindermen at trial and in this Appeal, which states:

It should be, and is, the purpose of this court, in situations similar to the one in the Des Champs Case (Des Champs v. Mims, 145 S.E.2d 623 (1926)) and to the one in the case at bar, **to protect the rights of remaindermen**, both vested and contingent, and all persons, in being and unborn, who may at any time have an interest in real estate, according to the terms of wills and deeds. In other words, **as far as possible**, this court proposes to **carry out the real intention of testators and grantors**, as expressed in their wills and deeds.” [Emphasis Added]

(Trial Tr., R. p. 263, line 13 to p. 268, line 14; p. 14, lines 4-16; See also Pl.’s Pre-Trial Brief, R. pp. 59-65; Pl.’s Memo in Opposition to Def.’s Mot. for Summ. J., R. pp. 45-58; and Mot. for Summ. J. H’rg Tr., R. pp. 97-130.)

In this instance, Equity strongly supports that the innocent Remaindermen be protected from a mortgage that was never disclosed to them. **It is undisputed that Countrywide never contacted the Remaindermen about its intent to place a \$625,000.00 mortgage on the property, despite being put on notice of the Remaindermen’s fee simple interest.** (Trial Tr., R. p. 229, lines 8-19; p. 243, lines 12-15; p. 247, line 18 to p. 248, line 9; p. 254, line 19 to p. 255, line 8; p. 185, lines 12-15; p. 303, lines 11-15). The closing attorney, demonstrating doubts as to the validity and enforceability of the mortgage, contacted the title insurance company to see whether it would insure the mortgage for Countrywide. (Trial Tr., R. p. 185, lines 12-15; p. 303, lines 11-15). The title insurance company “took the risk” as to whether the mortgage was valid and enforceable, but nobody—not Countrywide, not the title insurance company, not even the closing attorney—contacted the Remaindermen. Nobody inquired as to David’s reason for applying for a mortgage. (Trial Tr., R. p. 187, lines 4-12; p. 213, lines 9-17). All expressed concern as to Countrywide’s bottom line, but nobody expressed concern or exercised any due diligence with regard to the Remaindermen’s fee simple interest in the property. Equity cannot stand for a such a proposition, where a lender is allowed to “ameliorate their complete failure to exercise proper due diligence at the expense of third parties.” Minimally, Countrywide should

have contacted the Remaindermen once it was put on notice of the Remaindermen's fee simple interest in the property.

In *Shepard v. First Am Mortgage Co.*, 347 S.E.2d 118 (Ct. App. 1986), Justice Bell suggested a brilliant solution for a similarly extraordinary problem. In *Shepard*, there were two totally innocent parties before the Court. Both had valuable interests that could not be reconciled. Some innocent party had to lose. An innocent but incompetent grantor had been induced by a family member to convey his property to that family member. In turn, that person mortgaged the property to a totally innocent lender. As Justice Bell saw the equitable problem:

The court is faced with a problem of the equities between two innocent parties--the incompetent grantor and the innocent third party mortgagee. In this situation, the equities favor the incompetent grantor. The third party mortgagee is in a superior position to protect himself. He can take warranties of title from the mortgagor and he can also insure against undisclosed defects in the mortgagor's title by purchasing mortgagee's title insurance. Commercial lenders like First American commonly protect against the risk of defects in the mortgagor's title in both ways. The incompetent, on the other hand, is incapable of conducting his own affairs or protecting his own interests. His need for protection by the court of equity is correspondingly greater than the mortgagee's. If we held an incompetent's transactions could be made valid by a subsequent transaction with an innocent third party, we would create an open avenue for disposing of an incompetent's property through fraud and imposition.

Shepard v. First American Mortg. Co., 347 S.E.2d 118, 120, 289 S.C. 516, 519 (Ct. App. 1984)

Here, Countrywide, Nationstar's predecessor-in-interest, is not innocent. It knew that David only held a life estate by virtue of Roberta's Will. It knew that the Remaindermen held a fee simple interest in the property. Yet, it never even read the Will. It never considered any of the limitations contained therein. It never contacted the Remaindermen. Like the lender in

Shepard, Nationstar is in a superior position to protect itself because it obtained title insurance to protect against this very issue. The closing lawyer even anticipated that there could be an issue with the validity and enforcement of the mortgage and “ran it up the flagpole” with higher-ups at the title insurance company. (Trial Tr., R. p. 206, lines 6-16; p. 212, lines 3-7). The title insurance company “took the risk.” (Trial Tr. page 213, lines 9-17).

Appellant’s respectfully request that this Court, just as Justice Bell did, ask:

1. Who is in the better position to protect themselves?
2. Who better deserves the protection of Equity?
3. Who was more able to avoid the problem the Court confronts?

