VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 21st day of September, 2017.

Caroline Molina-Ray, Individually and as
Trustee of the E.L. Phillips and
Ann P. Phillips Living Trust, et al., Appellants,

against Record No. 161189
Circuit Court No. CL14-76

Patricia E. King, Individually and as
Executrix of the Estate of E.L. Phillips, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Albemarle County.

This case arises from a dispute over competing claims to an interest in Ann P. Phillips's family farm governed by a trust agreement ("the Trust Agreement"). Ann's children claimed that the trust dictated that the interest should pass to them upon the death of their stepfather, Eldred LaVaughn Phillips ("E.L."). E.L.'s daughter, Patricia E. King, claimed that this interest had already passed to her father during his lifetime and, thus, passed to her after his death. Prior to trial, the circuit court entered partial summary judgment, which awarded the interest to King. We hold that the court prematurely decided this issue at the summary judgment stage because genuine disputes as to material facts remained that should have been resolved at trial.

I.

During the 1970s, Ann acquired a fractional interest in her family's historic farm, called Dunlora Farm, in Albemarle County, Virginia. She acquired this interest through an inheritance, a purchase with her first husband, and a property settlement agreement upon divorcing her first husband. A subsequent partition suit in 1986 consolidated her interest into the unitary ownership of an 80.8-acre parcel of Dunlora Farm that included a home designed by Thomas Jefferson for his sister, who had married one of Ann's ancestors.

Ann married E.L. in 1980, while both were residents of Texas, a community property state. There were no children of this union, but both had children from their respective prior

marriages. Ann had six children, and E.L. had an estranged daughter. In 1992, Ann and E.L. created a revocable living trust by executing the Trust Agreement, which was governed by the law of Texas through a choice-of-law provision. Ann and E.L. appointed each other co-trustees during their lifetimes and provided that the surviving spouse would be sole trustee upon the death of the other. The first paragraph of the Trust Agreement states the settlors' intent to "hereby transfer to ourselves, *as Trustees* . . . the property listed" on the attached schedules. J.A. at 150 (emphasis added). The 80.8-acre parcel of Dunlora Farm is listed on Schedule A. *See id.* at 171.

The Trust Agreement provides that the trust corpus would be divided into two trusts upon the death of the first grantor. Under Article 5.03(a), the first of these two trusts, Trust "A," would include the surviving grantor's separate property and his or her interest in all joint and community property. The second of the two trusts, Trust "B," would include the deceased grantor's separate property and his or her interest in all joint and community property. Under Article 5.03(b), the trustee would be responsible for dividing the trust corpus between Trust A and Trust B in a manner necessary to qualify for the federal estate tax marital deduction and the federal unified tax credit under the Internal Revenue Code. Article 5.04 requires that Trust A "be held, administered, and distributed as outlined in Article 5.05 through 5.10." *Id.* at 159. Article 5.05 further directs the trustee to maintain "Trust A," to the extent possible, as a qualified terminable interest property ("QTIP") trust for tax purposes but authorizes the trustee to divide "Trust A," if necessary, into two trusts, one that would qualify as a QTIP trust and "Trust A" that would not qualify. *Id.* at 159-60.

The division of the trust corpus between Trust A and Trust B under Article 5.03(b) is the primary reason for this litigation. Trust A, containing the separate property of the surviving spouse, would remain revocable by the surviving grantor, but Trust B would become irrevocable. Further, the surviving grantor was entitled to all income from Trust A under Article 5.06, and the trustee could use Trust A's principal under Article 5.07(a) to provide for the surviving spouse's care, health, support, or maintenance and to maintain his or her standard of living. Under Articles 5.12 and 5.13, the trustee could only use the income and principal from Trust B to provide for the surviving spouse's care, health, education, support, or maintenance.

Article 5.15 provides that, upon the death of the surviving grantor, the remaining trust corpus from all of the associated trusts would be divided equally into shares for each of the

surviving children of the grantors and each of the predeceased children with surviving issue. Article 5.19(c) further provides that the trust corpus, minus the grantors' life insurance proceeds, would be divided into seven shares, to be distributed to Ann's 6 children: 2/7 to Angela Horan, 1/7 to Michelle Dailey, 1/7 to Philip Molina, 1/7 to Caroline Molina, 1/7 to John Molina, and 1/7 to Stephanie Molina. The trust did not provide a share for King, but Article 5.19(a) made her the beneficiary of a 1/2 interest in E.L.'s life insurance policy if Ann predeceased him.

