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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2023-001402
Case No. 2017-CP-10-04445

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

Petitioners,

v.

Nationstar Mortgage, LLC

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Lawrence M. Hershon (SC Bar No. 77514)
The Hershon Law Firm, P.A.
1565 Sam Rittenberg Blvd., Suite 103
Charleston, South Carolina 29407
Telephone: (843) 829-2022
Facsimile: (843) 829-2023
lawrence@hershonlawfirm.com

Attorney for Respondent Nationstar Mortgage, LLC

INTRODUCTION

Respondent, pursuant to Rule 242(f), SCACR, submits this Return in Opposition to Petitioners' Petition for Writ of Certiorari. The Petition should be denied.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." *Ellison v. State*, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009). In determining whether special reasons for review exist, the Court considers the following five criteria: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. *Haggins v. State*, 377 S.C. 135, 659 S.E.2d 170 (2008); Rule 242(b), SCACR.

Furthermore, on certiorari, the Supreme Court will only review errors of law, and factual findings will not be reviewed "unless wholly unsupported by the evidence." *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009); *Lewis v. Lewis*, 392 S.C. 381, 400, 709 S.E.2d 650, 660 (2011) (Pleicones, J., dissenting); *City of Columbia v. S.C. Pub. Serv. Comm'n*, 242 S.C. 528, 532, 131 S.E.2d 705, 707 (1963) ("The Superior Court, in considering the record of the inferior tribunal, must confine its review to the correction of errors of law only and not review findings of fact except when such findings are wholly unsupported by the evidence.").

While in an effort to meet the required standard for seeking certiorari Petitioners use the phrases such as "directly conflicts" with previous decisions of this Court, such conflicts simply do not exist. Petitioners, as opposed to any court that has reviewed this matter, continue to misapprehend the facts and law in each of the arguments set forth in their Petition. Petitioners'

submission simply reflects that they merely seek to reargue a case in which judgment, following trial, was rendered in favor of Respondent by the trial court, the underlying decision was affirmed by the Court of Appeals without dissent, and a petition for rehearing of such decision was denied by the Court of Appeals.

This appeal involves whether a life tenant with the power of disposition under a will had the power to mortgage real property, as well as to continue to refinance the mortgage. The Circuit Court ruled that the case is to be considered as a matter of law, while the Court of Appeals made one change to the Circuit Court's ruling, instead finding the matter as one in equity. Petitioners' arguments in their petition center on one position: now that the matter is an equitable one, they are not bound by the law, and that the law on mortgages, life tenancy with the power of disposition, and other legal principles must simply be ignored. This position is fundamentally incorrect. Petitioners desire to pick equitable maxims that fit into a misguided concept of fairness, but ignore one simple maxim: Equity follows the law.

In essence, Petitioners argue that they should not be bound by the law, and that to be fair to the remainderman somehow a mortgage and loan, issued to a life tenant with power of disposition, should be voided because the remaindermen did not receive notice of the transaction (a purported requirement for which there is no law to support) and the lender failed to consider the remaindermen's rights (a purported requirement for which there is no law or evidence to support). Simply put, Petitioners provide this Court with no legal or equitable basis for vacating the decision of the Court of Appeals.

The Opinion of the Court of Appeals does not contain any error of law or include any unsupportable evidence. There was no dissent at the Court of Appeals and no conflict with a prior decision of the Supreme Court. The Petition is almost entirely a re-argument of the same points

from the Briefs at the Court of Appeals, and the Supreme Court has not been presented with any grounds that would justify a decision to grant the Petition. The Court of Appeals made a proper ruling in this case and that ruling should be left undisturbed.

COUNTER-STATEMENT OF THE CASE

This matter concerns a declaratory judgment action that sought the interpretation of a will and the powers granted thereunder. The interpretation of the will then affects whether or not a mortgage that encumbers certain real property remained valid and enforceable following the death of the Grants' father.

On August 29, 2017, Petitioners Kathleen A. Grant, Dylan T. Grant, Devin D. Grant, and Andrea J. Grant (collectively, the "Grants"), the adult children of Roberta and David Grant, filed an action seeking the interpretation of the Last Will and Testament of Roberta R. Grant (the "Will"), the Grants' late mother, who died testate on December 28, 1988. (R. pp. 22-25). More specifically, the Grants sought assistance from the Circuit Court regarding whether the Will granted the Grants' late father, David Grant ("Mr. Grant"), the authority to mortgage certain real property as a life tenant under the Will. (*Id.*)[1] As set forth in the Complaint, the Grants sought a declaration from the Court as to "whether or not certain mortgages are valid vis-à-vis four remaindermen/remainderwoman [sic] . . . ." (Compl. at ¶ 1, R. p. 22). The Grants further explained in their Complaint that this action was filed "specifically under S.C. Code Sections 15-53-20 and 15-53-30" and that they were asking the Court "to interpret various wills and to declare the meaning of those documents in light of the law with relationship to the mortgages now on their property but placed without their knowledge or consent." (R. p. 22). Simply put, this matter

[1]The real property that is the subject of this action is located at 1 Wall Street, Charleston, South Carolina 29401 (the "Property"). (R. pp. 23, 80, 91).

involves the enforceability and meaning of a will -- only upon a review of the Will can a determination about the enforceability of the mortgage be made.