Nationstar, Countrywide’s successor-in-interest, wishes to construe the language of the testamentary trust contained in the Will (a Will that Countrywide knew about, but never bothered to request or read) with the hopes of enforcing a mortgage against the completely innocent Remaindermen. Much like the lender in *Wachovia v. Coffey*, Countrywide/Nationstar “is the architect of its own problem,” having failed to “exercise proper due diligence at the expense of third parties.” *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 424, 746 S.E.d 35, 37. Accordingly, for the foregoing reasons, the mortgage should be cancelled as to these completely innocent Remaindermen.

II. This Court’s opinion misconstrues Roberta Grant’s testamentary intent in finding that David Grant had the authority to mortgage property as he saw fit.

The Court cites three cases in support of the proposition that David had a right to mortgage the property “as he saw fit.” However, a closer review of each of these cases along with the subject Will reveals that the opposite is true.

First, the Court’s opinion cites *First Nat. Bank v. Hutson*, for the proposition that “a life

tenant may execute a mortgage *to the fullest extent of their life estate.*” *First Nat. Bank v. Hutson*, 142 S.C. 239, 244 140 S.E. 596, 597 (1927). [Emphasis added]. That is not what happened here. Countrywide/Nationstar sought to divest more than David’s mere life interest in the property—which they could have done only during David’s lifetime—they also expressly sought to divest the Remaindermen of their interest in fee simple. Following the title insurance company’s decision to insure the mortgage, the closing attorney issued an opinion letter to Countrywide stating that David held a life interest in the subject property by virtue of Roberta’s Will and that Roberta’s children held the remainder interest, but that Countrywide would nonetheless have a fully enforceable fee simple mortgage to foreclose on, which would divest not only David from any interest he had in the property, **but also the Remaindermen’s fee simple interest.** “[T]he bank will have a fully enforceable fee simple mortgage to foreclose on which will divest Mr. Grant and Mrs. Grant [David’s second wife] from any interest they have in the house, **not only of their life interests, but also of the remaindermen in fee simple.**” (Opinion Letter, R. p. 365, Trial Tr. p. 183, lines 6-9.). This goes well beyond divesting the life tenant of his life estate. It seeks to use the mortgage obtained by a life tenant to divest the Remaindermen as well. Because the bank sought the ability to foreclose on the Remaindermen and divest them of their fee simple interest, it had an equitable duty to contact them in the first place. See *Wachovia*, cited *supra*, see also *Cody Discount, Inc. v. Merrit*, 629 S.E.2d 697, 699, 368 S.C. 570 (Ct. App. 2006), stating, “Actions to foreclose or cancel an instrument are actions in equity,” quoting *Wilder Corp. v. Wilke*, 324 S.C. 570, 576 479 S.E.2d 510, 513 (1996).

Additionally, *First Nat. Bank v. Hutson* does not address a central issue of this case: whether a bank is required to provide notice to a remainderman of its intent to encumber *the* remainderman’s interest in the property. “The sole question presented by this appeal is: What

estate did Ethel O. Hutson take in the real estate devised by the testator?" *First Nat. Bank v. Hutson*, 142 S.C. 239, 244 140 S.E. 596, 597 (1927). Because the case does not address the issue of Notice, its applicability to the present case is misplaced.

Second the Court cites *Bethea v. Bass*, for the proposition that "a mortgage executed by a life tenant covers only his life estate interest and not a fee interest." *Bethea v. Bass*, 240 S.C. 398, 412, 126 S.E.2d 354. This is a true statement and also the opposite of what transpired in this case. As noted, *supra*, Countrywide/Nationstar sought to divest more than David's mere life interest in the property—which they could have done only during David's lifetime—they also expressly sought to divest the Remaindermen of their interest in fee simple. It is both inequitable and disgraceful for a bank to use a mortgage granted to a life tenant to later divest innocent remaindermen of their fee simple interest, especially, when the bank—knowing of the remaindermen's interest—does not even contact them to inform them of the encumbrance. As noted *supra*, Countrywide did not exercise any due diligence. **Countrywide did not even read the Will, which it wishes this Court to misconstrue.**

Additionally, it is essential to note that in *Bethea v. Bass*, the South Carolina Supreme Court actually took steps to *protect* the remainderman's interest, not divest him. There, the decedent, Thomas D. Bethea, Sr., held a life estate interest in certain property, which he mortgaged in 1925. The property was later foreclosed upon. Pursuant to the decree of foreclosure, the property was sold and conveyed to Mr. Howard H. Bass by way of master deed in 1931. Mr. Bass continued to own and possess the property until his death in May, 1954, when his interest in the property passed to his family. **Five years later**, Thomas D. Bethea, Sr. died. His son, Thomas M. Bethea, Jr. then, **for the first time in twenty-seven years**, notified Mr. Bass's family of his claim of ownership, and demanded possession. The family refused to

surrender possession, claiming that they owned the property in fee simple; and shortly thereafter he commenced the action. Ultimately, **the South Carolina Supreme Court found for the remainderman** noting that a life tenant cannot encumber the remaindermen's interest. The Court reasoned:

Thomas M. Bethea, Sr. took a life estate only, and the respondent, Thomas M. Bethea, Jr., a contingent remainder, which became vested upon his father's death in 1959. The mortgage from Thomas M. Bethea, Sr., in 1925, though purporting to include the fee, covered only his life estate, for that was all that he had; and the Master's deed in the foreclosure could convey no more. Griggs v. Griggs, 199 S.C. 295, 19 S.E.2d 477. Nor did the length of possession under that deed bar respondent's claim, for his cause of action did not accrue until his father's death. Crotwell v. Whitney, 229 S.C. 213, 92 S.E.2d 473.

Bethea v. Bass, 126 S.E.2d 354, 360, 240 S.C. 398, 412 (1962)

Here, David Grant, like Mr. Thomas Bethea, Sr., held a life estate in the property. Likewise, the mortgage did not make any reference to David's life estate. (Mortgage, R. p. 450; Trial Tr., R. p. 308, lines 21-25). Countrywide/Nationstar cannot now equitably divest the remaindermen of their fee simple interest in the property, especially without having provided them with notice of the encumbrance in the first place. To do so would, again, allow Countrywide/Nationstar to "ameliorate their complete failure to exercise proper due diligence at the expense of third parties." Equity regards as done what ought to be done. *Bank v. Wingard Properties Inc.*, 394 S.C. 241, 715 S.E.2d 348, 353 (Ct. App. 2011). Here Countrywide did not do what it was supposed to do—notify the innocent Remaindermen of its intent to encumber the property and divest them of their fee simple interest.

Third, the Court cites *Johnson v. Waldrop*, 256 S.C. 372, 375, 182 S.E.2d 730, 731 (1971), for the proposition that "a life estate, with the complete power to dispose and consume" was a valid devise." In *Johnson*, the South Carolina Supreme Court found, upon analysis of the

provisions of the Will, that the Decedent had intended to convey a life estate to his wife, with complete power to dispose and consume, and to convey the remainder to his brother and sister. In rendering its decision, the Court found that it could not justify a conclusion which ignored a second qualifying sentence contained within the Will, stating, “We cannot justify a conclusion that the second sentence is meaningless.” *Id.* 256 S.C. 372, 375, 182 S.E.2d 730, 731 (1971). In the present case, Roberta’s Last Will and Testament set forth express limitations and restrictions as to David’s life estate interest in the Property. (Will, R. pp. 431- 433). The Court’s opinion, however, effectively renders these limitations meaningless.

Specifically, Article V, Section 1(b) of the Will instructed, *inter alia*, that David could not consume or retain any principal of this estate as his own **and that the provisions of Article V and of the Will should be construed in accordance with this restriction:**

He [David] shall not *in any event* be entitled, directly or indirectly, to consume or otherwise retain any principal of this estate absolutely as his own, **or have or possess any substantially equivalent powers or rights, and the provisions of this ARTICLE and of this Will in general shall be construed accordingly.**

[Emphasis added] (Will, R. p. 431)

The Court’s opinion ignores this limitation, finding that it only “restricts David from converting the mortgage proceeds to fee simple.” That is not what the provision says. The provision specifically uses the words “not in any event” and states that “the provisions of this Article [Article V] and of this Will *in general* shall be construed accordingly.” [Emphasis added]. The Court’s opinion errs in narrowing the application of this provision, which Roberta Grant expressly intended be applied broadly.

The Opinion also incorrectly states “there was no evidence presented at trial that David misused the proceeds of the mortgage by conversion or retention.” There was ample evidence

that David, contrary to the Remaindermen's interest, had failed to maintain the property or provide necessary repairs during his life tenancy and that the Property had deteriorated and fallen into terrible disrepair, demonstrating that the funds were not used for the benefit of the property or the Remaindermen. (Trial Tr., R. p. 226, line 23 to p. 228, line 25; p. 246, line 16 to p. 247, line 17; p.251, line 18 to p. 252, line 3; p. 252, line 23 to p. 254, line 18). The Remaindermen testified that David had allowed half the property's windows to rot out, resulting in broken glass throughout the property; that the home's porches had also rotted off; that a hole had opened up in the home's entryway due to an unattended bathroom leak; that the HVAC system had not been properly maintained, leading to moisture dripping through the wall; and that rodents and other vermin had taken up residence in the walls. (R. at Id.). There was also testimony that David had stopped working after Roberta passed, and had no other demonstrable income than the mortgage proceeds he obtained on the property. (R. p. 248, lines 1-9).