As previously noted, Schedule A of the Trust Agreement identifies the 80.8-acre parcel as real property transferred to the Trust Estate, along with the marital residence in Texas. On the same day that she and E.L. executed the Trust Agreement, Ann conveyed the 80.8-acre parcel by deed to the "E.L. Phillips and Ann P. Phillips Living Trust," rather than to both of them as co-trustees of the E.L. Phillips and Ann P. Phillips Living Trust. *Id.* at 177 (capitalization omitted). In 1993, in her capacity as co-trustee, Ann conveyed a 1/2 interest in the parcel to E.L., in his capacity as co-trustee. *See id.* at 179. In 2000, Ann died, and three years later, E.L. reconciled with his estranged daughter, King, whom he had not seen in 40 years.

Between 1995 and 2005, Ann and E.L., in their capacities as co-trustees before Ann's death in 2000, and E.L. in his capacity as sole trustee after Ann's death, conveyed a total of 49.179% of the trust's interest in the 80.8-acre parcel to Ann's 6 children.[1] In 2004, however, E.L. purportedly allocated 38.651% of the 80.8-acre parcel to Trust A, 21.7671% to Trust B, and 16.8839% to a QTIP trust designated Trust C. *See id.* at 547-54.[2] In April 2011, the trust's liquid assets were depleted, and E.L. grew concerned about the funds available for his care. He proposed selling 15 acres of the 80.8-acre parcel, including the Jefferson house, to generate income. Ann's daughter Caroline agreed to pay for E.L.'s care, and Ann's daughter Stephanie

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[1] At the time of Ann's death, Ann and E.L. had conveyed 30.264% of the entire parcel to Ann's children. From 2000 to 2005, E.L. continued to make conveyances to Ann's children, and those conveyances totaled 18.915% of the entire parcel.

[2] By 2004, however, he and Ann had already conveyed 45.396% of the parcel to Ann's children. This allocation to the three trusts, totaling 77.302%, exceeded the total interest in the parcel remaining in the trust corpus. Although the 2004 Declaration of Trust Split states that "the valuations should be assigned as of the date of [Ann's] death," *id.* at 547, the 77.302% allocation would still exceed the total interest remaining in the trust corpus at that time because 30.264% had already been conveyed to Ann's children by the time of her death in 2000, *see supra* note 1.

agreed to pay the costs of maintaining the parcel, including the mortgage, taxes, and insurance. E.L. continued discussing his care with Ann's children throughout the summer, which culminated in a written agreement executed in September 2011 ("the Support Agreement"). In the Support Agreement, Caroline and Stephanie agreed to pay E.L. $500 to $2000 a month for the remainder of his life in exchange for his agreement not to execute his right to "amend, alter, revoke, or terminate Trust A" under the Trust Agreement. *Id.* at 558. That same day, E.L. resigned as trustee and appointed Caroline and Stephanie successor co-trustees.

In November 2012, while preparing to convey the interest of Ann's children in the parcel to a family-owned limited liability company, Dunlora Farm, LLC, Caroline discovered that E.L., in his capacity as trustee, had withdrawn a 15.953% interest in the 80.8-acre parcel from the trust corpus and had conveyed it to himself personally in March 2011, ostensibly through his power under the Trust Agreement to withdraw property from Trust A as the surviving grantor. E.L. had not informed Ann's children of this conveyance during the negotiations for or execution of the Support Agreement. In December 2012, Ann's 6 children collectively conveyed an 84.047% interest in the parcel to Dunlora Farm, LLC.[3]

E.L. died in February 2013, and his will bequeathed the withdrawn 15.953% interest in the 80.8-acre parcel to King. In February 2014, King filed a complaint against Dunlora Farm, LLC, seeking partition of the 80.8-acre parcel. Caroline and Stephanie, in their capacity as successor co-trustees and in their personal capacities as beneficiaries of the trust (collectively, "the Co-Trustees"), filed motions to intervene and to join King in her capacity as personal representative of E.L.'s estate so that they could pursue claims for breach of fiduciary duties, breach of trust, and quiet title. The circuit court granted the motions.

The Co-Trustees thereafter filed a complaint alleging that E.L. had breached his fiduciary duty as trustee by (i) failing to provide an accounting, (ii) failing to convey the Texas marital residence to the Trust Estate, (iii) failing to utilize the proceeds of Ann's life insurance to retire debt as required by Article 5.19(b) of the Trust Agreement, (iv) failing to pay taxes owed on the parcel, (v) allocating a portion of the parcel to Trust A instead of the entire parcel to Trust B

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[3] This collective conveyance includes the 49.179% interest conveyed from the trust corpus to all 6 children between 1995 and 2005 and the 34.868% interest purportedly remaining in Trust B, which was conveyed by Stephanie and Caroline, in their capacities as successor co-trustees.

upon Ann's death, and (vi) concealing his withdrawal of the 15.953% interest in the parcel from Ann's children before they executed the Support Agreement. *See id.* at 76-78. They also alleged breach of trust for each of these acts and sought an order quieting title to the parcel. *See id.* at 75, 78-79.