Thereafter, on November 2, 2017, Respondent Nationstar Mortgage, LLC ("Nationstar"), holder of the mortgage that is the subject of this appeal (the "Mortgage"), timely filed its Answer in response to the Grants' Complaint. (R. pp. 26-28). In so doing, Nationstar denied the material allegations set forth in the Complaint to the extent they suggested that Nationstar's mortgage was not a valid encumbrance on the Property and asserted various affirmative defenses. (*Id.*)

On July 30, 2019, a non-jury trial was held before the Honorable Bentley D. Price in the Court of Common Pleas for Charleston County (the "Circuit Court"). (R. p. 9). At trial, the parties stipulated that the subject mortgage was the result of a series of refinances and, as of July 16, 2019, the principal balance remaining owed on the subject mortgage was $615,675.38 and there was interest due in the amount of $54,309.51. (R. pp. 497-502). No payments have been made on the subject mortgage since September 1, 2017. (R. p. 501). Nationstar submitted evidence to the Circuit Court which established that the Will provided Mr. Grant a life estate with the power of disposition. (*See* R. pp. 85-86, 159, 201). Further, Nationstar argued that it and its predecessors in interest did not owe a legal duty to the Grants to notify them of the Mortgage or ensure that Mr. Grant properly utilized the funds provided as part of the refinancing. (*See* R. pp. 156-157, 161, 261-262). Additionally, while the Grants' arguments concerning the duties and responsibilities of a lender lacked legal merit, Nationstar argued that the Grants failed to proffer any evidence to the Circuit Court that established that Mr. Grant improperly used the funds resulting from these refinances and that, instead, Mr. Grant actually benefited the Grants by keeping the Property in his possession so that it could be devised to his children. (*See* R. pp. 15-19, 157-159, 274, 355).

The Grants attempted to persuade the Circuit Court that Mr. Grant did not have the authority to mortgage the Property as he did pursuant to the Will and did not take into account the Grants, as remaindermen under the Will, when he refinanced the two initial mortgages originally placed on the Property by their deceased mother when she first purchased the Property. (R. pp. 60-63, 150-152). The Grants also argued that Nationstar had a duty to ensure that Mr. Grant utilized the loaned funds in a manner that took into account the interest of the Grants. (R. pp. 152-163). Further, the Grants argued that equitable principles should control the disposition of the litigation as this case involved the challenge to the validity of the Mortgage. (R. pp. 143-148).

On August 14, 2019, the Circuit Court entered an Order ruling that (1) this litigation was an action at law, (2) Mr. Grant had the authority to mortgage the Property under the Will and the testamentary trust created under the Will, (3) Mr. Grant preserved the Property and did not invade the principal of the Property thereby taking into account the protection of Grants as mandated by the Will, and (4) Nationstar did not have a duty to ensure that Mr. Grant utilized the funds loaned to him in a manner that took into account the protection of Grants as remaindermen under the Will. (*See* R. pp. 9-20). Ultimately, the Circuit Court ruled that Nationstar's mortgage remains a valid encumbrance on the Property both under the express terms of the Will and the testamentary trust created thereunder. (R. p. 20).

On August 22, 2019, the Grants filed, pursuant to Rule 59(e), a motion to alter or amend the Circuit Court's Order. On September 27, 2019, the Circuit Court denied the motion, and Grants filed their Notice of Appeal on October 10, 2019. (R. p. 21). The Circuit Court's decision was affirmed without dissent by a three judge panel at the Court of Appeals on July 27, 2023, and the petition for a rehearing was denied on August 9, 2023. (App. pp. 77-84, 110). The petition for writ followed.

FACTUAL BACKGROUND

As set forth in the Complaint, the Grants sought a declaration from the Circuit Court as to whether Nationstar's mortgage that encumbers the Property remained valid following the death of Mr. Grant, the Grants' father. (R. pp. 22, 24). As such, the Grants asked the Circuit Court to interpret the Will of the Grants' late mother. (Compl. at ¶¶ 1-2, R. p. 22). Moreover, as set forth in the Complaint, the Will created a testamentary trust that needed to be construed to determine the powers afforded to the trustee, Mr. Grant. (Compl. at ¶ 9, R. p. 24).

1. Key Provisions of the Will

Pursuant to the terms of the Will, Mr. Grant was granted a life estate in the Property. (R. pp. 432, 498). Specifically, Article V of the Will provides, in relevant part, as follows:

> 1. (a) All of the rest, residue and remainder of my property of whatsoever kind or character, or wherever located, being the remaining fraction of my residuary estate, I give, devise and bequeath to my husband, David E. Grant, for the term of his life, if he shall survive me.
>
> (b) The properties of such life estate herein passing to my husband, David E. Grant, as and in such form as such property may exist from time to time, shall be kept by him in a single fund separate and apart from such other property as may be owned or held by him. He 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, 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.
>
> . . .
>
> (d) 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 during his lifetime to mortgage or pledge all or any portion of such property, and to sell, convey or otherwise dispose of all or any portion of such property, either realty or personalty, or both, in fee simple, absolutely, by warranty deed or otherwise . . . 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.

(R. pp. 431-432) (emphasis added).

The language above provided Mr. Grant, at the time of Mrs. Grant's death, not only a life estate, but a life estate with the power of disposition, specifically setting forth his ability and full power to mortgage, sell, or convey such property under such terms that he saw fit.