Article V of the Will also instructed that David shall possess the power and authority to mortgage the Property, but only *in furtherance of his obligation to protect the Remaindermen taking after him*. (Will, R. pp. 431- 432) Specifically, Article 5, Section 1(d) instructed as follows:

David E. Grant shall be obligated to invest and reinvest the properties from time to time constituting the assets of such life estate, **in order to protect the remaindermen taking after him**, and *in furtherance of said obligation* he shall have and possess full power and authority during his lifetime to mortgage or pledge all or any portion of such property [...] upon such terms and conditions as he in his absolute discretion may deem most advantageous, *taking into account the protection of the remaindermen taking after him*. [Emphasis added].

(Will, R. pp. 431-432)

The Court's Order renders this limitation meaningless, ignoring the express requirement that any mortgages obtained on the property be obtained in furtherance of protecting the

Remaindermen, taking into account their protection. David did not have the express authority to mortgage the property as he saw fit. The opposite was true. Roberta Grant *expressly* provided that David only had authority to mortgage the property in furtherance of his obligation to protect the Remaindermen taking after him. It is important to note that the foregoing language is contained under Article V of Roberta's Will. Article V, Section 1(b) of the Will, discussed *supra*, removes any doubt as to Roberta's intent to curtail David's authority to encumber the property by instructing that this mortgage provision (and all provisions in the Will) be construed in accordance to the express limitations and restrictions contained in Section 1(b) ("the provisions of this ARTICLE and of this Will in general shall be construed according." (Will, R., p. 431).

"In assigning meaning to the words used in the will and ascertaining the intent of the testator, the court must view the will as a whole." *Holcombe-Burdette v. Bank of America*, 640 S.E.2d 480, 484 (Ct. App. 2006), citing *Pate v. Ford*, 297 S.C. 294, 299, 376 S.E.2d 775, 778 (1989). "Intent is to be ascertained upon consideration of the entire will." *Id.*, citing *Epworth Children's Home v. Beasley*, 365 S.C. 157, 165, 616 S.E.2d 710, 714 (2005), and "*In re Estate of Prioleau*, 361 S.C. 627, 631, 606 S.E.2d 769, 772 (2004). "[E]ach item of a will must be considered in relation to the other portion." *Id.*, citing *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715. "A court may not consider the will piecemeal, but must give due weight to all its language and provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with each other and with the will as a whole." *Id.*, citing *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715 (citations omitted). "Arriving at the intent of the testator requires that every item be considered in relation to the other portions of the will. *Id.*, citing *Black v. Gettys*, 238 S.C. 167, 173, 119 S.E.2d 660,

662-63 (1961). “An interpretation that fits into the whole scheme or plan of the will is most likely to be the correct interpretation of the intent of the testator.” *Id.*, citing *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715. Here, the entire Will must be read through the lens of Article V, Section 1(b), because that is what Roberta expressly intended. **“He [David] shall not in any event be entitled, directly or indirectly, to consume or otherwise retain any principal of this estate absolutely as his own, or have or possess any substantially equivalent powers or rights, and the provisions of this ARTICLE and of this Will in general shall be construed accordingly.”** [Emphasis added] (Will, R. p. 431)

Additionally, it is undisputed that Countrywide had knowledge that the Remaindermen had an interest in the property, and failed to inquire as to the purpose of the mortgage. Even if Countrywide were not required to investigate how the funds were applied, it still had a duty to contact the innocent remaindermen as to its intent to encumber the property and divest them of their fee simple interest. As noted above, and in Appellant’s Final Brief, “Sophisticated financial institutions that prepare mortgages purporting to encumber a customer's property must ensure that the customer in fact holds a legal interest in that property so as to protect all pertinent interests.” *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421 at n.1, 746 S.E.d 35 at n.1. It is their legal duty. It is an obligation that cannot be disregarded and then later excused at the expense of innocent third parties. As the South Carolina Supreme Court noted, “[W]e would be more concerned with an equitable doctrine so broad as to allow lenders to ameliorate their complete failure to exercise proper due diligence at the expense of third parties.” *Id.* Here, it is undisputed that Countrywide never even read the Will or any of the limitations contained therein. (Trial Tr., p. 180, line 15 to p. 181, line 5; p. 181, line 14 to p. 182, line 6; . 182, lines 4- 6; p. 308, lines

21-25). Again, the mortgage does not even make reference to David's mere life interest in the property.

Additionally, Article V, Section 1(f) of the Will also left instructions for the creation, funding, and administration of separate trusts to benefit each of Roberta's living children (i.e. the Remaindermen) upon the occurrence of either of the following: 1) Upon Roberta's death if she were predeceased by David, or 2) Upon David's death if he survived Roberta, but failed to leave a will exercising the "power of appointment" afforded to him under Article V, Section 1(e) of Roberta's Will. (Will, R. p. 432) Absent these two limited circumstances, the Will does not provide instructions for the creation, funding, or administration of trusts for the Remaindermen. At trial, the closing attorney for the Subject Mortgage transaction testified that neither of the events described under Article V, Section 1(f) had occurred when Countrywide placed the mortgage on the Property. (Trial Tr., R. p. 170, line 4 to p. 171, line 4) Indeed, David was alive when Countrywide placed the encumbrance on the Property. Said differently, the circumstances giving rise to the testamentary trusts under the Will had not occurred. Accordingly, David could not act as a trustee to trusts that never came into existence in the first place.