In response to the Co-Trustees' complaint, King filed a counterclaim in her personal capacity. She sought a declaratory judgment that the December 2012 conveyance to Dunlora Farm, LLC constituted a breach of trust because E.L. was still alive at the time and because the Trust Agreement provided that the trust corpus would be available to provide for him. Ann and E.L. had conveyed only 49.179% of the 80.8-acre parcel to Ann's children during their lifetimes, and E.L. had withdrawn only 15.953%. King reasoned that the remaining 34.868% of the 84.047% conveyed to Dunlora Farm, LLC was a trust asset that Stephanie and Caroline lacked authority under the Trust Agreement to convey. King further alleged that the trust corpus should have been divided into seven equal shares pursuant to Article 5.15, one for each of Ann's 6 children and one for her as E.L.'s only child. Thus, King was entitled to a 1/7 share in the 34.868% of the parcel that should have remained in the trust corpus at E.L.'s death, in addition to the 15.953% that she inherited from his estate.

King thereafter filed a motion for partial summary judgment asking the court to find that E.L. had authority to withdraw the 15.953% interest from the trust corpus. She also sought dismissal of the Co-Trustees' claim for quiet title and the claim for breach of fiduciary duty related only to E.L.'s withdrawal of the 15.953% interest. The circuit court held that Virginia law applied because the 80.8-acre parcel is located in Virginia. *See id.* at 278. The court found that the parcel ceased being Ann's separate property when she transferred it to the trust and that she intended to make the parcel joint property in 1993 when she, in her capacity as co-trustee, purportedly conveyed a 1/2 interest in the parcel to E.L., in his capacity as co-trustee. Thus, at Ann's death, E.L.'s remaining 1/2 interest in the parcel transferred to Trust A, and Ann's remaining 1/2 interest transferred to Trust B. As a result of this division of the interest in the parcel, the circuit court reasoned that E.L. could withdraw up to 50% of the remaining parcel interest from the trust corpus. The circuit court held, therefore, that E.L. validly withdrew the 15.953% interest, which was subsequently inherited by King, and granted King's motion for partial summary judgment.

The court also granted a nonsuit of King's original partition complaint over the Co-Trustees' objection. The remaining issues, including, inter alia, the Co-Trustees' claims for breach of trust and breach of fiduciary duty for failing to provide an accounting as well as King's counterclaim, were tried by the court. In ruling on the Co-Trustees' complaint, the court held that Article 3.14 of the Trust Agreement immunized E.L. from liability unless caused by "gross negligence or willful commission of an act in breach of trust," and the evidence did not demonstrate such gross negligence or willfulness. *Id.* at 287. On King's counterclaim, the court found that the specific distribution of the trust corpus only among Ann's children in Article 5.19(c) prevailed over the general distribution among the children of both grantors in Article 5.15. The court thus entered judgment for King but only as to the 15.953% interest at issue in King's motion for partial summary judgment.

II.

We granted the Co-Trustees' petition for appeal to address their challenge to the circuit court's grant of partial summary judgment. They argue that the genuine disputes as to material facts rendered partial summary judgment premature and that these disputed facts should have been resolved at trial. *See* Rule 3:20 ("Summary judgment shall not be entered if any material fact is genuinely in dispute."). On appeal, "the trial court's determination that no genuinely disputed material facts exist and its application of law to the facts present issues of law subject to de novo review." *Mount Aldie, LLC v. Land Tr. of Va.*, 293 Va. 190, 196-97, 796 S.E.2d 549, 553 (2017).

The main target of the Co-Trustees' complaint was E.L.'s decision after Ann's death to allocate a portion of the 80.8-acre parcel remaining in the trust corpus to Trust A rather than allocating the entire remaining interest in the parcel to Trust B. If that decision was improper, the Co-Trustees contend, E.L. had no authority to later withdraw a 15.953% interest in the parcel for himself personally, and thus, the interest could not pass through his will to King. For several reasons, we believe that genuine disputes as to material facts, coupled with errors of law, precluded the circuit court from deciding this issue upon partial summary judgment before trial.

A.