As discussed briefly above, the Will also created a testamentary trust and Mr. Grant was named the Trustee. (R. pp. 438-442). With regards to the power of Mr. Grant, as Trustee, Article VII of the Will provides as follows:

> 1. Any Trustee hereunder shall have the following powers, and any others that may be granted by law, with respect to each Trust hereunder, to be exercised as the Trustee in its discretion determines to be the best interest of the beneficiaries:
>
> . . .
>
> c) To sell any Trust Property, for cash or on credit, at public or private sales; to exchange any Trust Property for other property; to grant options to purchase or acquire any Trust Property; and to determine the prices and terms of sales, exchanges and options;
>
> . . .
>
> e) To borrow money for any purpose, either from the Trustee or from others, and to mortgage or pledge any Trust Property . . . .
>
> 2. a) No Trustee shall be required to give any bond as Trustee; to qualify before, be appointed by or in the absence of breach of trust account to any court; or to obtain the order of approval of any court in the exercise of any power or discretion.
>
> **b) No person paying money or delivering any property to any Trustee need see to its application.**

(*Id.*) (emphasis added).

2. History of Refinancing of Mortgages on the Property

Roberta Grant purchased the Property on June 25, 1987 for the purchase price of $240,000.00. (R. p. 497). In connection with the purchase, she executed two mortgages in the total amount of $160,000.00, which mortgages encumbered the Property (the "Original Mortgages"). (R. pp. 497-498). Roberta Grant's Probate Estate filings indicated that the Original

Mortgages remained encumbrances on the Property in the amount of $166,377.85, and her Estate's interest in the Property was appraised at $190,000.00 as of May 30, 1991. (R. p. 498).

Following Roberta Grant's death, Mr. Grant consolidated and refinanced the existing mortgages multiple times. On May 2, 1990, Mr. Grant, individually and as Trustee for the Grants, executed and delivered a mortgage on the Property to First Federal Savings and Loan Association of Charleston in the amount of $190,000, which mortgage was recorded in the Charleston County Register of Mesne Conveyance ("RMC") on May 3, 1990. (R. p. 499). This mortgage was a consolidation and refinance of the two mortgages executed and delivered by Roberta Grant at the time of purchase. (*Id.*)

Between September 1990 and January 2006, Mr. Grant refinanced the mortgages on the property several times. (R. pp. 499-500). The final refinance, which is at issue in this litigation and appeal, was executed and delivered on March 14, 2007, by Mr. Grant, individually, and as "David E. Grant, as Trustee under the Last Will and Testament of Roberta R. Grant," to Countrywide Home Loans, Inc. in the amount of $625,000, which mortgage was recorded in the RMC on March 19, 2007 in Book C-619 at Page 182 (the "Mortgage"). (R. p. 501). The Mortgage was a refinance of the mortgage from January 2006. (*Id.*) The Mortgage was ultimately assigned to Nationstar, which assignment was recorded in the RMC on September 3, 2013. (*Id.*)[2]

At all relevant times and up until the date of Mr. Grant's death on July 3, 2016, the property taxes and homeowners' insurance for the Property were paid out of escrow pursuant to the various mortgages. (*Id.*) The homeowners' insurance remained current and was utilized on at least one

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[2]A detailed history of the mortgages and refinances thereof are located in a Stipulation of Facts submitted as a court exhibit at trial. (R. pp. 497-501).

occasion to pay for repairs to the Property following Hurricane Matthew. (R. pp. 228-229, 240-242, 398-425).

3. Mr. Grant's Use of the Proceeds of the Refinances

During the trial, none of the Grants could testify how Mr. Grant used the proceeds of the loan at issue. (R. p. 243, 248, 257). Furthermore, no evidence was presented at trial to indicate how the proceeds of the various refinances were used. (*Id.*)[3] As of July 16, 2019, the principal balance remaining owed on the Subject Mortgage was $615,675.38 and there was interest due in the amount of $54,309.51. (R. p. 501). No payments have been made on the Subject Mortgage since September 1, 2017. (*Id.*)

4. Appraisal of the Property Prior to Trial

An appraisal commissioned jointly by the Grants and Nationstar valued the Property at $1,100,000.00, as of December 20, 2018. (R. pp. 336-337, 367-396). Thus, there remained equity in the Property for Grants in the amount of $484,324.62, exclusive of interest and any advances made as of that date (R. at 86).

ARGUMENT BASED ON QUESTIONS PRESENTED

I. Did the Court of Appeals Err in Failing to Consider Equitable Principles?

The underlying issue in this case is whether Mr. Grant had the authority under the Will to mortgage the Property as he did. Respondent continues to stand by its position that the Circuit Court was correct in its ruling that the language of the mortgage itself was not at issue; what was at issue was the interpretation of a will. This then led to the conclusion that the action was a matter at law. The Court of Appeals determined that the matter at bar is an action in equity. Regardless of whether this is an action at law or in equity, the Court of Appeals correctly affirmed the decision

[3]Regardless, how or in what fashion Mr. Grant utilized the proceeds is inconsequential to the decision in this appeal as set forth more fully below.

of the Circuit Court. In other words, the Circuit Court determined the matter at bar is a matter at law, while the Court of Appeals determined that the matter is in equity, yet they both came to the same result.

The reason for this is simple, as stated by perhaps the most important maxim concerning equity: Equity follows the law. *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 254, 715 S.E.2d 348, 355 (2011). While the Court of Appeals does not cite to any equitable maxims, it does not need to in order to rule on this matter. What Petitioners desire for this Court to do is to ignore the law and ignore precedent, and instead make a decision that flies in the face of this Court's previous opinions under a misguided argument of fairness. Petitioners ignore the simple rule that "[w]hen providing an equitable remedy, the court may not ignore statutes, rules, and other precedent." *Id. citing Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996). If the Court of Appeals erred at all, which Respondent denies, all that would be required to resolve the issue cited in their Petition would involve citations to *Regions Bank* for the principle that equity follows the law.