Further, the wide range of liberties afforded to trustees under the Will did not apply to David Grant. While there is language in the Will which transfers the Property to David Grant "for the term of his life, if he shall survive me" (i.e. creates a life interest subject to the express limitations and restriction set forth under Article V of the Will) there is no language which transfers the property to any specified trust for the benefit of the Remaindermen during David's lifetime. However, even if this Court were to assume, *arguendo*, that the Property had, under some theory, transferred to some unspecified trust during David's lifetime for him to hold and administer as a trustee (and not just as a life tenant with a severely restricted right of disposition),

the testamentary trust language cited by this Court would *still* not give David the authority to mortgage the Property as he did. This is because the wide range of liberties afforded to possible trustees under the Will, which include Roberta’s sister, Barbara, specifically does not apply to David. (Will. R. pp. 431 and 445; Trial Tr., R. p. 218, lines 21-25). Unlike Barbara or other potential trustees under the Will, Roberta placed express restrictions and limitations on *David’s authority* to use, consume, and/or mortgage the Property, and she expressly instructed that—as it applied to David—“**the provisions of this Article [V] and of the Will in general shall be construed accordingly.**” (Will, R. p. 431)

CONCLUSION

For each of the foregoing reasons, Appellants respectfully request that this Honorable Court consider the equities in this case, grant their Petition for Rehearing, vacate its unpublished opinion, and give weight to the preponderance of the evidence, which establishes that (1) David Grant did not have the authority to encumber the subject property as he saw fit, and (2) it is inequitable for Nationstar, Countrywide’s successor-in-interest, to seek enforcement of the mortgage against innocent Remaindermen who were never notified by Countrywide of its intent to place a \$625,000 encumbrance on the property, divesting them of their fee simple interest.

[Signatures on following page]

Respectfully submitted,

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July 27, 2022
Mount Pleasant, South Carolina

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Kathleen A. Grant, Dylan T. Grant, Devin D. Grant, and
Andrea J. Grant, Appellants,

v.

Nationstar Mortgage, LLC, Respondent.

Appellate Case No. 2019-001732

Appeal From Charleston County
Bentley Price, Circuit Court Judge

Unpublished Opinion No. 2023-UP-264
Heard December 5, 2022 – Filed July 12, 2023

AFFIRMED

Daniel Scott Slotchiver and Stephen Michael Slotchiver,
both of Slotchiver & Slotchiver, LLP, of Mount Pleasant;
Jesse Sanchez, of The Law Office of Jesse Sanchez, of
Charleston; and Stephen A. Spitz, of A Business Law
Firm, of Charleston, all for Appellants.

Lawrence Michael Hershon, of The Hershon Law Firm,
P.A., of Charleston, for Respondent.

PER CURIAM: In this declaratory judgment action, Appellants Kathleen A. Grant, Dylan T. Grant, Devin D. Grant, and Andrea J. Grant (collectively, Appellants) seek review of an order of the circuit court finding that Respondent, Nationstar Mortgage, LLC's (Nationstar) mortgage is a valid encumbrance on property owned by Appellants. Appellants argue the court erred in finding that: (1) the current action is an action at law; (2) Nationstar had no duty to benefit the remaindermen; and (3) the life tenant had the authority to mortgage the property. We affirm as modified.

FACTS

On June 25, 1987, Roberta R. Grant (Roberta) purchased a property at 1 Wall Street, Charleston, South Carolina (the Property). On December 28, 1988, Roberta passed away and left her Last Will and Testament (the Will) granting her husband, David E. Grant (David), a life estate interest in the property. Under the terms of the Will, David was named as the executor of the estate and the trustee of the Will's testamentary trust, and Appellants were named as remaindermen.

At the time of Roberta's death, there were two mortgages—in the amounts of \$50,000 and \$110,000—on the Property. From May 2, 1990, to March 14, 2007, David refinanced and consolidated the existing mortgages on the property and executed new mortgages. The subject of this appeal is the March 14, 2007 mortgage executed and delivered to Countrywide Home Loans (Countrywide) in the amount of \$625,000. On September 3, 2013, the mortgage was assigned to Nationstar. On July 3, 2016, David passed away and Appellant Kathleen Grant was appointed as the personal representative of his estate. As of July 16, 2019, the most recent appraisal valued the property at \$1,100,000, and the remaining balance of the mortgage was \$669,984.89.