The circuit court held that Virginia title law provided the rule of decision because choice-of-law principles dictate that the situs of the real property governs questions of title. That is

generally true. *See Mort v. Jones*, 105 Va. 668, 671, 51 S.E. 220, 221 (1905) ("It is generally admitted that transactions relating to lands or immovable property of any kind are to be governed by the law of the place where the property is situated." (quoting Raleigh C. Minor, Conflict of Laws § 11, at 28 (1901))).[4] The focal issue in this case, however, is the administration and interpretation of a trust agreement governed by a Texas choice-of-law provision. *See generally* Restatement (Second) of Conflict of Laws § 277 (1971). Courts routinely "give effect to a provision in a trust instrument or will that it should be construed in accordance with the rules of construction of a particular state. This is true of a trust of interests in land, as it is in the case of interests in movables." *Id.* § 277(1) cmt. b. The law of the property's situs governs only "[i]n the absence of such a designation," *id.* § 277(2), when there is no reasonable basis for the choice-of-law clause, or when it is otherwise legally unenforceable, *see id.* § 187(2).

Upon the death of one of the grantors, the Trust Estate divided itself into sub-trusts (Trusts A and B) based in part on whether the property would be treated as either "separate" property of one of the grantors or the "joint" property of both. Texas law, not Virginia law, governed the classification of real property to determine its placement in the two sub-trusts. Under Texas law, "separate" property can be deemed joint or community property only in certain narrowly defined circumstances. *See* Tex. Const. art. XVI, § 15; Tex. Fam. Code Ann. §§ 3.001, 3.002 (2017) (defining separate and community property). The 1992 and 1993 deeds — the first by Ann to the trust and the second by Ann as co-trustee to E.L. as co-trustee — could not have converted the 80.8-acre parcel into joint or community property under the Trust Agreement unless doing so was consistent with Texas law, a topic that the circuit court never addressed.

B.

We also agree with the Co-Trustees that the Trust Agreement has internal ambiguities that should be resolved after consideration of extrinsic evidence at trial. The circuit court

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[4] *See also Richardson v. AMRESCO Residential Mortg. Corp.*, 267 Va. 43, 49, 592 S.E.2d 65, 68 (2004) ("We address the validity of the quitclaim deed under established principles of Virginia law, which govern this issue because the property conveyed by that deed is located in this Commonwealth."); *Ware v. Crowell*, 251 Va. 116, 119, 465 S.E.2d 809, 811 (1996) ("[S]ince this case involves the passage of title to real property located in Virginia, the law of Virginia controls."); *Seaton v. Seaton*, 184 Va. 180, 183, 34 S.E.2d 236, 237 (1945) (acknowledging that title to real estate is governed by the law of the situs).

granted partial summary judgment on the ground that, as a matter of law, the 80.8-acre parcel was no longer Ann's separate property because she had conveyed it to the trust. The court reasoned: "When Ann P. Phillips, as an individual, transferred her interest in Dunlora to the trust, she no longer retained an equitable or a legal title in the property. . . . Equitable and legal title was transferred into the living trust, and became jointly-owned property within the trust; no longer Ann P. Phillips' separate property." J.A. at 278-79. Accordingly, "[p]ursuant to the terms of the joint living trust, Section 5.03, at the death of Ann P. Phillips one-half in Dunlora went into the Trust A . . . and one-half of the interest went into Trust B." *Id.* at 279.

The court's ruling is correct insofar as the 80.8-acre parcel was no longer Ann's property once she conveyed it to the trust. *See Austin v. City of Alexandria*, 265 Va. 89, 95, 574 S.E.2d 289, 292 (2003) ("[N]o trust can arise while the grantor retains both the full equitable interest and legal title in the trust property.").[5] Because Ann no longer owned the property, the court reasoned that it no longer retained its attribute as her separate property because the trust owned it and not Ann. Followed to its logical conclusion, however, this would be true for *all property* conveyed to the trust, whether the property was conveyed by Ann or E.L. or whether it had been separate, joint, or community property prior to its conveyance to the trust. This view conflicts with Article 5.03(a), which directs the division of the trust corpus into Trust A and Trust B based on whether it is the separate, joint, or community property of either the surviving or the deceased spouse. It seems entirely reasonable to interpret this description of separate, joint, or community property, as the Co-Trustees do, to refer to the attributes of the property *prior* to its conveyance to the trust because the property has such an attribute only while it is owned by one or both spouses in their individual capacities. The property has no such attribute after it becomes part of the trust because it is no longer owned by either spouse — separately or jointly.