Furthermore, as cited to by the Court of Appeals, there is no requirement to disregard the factual findings of the trial court as a part of its review. Rather, "[i]n 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." *Cody Disc., Inc. v. Merritt*, 368 S.C. 570, 574-75, 629 S.E.2d 697, 699 (Ct. App. 2006).

Under the will, Roberta Grant provided a mechanism, following her death, for her husband to continue to utilize and live in their marital home, while protecting her wish that at Mr. Grant's death, whatever remainder of the estate still existed would go to her children, rather than whatever

change of heart Mr. Grant may have during the remainder of his life to perhaps have the property go elsewhere following his death. The purpose of the will was not to prevent Mr. Grant from living or from using his power of disposition. Petitioners seek to take advantage of the estate planning structure their mother provided to avoid their father's debts and take the property for free.

Such a result requires inequitable conduct. Of course, to seek equity, one must do equity. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) (declining to grant a plaintiff's request for specific performance where the plaintiff misled the defendants); *Anderson v. Marion*, 274 S.C. 40, 43, 260 S.E.2d 715, 716 (1979) (finding defendants who sought equity against the plaintiffs for specific performance were required to do equity and pay plaintiffs money they asserted they were willing and able to pay); *Shumaker v. Shumaker*, 234 S.C. 421, 427, 108 S.E.2d 682, 686 (1959) ("Plaintiffs who come into Court invoking the aid of equity should be required to do equity in order that justice might be done between the parties."); *Anderson v. Purvis*, 211 S.C. 255, 266, 44 S.E.2d 611, 616 (1947) (discussing the maxim that he who seeks equity should do equity). The testimony of the Grants establishes that they had minimal relationships with their father, never discussing the issue of finances and how their father would live without a source of income. (R. pp. 236-238; 248; 257-258). Yet, now they desire to criticize the estate structure following the death of their father, blaming him for mortgaging the family property, but failing to assist him during his lifetime. Furthermore, equity abhors a forfeiture. *South Carolina Tax Commission v. Metropolitan Life Insurance Company*, 266 S.C. 34, 221 S.E.2d 522 (1975) ("both in law and equity forfeitures are abhorred."). Petitioners argue that somehow paying off a mortgage for funds actually loaned to Mr. Grant is somehow a forfeiture. This turns the issue on its head; the actual forfeiture is a lender not being repaid debts owed to it for funds that were

actually loaned and used by the borrower. To cancel the debt owed to Nationstar would undoubtably be a significant forfeiture to the lender.

Petitioners seek to cast the lender as the "bad guy" that "turned a blind eye" to the fact that a will existed. These accusations are only that – arguments of counsel, unsupported by the record, and therefore should not be considered by the Court. There is no testimony in the record from anyone who worked at Countrywide or participated in this loan transaction from the lender side. More importantly, there was no "blind eye." The items of which Petitioners complain related to the closing are exactly what is required – a South Carolina attorney reviewed the transaction and confirmed that the mortgage was enforceable, placing a first lien on the real property. It is his obligation, as the closing attorney and title agent, to confirm this, and he properly did so. Petitioners are arguing for a change to customary closing procedures for a South Carolina real estate transaction, and they seek to do so without evidence, and without any requisite expert opinion, in their efforts to do so.

Further, the Grants seek to obtain a windfall, rather than prevent one, in this appeal. They desire to eradicate a mortgage, issued pursuant to a life estate with a power of disposition (which the Grants fully admit exists, per oral arguments by their counsel before the Court of Appeals), which provided funds so that their father had a source of funds from which to live in his later years. Equity is supposed to prevent windfalls, not create them. *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 426 n.1, 746 S.E.2d 35, 38 n.1 (2013) (Pleicones, J., dissenting).

There is no error by the Court of Appeals by not citing to any equitable maxims. The maxims set forth above support the Opinion of the Court of Appeals, but were not necessary for citation in the Opinion. To the extent the Supreme Court requires such citations, then the law set

forth above applies, so that no change in the result rendered by the Circuit Court and the Court of Appeals is required.

II. Did the Court of Appeals err in determining that no duty existed to the remaindermen? Did the Court of Appeals err in construing the intent of the Will?

A. Mr. Grant possessed a life estate with the power of disposition.

Under South Carolina law and the authority granted under the Will, Mr. Grant had the authority to mortgage the Property, pursuant to both the express terms of the Will and the testamentary trust.

Under South Carolina law, a life tenant may mortgage his entire life estate. As a general rule, a mortgage executed by a life tenant alone does not bind the interest of the remaindermen because the life tenant can only encumber his life estate interest. *First Nat'l Bank v. Hutson,* 142 S. C. 239, 140 S. E. 596 (1927)*; Federal Land Bank v. Wood,* 334 F. Supp. 1124 (D. S. C. 1970)*; Belue v. Fetner,* 251 S. C. 600, 164 S. E. 2d 753 (1968)*; Bethea v. Bass,* 240 S. C. 398, 126 S. E. 2d 354 (1962); *McDonald v. Woodward,* 58 S. C. 554, 36 S. E. 918 (1900); *see also* 27 S.C. Jur. Mortgages § 19.