On August 26, 2017, Appellants filed a declaratory judgment action asking the circuit court to declare whether the mortgage on the property was proper noting their position "that it was not proper or lawful to put permanent mortgages on the property". On August 14, 2019, the circuit court denied the requested relief, finding that "Nationstar's mortgage was a valid encumbrance on the Property both under the express terms of the Will and the testamentary trust created under the Will." This appeal followed.

STANDARD OF REVIEW

The parties disagree as to the proper standard of review in the present case. Appellants contend that the trial court erred in characterizing this action as an action at law. We agree.

The "[c]haracterization of an 'action as equitable or legal depends on the appellant's 'main purpose' in bringing the action.'" *Verenes v. Alvanos*, 387 S.C. 11, 16, 690 S.E.2d 771, 773 (2010) (quoting *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978)). "The main purpose of the action should generally be ascertained from the body of the complaint." *Id.* The "main purpose [is] reflected by the nature of the pleadings, evidence, and character of the relief sought." *Lollis v. Dutton*, 421 S.C. 467, 478, 807 S.E.2d 723, 728 (Ct. App. 2017) (quoting *Fesmire v. Digh*, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009)). "[W]hen necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Sloan v. Greenville Cnty.*, 380 S.C. 528, 534, 670 S.E.2d 663, 667 (Ct. App. 2009). "[W]here the complaint states facts which would support either a legal or an equitable action, the relief demanded will ordinarily determine its character." *Bramlett v. Young*, 229 S.C. 519, 531, 93 S.E.2d 873, 879 (1956) (quoting 1 C.J.S. *Actions*, § 54).

"The construction of a will is an action at law. . . [but a]n action to construe or interpret a testamentary trust is equitable in nature." *Holcombe-Burdette v. Bank of Am.*, 371 S.C. 648, 654-55, 640 S.E.2d 480, 483 (Ct. App. 2006). Further, "[a]ctions to foreclose or cancel an instrument are [also] actions in equity." *Cody Disc., Inc. v. Merritt*, 368 S.C. 570, 574, 629 S.E.2d 697, 699 (Ct. App. 2006).

The body of the complaint in the current action states in pertinent part:

This is a Declaratory Judgment Action filed pursuant to S.C. Code [Ann. § 15-53-10 (2017)]. *It asks the Court to declare whether or not certain mortgages are valid vis-à-vis four remaindermen / remainderwomen who only recently came into possession of certain property in Charleston, South Carolina and discovered that the property they inherited is deeply encumbered by mortgages that may well not be entirely proper.*

This action is filed specifically under S.C. Code Sections 15-53-20 and 15-53-30 and asks the [c]ourt to interpret various wills and to declare the meaning of those

documents in light of the law [in relation] to the mortgages now on their property but placed there without their knowledge or consent.

(emphasis added). The prayer for relief "request[s] that the [circuit c]ourt inquire into this matter and determine whether or not the mortgages¹ are indeed valid and lawful with regard to the [Appellants] in this case."

In *Holcombe-Burdette*, this court recognized that the differing standards of review between the interpretation of wills and trusts presented an "obvious conundrum" but declined to resolve the dilemma because it would not affect the outcome of that case. *Holcombe-Burdette* 371 S.C. at 655, 640 S.E.2d at 483. In the present case, the will and embedded testamentary trust present a similar conundrum. However, unlike the situation in *Holcombe-Burdette*, the Appellants' prayer for relief provides another consideration that we believe controls the analysis. See *Bramlett* 229 S.C. at 531, 93 S.E.2d at 879 ("[W]here the complaint states facts which would support either a legal or an equitable action, the relief demanded will ordinarily determine its character.") (quoting 1 C.J.S., *Actions* § 54). Because the prayer for relief asks the court to determine the validity of the mortgage, we find the character of the action is one in equity. See *Cody Disc., Inc.*, 368 S.C. at 574, 629 S.E.2d at 699 ("Actions to foreclose or cancel an instrument are actions in equity.").

"In an action in equity, while this [c]ourt is free to take its own view of the preponderance of the evidence, this does not require us to disregard the findings of the trial judge who saw and heard the witnesses and, accordingly, was in a better position to judge their credibility." *Id.* at 574-75, 629 S.E.2d at 699.

LAW/ANALYSIS

I. David's Authority to Mortgage the Property

Appellants argue that the circuit court erred in finding that David had the authority to mortgage the property "as he saw fit" because David was authorized to mortgage the Property only to protect the interests of the remaindermen. We disagree.

¹The Appellants' complaint asked the circuit court to inquire into "mortgages" instead of the "mortgage." The only mortgage at issue on appeal is the March 14, 2007 mortgage in the amount of \$625,000.