Compounding this threshold ambiguity is the role of Article 5.03(b), which authorizes the trustee to allocate property between Trust A and Trust B for tax purposes. King contends that the initial categorization of property as separate, joint, or community property under Article 5.03(a) begins the analysis but does not end it. The authorization to distribute property between

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[5] On this issue, the dispute over whether Virginia law or Texas law should govern is immaterial because the result is the same under both: A grantor must convey both legal and equitable title to the trust, or the conveyance is legally ineffectual. *Compare Austin*, 265 Va. at 95, 574 S.E.2d at 292, *with Land v. Marshall*, 426 S.W.2d 841, 846-47 (Tex. 1968).

Trust A and Trust B in Article 5.03(b), King argues, suggests that Article 5.03(b) wholly supersedes Article 5.03(a). That interpretation, however, runs afoul of the next sentence in Article 5.03(b), which states that "[t]he assets . . . shall be distributed to Trust A and Trust B as outlined in Article 5.03(a)." J.A. at 159. Not only do Articles 5.03(a) and 5.03(b) have conflicting interpretations under King's view, but Article 5.03(b) also has an internal inconsistency. Article 5.05(a) further complicates these inconsistencies. Article 5.05(a) states that "Trust A" shall be a QTIP insofar as certain other tax elections are made. *Id.* The circuit court, however, held that the Trust A referenced in Article 5.03(a) was *not* a QTIP trust and found that it was a different "Trust A" than the one referenced in Article 5.05. *Id.* at 279.

These interpretative anomalies, by themselves, undermine the circuit court's view that the unambiguous, plain meaning of the Trust Agreement justifies both E.L.'s decision after Ann's death to allocate a portion of the 80.8-acre parcel remaining in the Trust Estate to Trust A rather than to Trust B and his later decision to withdraw a 15.953% interest for himself personally. Under both Virginia and Texas law, "[a]n ambiguity exists when language is of doubtful import, admits of being understood in more than one way, admits of two or more meanings, or refers to two or more things at the same time." *Cascades N. Venture Ltd. P'ship v. PRC Inc.*, 249 Va. 574, 579, 457 S.E.2d 370, 373 (1995) (citation omitted); *see also National Union Fire Ins. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (holding that, if a "contract is subject to two or more reasonable interpretations, it is ambiguous"). Further, under Virginia law, which exclusively governs procedure in our courts, summary judgment is inappropriate when "neither party has offered a construction of [contract] provisions that could be deemed so clear that it unambiguously excludes the explanation offered by the opponent." *Cascades N. Venture Ltd. P'ship*, 249 Va. at 582, 457 S.E.2d at 374-75.

C.

Next, the circuit court's belief that the 1993 deed "was a gift conveyance of one-half divided interest to E.L. Phillips, as trustee," formed the foundation for its reasoning, and, as a result, the court found that "[t]itle at that point in Dunlora was no longer entirely the separate property" of Ann but rather the joint property of "the trustees with a one-half undivided interest to each party." J.A. at 279. The Co-Trustees correctly contend that donative intent could not be found as a matter of law based upon the factual record before the circuit court. The Co-Trustees claim that Ann merely intended to transfer legal title to E.L. solely in his capacity as co-

trustee — consistent with the general axiom that a "trustee, *as* trustee, ordinarily takes only what is generally described as the 'bare' legal title to the trust property." Restatement (Third) of Trusts § 42 cmt. c (2003) (emphasis in original). She had no intent, the Co-Trustees assert, to consolidate legal and equitable title in E.L. in his personal capacity. We offer no view on whether this inference is more or less persuasive than the inference relied upon by the circuit court to find donative intent. We merely hold that neither inference is so convincing that no rational factfinder could conclude otherwise, and thus, this dispute should have been decided after the presentation of evidence at trial rather than by partial summary judgment.

D.

Finally, the Co-Trustees also challenge the dismissal of their claims for quiet title, breach of fiduciary duty, and breach of trust insofar as they relate to E.L.'s decisions that are contested on appeal. Having found that the circuit court erred in entering partial summary judgment, we likewise find that the court erred in dismissing the Co-Trustees' claims for quiet title, breach of fiduciary duty, and breach of trust to the extent that the court's partial summary judgment order foreclosed these claims.

III.

For these reasons, we reverse the circuit court's grant of partial summary judgment, vacate the final order to the extent that it incorporated that judgment, and remand the case for trial on the Co-Trustees' claims for quiet title, breach of fiduciary duty, and breach of trust insofar as they relate to E.L.'s decisions that are contested on appeal.

This order shall be certified to the Circuit Court of Albemarle County.

A Copy,

Teste: Patricia L Harrington

Clerk