However, contrary to the foregoing restrictions on a life tenant's ability to mortgage property subject to his life estate, South Carolina courts have long recognized that a last will and testament may devise a life estate interest with the power of disposition. *Blackmon v. Weaver*, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005) (holding that South Carolina courts have previously recognized such an interest) (citing *Johnson v. Waldrop*, 256 S.C. 372, 374-76, 182 S.E.2d 730, 731 (1971) (finding a life estate with a complete power to dispose and consume) and *Thomason v. Hellams*, 233 S.C. 11, 15, 103 S.E.2d 324, 325 (1958)); *Shevlin v. Colony Lutheran Church*, 227 S.C. 598, 88 S.E.2d 674 (1955) (holding that under a will clause reciting in effect that testator willed to his wife all his property 'that is to say to the said' wife all his property to use for

her comfort, maintenance and support, to sell and dispose of same in any manner she might deem best, and that any part remaining on her death he desired to go to certain charities, the intention was to give a life estate with power of disposal, and not a fee); *Schultz v. Barr*, 186 S.C. 498, 196 S.E. 177 (1938) (recognizing life estate with power of disposition is a valid devise under South Carolina law); *Dye v. Beaver Creek Church*, 48 S.C. 444, 26 S.E. 717 (1897) (same). In *Thomason*, the Supreme Court expressly held that "[a] deed, devise or bequest for life with power of disposition and remainder to another (of such property as is not disposed of by the first taker) is valid." *Thomason* at 15, 103 S.E.2d at 325. This power of disposition has also been construed to support the ability of the life tenant to mortgage life estate property. *See Hamrick v. Marion*, 176 S.C. 361, 180 S.E. 213, 214 (1935).

Based on oral arguments at the Court of Appeals, all parties agree that Mr. Grant possessed a life estate with the power of disposition. In order to determine whether such a life estate with the power of disposition was granted to Mr. Grant under the Will, it is necessary to interpret the plain language of the Will. Under South Carolina law, "[i]t is the cardinal rule of will construction that the testator's intent should be ascertained and followed unless it violates some well-established rule of law." *McGirt v. Nelson*, 360 S.C. 307, 311, 599 S.E.2d 620, 622 (Ct. App. 2004). In ascertaining the testator's intent, effect must be given to every part of the will. *Id.* A court may not "by judicial construction make a will for the decedent that [she] has not made for [herself]." *Blackmon*, 366 S.C. at 250, 621 S.E.2d at 44 (internal quotation omitted).

The Grants do not dispute that Article V of the Will granted Mr. Grant authority to mortgage his life estate in the Property. (*See* R. pp. 60-61, 168-169). However, what the Grants do take issue with is that, in their opinion, Mr. Grant did not take into "account the protection of the remaindermen taking after him." (*See* R. pp. 63-64, 151-152, 174). The Grants' opinion is

three-fold: (1) Nationstar's predecessor in interest did not notify the Grants before entering into the final refinance in 2007; (2) the prior lender did not review the Will before agreeing to loan Mr. Grant the money; and (3) there is now a mortgage on the Property in excess of $650,000 that must be satisfied before the Grants can realize the substantial equity in the Property. (*See* R. pp. 149-153). Again, it needs to be stressed that the Grants presented no evidence as to how Mr. Grant used the loan proceeds for his own benefit or how he consumed any of the principal of this life estate absolutely as his own. (R. pp. 243, 248, 257). To the contrary, Nationstar presented evidence set forth below that Mr. Grant did utilize the loan proceeds and the mortgages to benefit the Grants.

As the Circuit Court and Court of Appeals properly found, it is clear from the plain language of the Will that Roberta Grant intended to grant Mr. Grant a life estate with the power of disposition or, at a minimum, he possessed "full power and authority during his lifetime to mortgage" the Property, so long as he took into account the protection of the remaindermen taking after him. (R. pp. 12-17). Indeed, the Will expressly states that Mr. Grant had full authority, as a life tenant, "to mortgage or pledge all or any portion of such property . . . at such prices and upon such terms and conditions as he in his absolute discretion may deem most advantageous," so long as he was taking into account the protection of the remaindermen under the Will. (R. pp. 431-432). This conclusion is further bolstered by the fact that the Will also expressly gave Mr. Grant the full authority to sell or dispose of the Property "in fee simple, absolutely, by warranty deed or otherwise . . . ." (R. pp. 15, 432). If Mr. Grant did not have the authority, as the Grants suggest, to refinance the existing original mortgages as he did even though the Property still remains in the family's hands, how could he also sell the Property in fee simple such that there would be no property left for the Grants to take?

Moreover, the above-stated conclusion is bolstered by the fact that Mr. Grant was named as Trustee of the testamentary trust created by the Will, and had full authority to "borrow money for any purpose, either from the Trustee or from others, and to mortgage or pledge any Trust Property," to include the Property. (R. pp. 16, 439). As a matter of fact, Nationstar's mortgage lists as one of its borrowers "David E. Grant, as Trustee Under the Last Will and Testament of Roberta R. Grant." (R. p. 501). This provision is significant because, as set forth in the plain language of the Will, the testamentary trust was created to hold the Grants' remainder interest and Mr. Grant, as trustee, executed the Mortgage on their behalf. (R. pp. 432-433).

Additionally, as set forth above, the South Carolina licensed attorney that closed the final refinance in 2007 and a representative of the title insurance company both testified that they reviewed the provisions of the Will prior to making the decision to close the Mortgage and issue title insurance with no "special exceptions." (R. pp. 164, 319, 322-323). Thus, the bank refinancing the loan, as Nationstar's predecessor in interest, was aware of the terms of the Will (through South Carolina licensed closing counsel). Furthermore, there is nothing in the Will or the Mortgage that required the prior lender to provide notice to the Grants that Mr. Grant was entering into a refinance of the Mortgage. (R. p. 205). It is also important to elucidate the fact that the Mortgage is a refinance of the original mortgages granted to previous lenders, which were originally granted by Roberta Grant, which means that several previous lenders and South Carolina licensed attorneys had each read the Will in the same manner: that it granted Mr. Grant the authority to mortgage the Property. (*See* R. pp. 497-502). It would appear that the Grants are, therefore, calling into question the competency of all these previous closing attorneys and title insurance companies who unanimously agreed that Mr. Grant had the authority to mortgage the Property as he did – such a conclusion strains credulity.