Long-established South Carolina precedent dictates that a life tenant may execute a mortgage to the fullest extent of their life estate interest. *See First Nat. Bank v. Hutson*, 142 S.C. 239, 244, 140 S.E. 596, 597 (1927) (finding that a life tenant could mortgage her interest in a life estate even when her children had a remainder interest); *see also Bethea v. Bass*, 240 S.C. 398, 412, 126 S.E.2d 354, 360 (1962) (clarifying that a mortgage executed by a life tenant covers only his life estate interest and not a fee interest). This is particularly true when a will explicitly carves out a life estate interest with the power of disposition. *See Johnson v. Waldrop*, 256 S.C. 372, 375, 182 S.E.2d 730, 731 (1971) (finding that "a life estate, with the complete power to dispose and consume[,] " was a valid devise).

Article V, Section 1(d) of the Will defines the executor's rights and obligations in pertinent part:

My husband, David E. Grant, shall be obligated to invest and reinvest the properties from time to time constituting the assets of such life estate, in order to protect the remaindermen taking after him[,] and in furtherance of said obligation *he shall have and possess full power and authority to mortgage* or pledge all or any portion of such property, either realty or personalty, or both[,] in fee simple, absolutely, by warranty deed or otherwise, and such conveyance may be public or by private sale, and at such prices and upon such terms and conditions as he *in his absolute discretion may deem most advantageous*, taking into account the protection of remaindermen taking after him. All resulting proceeds shall continue to be properties of such life estate.

(emphases added). In David's capacity as trustee of the testamentary trust, the Will reaffirms his authority "[t]o borrow money for any purpose, either from [himself] or from others, and to mortgage or pledge any trust property[.]"

The above provisions reflect Roberta's unambiguous intent to grant David absolute discretion to mortgage the Property. The circuit court, in stating that David had the authority to mortgage the Property "as he saw fit," echoed this express language in the Will.

Appellants argue that because David was subject to express limitations in the Will, he could not mortgage the Property. Specifically, Appellants challenge the circuit court's finding that David had the authority to mortgage the Property "as he saw fit" because this finding is incongruent with the following limitation in Article V, Section 1(b) of the Will:

[David] shall not in any event be entitled, directly or indirectly, to consume or otherwise retain any principal of this life estate absolutely as his own, or have or possess any substantially equivalent powers or rights, and the provisions of this article and of this [w]ill in general shall be construed accordingly.

We find this provision restricts David from converting the mortgage proceeds to fee simple.² However, we do not believe that this limitation conflicts with David's wide latitude to mortgage the property as he deemed appropriate. Therefore, we find that the circuit court did not err in finding David had the authority to mortgage the property as he saw fit.

II. Countrywide's Duty to Remaindermen

Appellants next argue that if David lacked the authority to mortgage the property, Countrywide—as a "sophisticated financial institution"—had a duty to look after the remaindermen's interests. We disagree.

A. Roberta's Testamentary Intent

"The paramount rule of will construction is to determine and give effect to the testator's intent." *Holcombe-Burdette*, 371 S.C. at 655, 640 S.E.2d at 483. "In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator." *Id.* at 656, 640 S.E.2d at 483. "The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." S.C. Code Ann. § 62-7-112 (2022).

² There was no evidence presented at trial that David misused the proceeds of the mortgage by conversion or retention. The circuit court found that David's "utiliz[ation of] the proceeds is inconsequential as to the findings of this [c]ourt[.]"

Here, the testamentary trust embedded within the Will lists powers which apply to "[a]ny [t]rustee . . . and any others that may be granted by law[.]" This part of the trust includes a provision that states "[n]o person paying money or delivering any property to any [t]rustee need[s] to see to its application." In her Will, Roberta states that "I appoint my husband, David E. Grant . . . as sole Trustee of this Will[.]" Countrywide was delivering money to David as the appointed trustee in exchange for a mortgage on the Property. Appellants suggest that Countrywide had a duty to inquire into David's handling of the mortgage funds. However, according to the Trust's explicit terms, Countrywide had no duty to oversee its administration on behalf of the remaindermen.

Appellants argue that "the wide range of liberties afforded to possible [t]rustees under the Will . . . specifically [do] not apply to David." This is in reference to the provision in the will that states "[David] shall not in any event be entitled, directly or indirectly, to consume or otherwise retain any of the principal of this life estate absolutely as his own[.]" This limitation protects the nature of the money or property in the life estate because "[David is] obligated to invest and reinvest the properties from time to time[.]" However, we do not believe this limiting provision may be translated into a duty owed by a mortgagee to the remaindermen. Such a reading would contravene Roberta's intent in excluding third-party obligations. *See Holcombe-Burdette*, 371 S.C. at 656, 640 S.E.2d at 483. ("In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator."). Therefore, we find the circuit court did not err in finding that Nationstar (and Countrywide) had no duty to benefit the remaindermen.

B. Countrywide's Duty as a "Sophisticated Financial Institution"

Appellants also argue that as a "sophisticated financial institution," Countrywide had a duty to protect the remaindermen's interest. We disagree.