As Nationstar presented at trial, on May 30, 1991, there were two mortgages that encumbered approximately 87% of the value of the Property, leaving equity in the Property in the amount of approximately $23,623. (R. pp. 480-485, 498). Based on the December 20, 2018 appraisal, valuing the Property at $1,100,000.00, the principal balance of the Mortgage encumbered only 56% of the value of the Property at the time of the most recent appraisal. (R. pp. 366-396, 501). Thus, there remained equity in the Property, at the time of the appraisal, in the amount of $484,324.62, exclusive of interest and advances made. Accordingly, while not necessary for determining whether Mr. Grant had the authority to mortgage the Property, it is important to note that Mr. Grant did not invade the principal of the Property that was in existence at the time of Roberta Grant's death, and it appears that he did, in fact, take into account the protection of Grants. Simply put, the net value of the Property greatly increased during the life tenancy of Mr. Grant, and the refinancing of the previous loans allowed for Mr. Grant to retain ownership of the Property so that it was available at his death to transfer to his adult children (as, alternatively, he could have sold the Property and simply placed the proceeds in a bank account).

Furthermore, the property taxes and insurance were paid by Nationstar and the prior lenders out of escrow under the terms of the Mortgage. (R. p. 501). Payment of the property taxes under the Mortgage protected the Property from being involuntarily sold at a tax sale, which would have divested the Grants of their rights to some of the proceeds in the Property. Moreover, the payment of the homeowners' insurance also protected the Property. Specifically, following Hurricane Matthew, Petitioner Kathleen Grant testified that the homeowners' insurance policy was utilized

to make necessary repairs to the roof. (R. pp. 228-229). The premiums for the insurance policy were also paid out of the Mortgage's escrow account. (R. p. 501).[4]

The Court of Appeals found that that the Will provided authority for Mr. Grant's actions to mortgage the Property, and the evidence presented at trial supports such a finding. (R. p. 15). There is no authority for the Court to hold the lender responsible for the actions of a life tenant following issuance of its loan. (R. pp. 17-19). The Court's analysis of this matter is complete upon finding that Mr. Grant had the right under the Will to mortgage the property. *See Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).[5]

B. A Lender owes no duty to notify the remaindermen concerning the mortgage or to oversee the use of the funds.

The Grants failed to introduce any convincing evidence at trial that Mr. Grant did not utilize the proceeds of the various loan refinances to take into account the protection of his adult children. (R. pp. 243, 248, 257). Furthermore, South Carolina law does not impose a duty on Nationstar's predecessors-in-interest (as the bank that originated the loan, and, accordingly, Nationstar) to the Grants to notify them that the Mortgage was entered into and ensure that Mr. Grant utilized the proceeds of the loan properly under the Will.

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[4]Regardless, whether Mr. Grant properly protected the principal of the life estate may provide a basis for a claim by his adult children against the estate of Mr. Grant, but there is no legal support presented by the Grants for a court to hold a lender liable for the actions taken by a life tenant with the power of disposition. The case law cited by the Grants at most supports actions against the life tenant.

[5]Furthermore, this Court "may affirm a trial judge's decision on any ground appearing in the record and, hence, may affirm the trial judge's correct result even though he may have erred on some other ground." *Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987).

The long-standing jurisprudence in South Carolina is clear: The normal arrangement between and bank and its <u>customer</u> "creates a creditor-debtor relationship rather than a fiduciary one." *Burwell v. South Carolina Nat. Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) (citing *Nat. Loan and Exchange Bank v. New York Life Ins. Co.*, 149 S.C. 378, 147 S.E. 322 (1929); *see also Citizens and Southern Nat. Bank of South Carolina v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994) ("The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document."); *Regions Bank v. Schmauch,* 354 S.C. 648, 669, 582 S.E.2d 432, 443 (Ct. App. 2003) (holding the borrower "was not in a vulnerable position, and the bank owed no special duty of care"). Other jurisdictions are in accord with the general principle that there is no duty for a lender to use reasonable care in making a loan in the context of a loan application and lender-borrower relationship. *Nelson v. Production Credit Assoc. of the Midlands,* 930 F.2d 599, 605 (8th Cir. 1991) (finding the "Court would not impose a duty on a lender to use reasonable care in making a loan."); *Parker v. Columbia Bank,* 604 A.2d 521, 535 (Md. App. 1992) (finding "a lender owes no duty of care to its borrower"); *Baskin v. Mortgage and Trust, Inc.,* 837 S.W.2d 743, 747-48 (Tex. App. 1992) ("Regarding [lender's] liability for its own negligence, if any, the relationship between a borrower and its lender generally does not create a fiduciary duty or impose a duty of good faith and fair dealing"); *Commercial Natl. Bank v. Audobon Meadow Partnership,* 566 So.2d 1136, 1140 (La. App. 1990) ("we find no source of a duty in tort which would impose liability upon the bank").

In limited circumstances, a fiduciary relationship <u>*may*</u> be created between a bank and a <u>customer</u> "if the bank undertakes to advise the customer as a part of the services the bank offers." *Burwell*, 288 S.C. at 40-41, 340 S.E.2d at 790. However, the Grants in this case are not customers of Nationstar nor were they customers of the previous lenders.

The Grants have not cited any authority that imposes a duty upon a bank to notify remaindermen of mortgages that are taken out by a life tenant or ensure that the loan proceeds are used properly. One of the Grants' contentions is that simply because the prior lender was involved in nationwide lending during the financial crisis that led to the demise of several financial institutions that this somehow supports imposing a legal duty on Nationstar. (R. pp. 265-266).[6] The imposition of such a duty on financial institutions, taken to its logical conclusions, would chill residential home lending in South Carolina.

In support of their arguments, the Grants rely on the Supreme Court's decision in *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 746 S.E.2d 35 (2013) and contend that this decision stands for the principle that financial institutions have a duty to investigate and take into account the interests of "innocent third parties" through "proper due diligence." *Id.* at 426 n.1, 746 S.E.2d at 38 n.1. First, as this Court is well aware, *Coffey* dealt with a lender, that issued a home equity loan to a deceased husband, that subsequently filed suit against the husband's estate, wife, and others to foreclose on the estate after the wife stopped making payments. *Id.* at 422, 746 S.E.2d at 38. In addition, the lender prepared the loan documents and closed the loan transaction without the participation or supervision of a closing attorney. *Id.* The significant fact in this case was that the real property pledged as a mortgage for the home equity line of credit by the husband was not owned by the husband, but solely by the wife. *Id.* The Supreme Court held that the dispositive issue in the case was whether the lender could foreclose on an invalid mortgage. *Id.* at 425, 746

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[6]Again, the Grants did not submit any evidence to the Circuit Court, other than Mr. Grant's daughter's conjecture, that Mr. Grant failed to use the funds for a purpose other than protecting the Grants. (R. pp. 243, 248, 257). To the contrary, as discussed herein, Nationstar established that Mr. Grant preserved the Property for his children as was required under the Will. Further, no evidence was presented at trial to support Petitioners' argument that the lender caused the financial crisis.

S.E.2d at 38. The Supreme Court explained that, because the lender failed to verify the husband's interest in the couple's residence, it never possessed a valid mortgage on the property and could not pursue an action against the wife related to the mortgage. *Id.* at 426, 746 S.E.2d at 38.

The language actually cited by the Grants is located in a footnote to the opinion that was drafted specifically to address the dissent's arguments that equitable principles militated in favor of the lender and not the wife. *Id.* at 426 n.1, 746 S.E.2d at 38 n.1. What the Grants failed to appreciate is that the prior lenders in the case at bar did, in fact, conduct proper due diligence when they made the repeated decisions to allow Mr. Grant to refinance the mortgage. (*See* R. pp. 199-200). This was testified to at trial by both the closing attorney for the latest refinance and a representative from the title insurance company that issued the policy covering the Property. (R. pp. 318-319).[7] Indeed, both the closing attorney and the representative from the title insurance company reviewed the Will and conducted an examination before closing the Mortgage and issuing a title insurance policy. (R. pp. 196-208, 316-319). Such conduct is exactly what the Supreme Court envisioned in its ruling in *Coffey*. Moreover, as discussed in more detail below, the Grants have not been harmed by Nationstar's and the previous lenders' conduct and, in fact, they now have a valuable piece of real property that would not have been in Mr. Grant's estate had he not refinanced the mortgages through the years.

The Grants also cite to the Supreme Court decision in *Kirkham v. First Nat. Bank of City of New York*, 149 S.C. 545, 147 S.E. 648 (1929) for the apparent proposition that the purpose of the court is to protect the rights of remaindermen who may at any time have an interest in real

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[7]The Grants contend in their petition that the closing attorney and the title insurance representative had conflicts of interest and that their testimony should be discounted. The Grants never raised these apparent "conflicts of interest" at trial or in their Rule 59 Motion. Accordingly, this contention should be given no weight as it is not preserved for appeal. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

estate if they are incapacitated or not of age and should step in to ensure that the rights of the remaindermen are protected. However, as to what the Grants actually rely upon, the court in *Kirkham* merely stated that it was not going to disturb the general rule that a life tenant owes a duty to protect the remainder. *Id.* at 649. The case did not involve the duties of a third party to the remaindermen.[8] Thus, *Kirkham* is inapposite to the facts of this case.[9] Had the Grants wanted to sue Mr. Grant or his probate estate to challenge whether he breached his duty, they had/have that opportunity. However, as of the date of this brief, they have chosen not to take that approach.

Finally, Petitioners cite to *Shepard v. First Am Mortgage Co.*, 289 S.C. 516, 347 S.E.2d 118 (Ct. App. 1986), raising this case for the first time in this matter in their petition. *Shepard* involved a son petitioning a probate court to declare his mother incompetent. Then, the son had property of his mother deeded to him, and then he placed a mortgage on the property. The Court's decision on whether to invalidate a deed and mortgage centered on the principle that equity takes special charge of persons *non compos mentis*. The *Shepard* court concluded that because the subject deed conveyed no rights to a grantee with notice of the grantor's incompetency, the grantee had no interest which he could mortgage. This case has no applicability to the case at bar, in which there is no issue of mental incapacity requiring the court's protection. The protections required by

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[8] Moreover, the Supreme Court stated: "The appellant refers to Miss Kirkham as a life tenant; we are not to be understood as adopting this characterization." *Id.* at 649 (emphasis added). Accordingly, the underlying facts did not even support the finding of a life tenancy at issue.