"The normal bank-depositor arrangement creates a creditor-debtor relationship rather than a fiduciary one." *Burwell v. S.C. Nat. Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). "In limited circumstances, . . . a fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers." *Id.* However, where there is no evidence of a special relationship beyond that of a typical creditor-debtor relationship, no fiduciary relationship is created. *See Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 654, 780 S.E.2d 263,

273 (Ct. App. 2015) (finding that because there was no evidence that a debtor reposed a special trust in a creditor, a fiduciary relationship was not created).

Appellants hang their hat on a footnote in *Wachovia Bank, N.A. v. Coffey* stating that "sophisticated financial institutions that prepare mortgages purporting to encumber a customer's property must ensure that the customer in fact holds a legal interest in that property so as to protect all pertinent interests." 404 S.C. 421, 426 n.1, 746 S.E.2d 35, 38 n.1 (2013). Appellants' reliance upon this statement, in isolation, decontextualizes its meaning and misconstrues longstanding South Carolina precedent.

The dispositive question in *Wachovia* was whether a bank may foreclose on an invalid mortgage. *Id.* at 425, 746 S.E.2d at 38. In *Wachovia*, a husband "obtained a \$125,000 home equity line of credit from [the lender], and secured the loan with the couple's residence, which was titled in [his w]ife's name only." *Id.* Our supreme court found that the lender "never possessed a valid mortgage on the property and cannot pursue an action against [the w]ife related to that mortgage." *Id.* at 425–26, 746 S.E.2d at 38. As a result of the lender's flagrant disregard of proper title, the court cautioned against "allow[ing] lenders to ameliorate their complete failure to exercise proper due diligence at the expense of third parties." *Id.* at 426 n.1, 746 S.E.2d at 38 n.1.

Here, David had the express authority to mortgage the property by virtue of his status as the executor of Roberta's estate and trustee of her testamentary trust. Unlike the situation in *Wachovia*, there was no reason for Countrywide to be concerned that David did not have the authority to mortgage the property. We find that Countrywide had neither a fiduciary responsibility to warn the remaindermen that a mortgage had been levied upon the property nor the authority to overrule David's decision to do so. Therefore, we find Countrywide—and Nationstar as its successor in interest—had no duty to protect the remaindermen.

CONCLUSION

Accordingly, we affirm the circuit court's order as modified to reflect the proper designation of the action as one in equity.

AFFIRMED.

GEATHERS and MCDONALD, JJ., and HILL, A.J., concur.

RECEIVED

Jul 27 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2019-001732

Kathleen A. Grant, Dylan T. Grant,
Devin D. Grant, and Andrea J. Grant,

Appellants,

v.

Nationstar Mortgage, LLC,

Respondent.

PROOF OF SERVICE

I, the undersigned, certify that I have served *Appellants' Petition for Rehearing* on counsel of record via his AIS-designated email on July 27, 2023, at the following email address: lawrence@hershonlawfirm.com.

Pursuant to Rule 262(C)(3), SCACR, and the Order of The Supreme Court of South Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), a copy of the aforementioned email correspondence is attached.

[Signature on following page]

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC


s/Jesse Sanchez

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ATTORNEY FOR APPELLANTS

Mount Pleasant, South Carolina
July 27, 2023



From: Jesse Sanchez jesse@jessesanchezlaw.com 
Subject: Kathleen A. Grant v. Nationstar Mortgage, LLC - Appellate Case No. 2019-001732
Date: July 27, 2023 at 2:21 PM
To: Lawrence Hershon lawrence@hershonlawfirm.com
Cc: stephenspitz994@gmail.com, Dan dan@slotchiverlaw.com, Steve Slotchiver steve@slotchiverlaw.com

Counsel,

Attached for service, please find Appellants' Petition for Rehearing and corresponding Cover Letter, both of which are being filed momentarily with the South Carolina Court of Appeals via OneDrive electronic submission.

Regards,

Jesse

--

PLEASE NOTE WE HAVE A NEW ADDRESS:

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July 27, 2023

VIA ONEDRIVE ELECTRONIC SUBMISSION

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
Jul 27 2023
SC Court of Appeals

RE: Kathleen A. Grant, et al., v. Nationstar Mortgage, LLC,
Appellate Case No. 2019-001732

Dear Ms. Kitchings:

Enclosed for filing, please find the following:

1. Appellant's Petition for Rehearing, with copy of the subject unpublished opinion.
2. Proof of Service evidencing service on counsel of record.

A check for the fifty dollar (\$50.00) filing fee has been placed in today's outgoing mail. Thank you for your assistance with this matter. Should you have any questions or wish to discuss the filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

Enclosures (as stated)

Cc: Stephen A. Spitz, Esq. (Via email only)
Daniel S. Slotchiver, Esq. (Via email only)
Stephen M. Slotchiver, Esq. (Via email only)
Laurence M. Hershon, Esq. (Via email only)