[9] The Grants also attempt to rely on the case of *Des Champs v. Mim*, 148 S.C. 52, 145 S.E. 623 (1928) and its progeny to support their argument that Nationstar's predecessor-in-interest owed a duty to the Grants; however such reliance is misplaced. *Des Champs* dealt with a life tenant who sold land to pay off his mortgage debts and completely divested his unborn son of his remainder interest in the subject property. The case did not, as we have here, involve a life estate interest with the power of disposition nor did it involve a claim against the bank that held the mortgage. Rather, the claim was against the life tenant for failing to preserve the property. Again, the Grants have chosen not to sue Mr. Grant or his estate and, accordingly, *Des Champs* and its progeny are neither binding nor relevant precedent on this Court's decision.

the *Shepard* court do not apply to the Petitioners; rather, the Petitioners are requesting a new form of protection that does not exist in South Carolina jurisprudence.

All told, the Grants have not cited a single case that holds (or supports a holding) that a lender owes a duty to remaindermen to ensure a life tenant with the power of disposition, who mortgages property subject to the life estate, properly uses the proceeds of the loan or provides notice to the remaindermen that a transaction with the life tenant is taking place. Further, the Grants failed to present any evidence that Nationstar or the originating lender did anything to create a duty between them and Mr. Grant or the Grants.

Moreover, the actual Will itself absolves Nationstar or any other lender of any responsibility to oversee Mr. Grant's use of the proceeds. Specifically, the terms that created the testamentary trust provide: "No person paying money or delivering any property to any Trustee need see to its application." (R. p. 442). Furthermore, Plaintiffs did not point to any language in the Mortgage that would impose such a duty on the prior lenders. The Grants argued at trial that the prior lenders assumed some form of a "conservatorship" role by loaning the proceeds to Mr. Grant because it knew of the Will. (R. p. 153). While no concrete evidence was presented that the prior lenders knew the terms of the Will, even if they did, nothing in the language of the Will, the Mortgage, or any order from the Probate Court from the estate file of Roberta Grant created such a "conservatorship" and the law does not impose such a role. (R. pp. 156, 203).

South Carolina law does not impose a legal duty on Nationstar's predecessors-in-interest (and, accordingly, Nationstar) to the Grants to ensure that Mr. Grant utilized the proceeds of the loan properly. Moreover, although though not dispositive and as discussed below, the Grants could not prove to the Circuit Court that Mr. Grant improperly utilized the proceeds for the refinances and failed to protect the Grants' interest in the Property. (R. pp. 243, 248, 257). Therefore, the

Court of Appeals did not err when it refused to impose a duty on Nationstar to notify the Grants that the Mortgage was to be refinanced and to ensure that Mr. Grant used the loan proceeds properly pursuant to the terms of the Will.[10]

C. Mr. Grant preserved the property for his adult children and took into account their interest.

Finally, Mr. Grant kept the Property in the family's name for a period of approximately 28 years. (R. p. 17). The Property has been preserved for the Grants and they currently stand to recover close to $500,000 in equity. (R. pp. 16, 366-367, 501). As discussed previously, Mr. Grant protected the Property through the refinancing of the Mortgage so that the taxes remained paid, the homeowners insurance policy remained current, and the Property is now available for Grants and their posterity. (R. pp. 228-229, 240-242, 398-425). The Grants cannot point to any applicable authority that requires a lender to manage the funds loaned to a life tenant following issuance of the loan. It strains credulity to argue that Mr. Grant (who had the express right under the Will to mortgage the Property) did not preserve the assets that his late wife hoped to pass down to her children. The Grants will reap the benefits of the increased equity in the Property. By virtue of his actions, Mr. Grant ensured that there would be something left for his children, as Roberta Grant intended in the Will, and he, therefore, took them into account when refinancing the mortgages in order to hold onto the Property until his death.

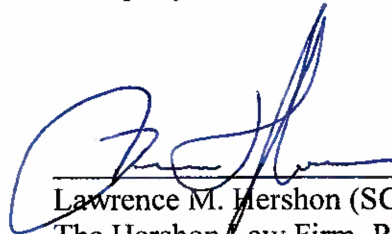
Because the Circuit Court and Court of Appeals found that Mr. Grant could place a mortgage on the property, and that no duty existed for the lender to take any actions further than those indicated in the record of this matter, the Circuit Court and Court of Appeals correctly held

[10]As noted by the Circuit Court, in addition to the lack of legal authority for such a requirement, for a bank to take such a step is entirely impractical. It would require that a bank determine each potential beneficiary under a will for generations, and who are unlikely to each be named individually, and provide notice to them of the transaction. (*See* R. pp. 18-19).

that Nationstar held a valid encumbrance on the Property. The Grants ask for nothing less than an invalidation of a document that provides security for a validly issued loan, due simply to their "innocence." A cancellation of a mortgage securing debt for the reasons set forth by the adult children of Mr. Grant is not supported by the law of the State of South Carolina.[11]

CONCLUSION

For the foregoing reasons, the Court should **AFFIRM** the Court of Appeals' opinion that Mr. Grant had authority under the clear terms of the Will to mortgage the Property as he did, the clear terms of the Will authorized disbursement of the funds under the Mortgage, and the Mortgage is and remains a valid, first priority lien on the Property.



Lawrence M. Hershon (SC Bar No. 77514)
The Hershon Law Firm, P.A.
1565 Sam Rittenberg Blvd., Suite 103
Charleston, South Carolina 29407
Telephone: (843) 829-2022
Facsimile: (843) 829-2023
lawrence@hershonlawfirm.com

Attorney for Respondent Nationstar Mortgage, LLC

October 6, 2023
Charleston, South Carolina

[11]Much of this case attempts to pin the alleged wrongdoings of the father against his last lender; if the Grants wished to attack the actions of their father, they had the ability to do so, but chose not to take that course of action.