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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. Is there evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of JONATHAN RAY MATTOX?

II. Is the Appellant precluded from litigation by the doctrine of *res judicata*?

III. Has the Appellant demonstrated prima facie evidence for the equitable relief sought?

STATEMENT OF THE CASE

JONATHAN RAY MATTOX died October 1, 2016. By its Order in this Estate entered September 27, 2017, the Probate Court determined that the late JONATHAN RAY MATTOX signed a Last Will and Testament in 2005 in Gwinett County, Georgia, a copy of which was entered into evidence at the hearing on his Estate held June 19, 2017. [Finding of Fact 4.] That Will named his brother DAVID J. MATTOX as his heir.

After execution of the said Will, the deceased married the Respondent LISA JO BARE MATTOX. No later Will naming her as an heir has been found.

The 2017 Order of the Probate Court concluded that in the absence of evidence that the Will had been inadvertently lost or destroyed, the legal presumption was that Will had been intentionally revoked. [Conclusion of Law E.] In light of that legal presumption, the decedent was found to be intestate and without children, leaving his wife, the Respondent, as his sole heir. [Conclusion of Law F. and the Order proper]

The original Will, conforming in all respects to the copy submitted as evidence, was later discovered in the possession of Mrs. Peggy M. Mattox, mother of the Deceased and the Appellant DAVID J. MATTOX, and filed with the Probate Court. The Appellant also filed his Motion under Rule 60, S.C.R.C.P. and Petition under S.C. Code § 62-3-412, both within one year after the judgment contained in the said Order of September 27, 2017.

Hearing was held on October 5, 2018. The Probate Court issued its Order denying the Appellant's Motion and Petition on November 21, 2018 and received by Appellant November 26, 2018. This Appeal to the Circuit Court for York County was filed December 5, 2018.

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ARGUMENT

I. Is there evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of JONATHAN RAY MATTOX?

In its November, 2018 Order, the Honorable Probate Court concluded [Conclusion of Law No. 2] that the Appellant did not exercise due diligence in discovering the original Will of his deceased brother as submitted to that Court with his Petition for Relief from Judgment and for Stay of Enforcement. The basis for this conclusion was, *inter alia*, a statement made in an earlier hearing, of the Appellant's residence with his mother, who discovered the original will. No evidence as to his present residence nor of his control of his mother's premises, was presented. The Honorable Probate Court was without sufficient evidence to make this conclusion.

In the same Order, the Honorable Probate Court found or implied that the Appellant's mother, as the discoverer of the original will, should have discovered the same at an earlier date. The Appellant's mother's evidence, as stated in her Affidavit to the Probate Court, does not sustain this interpretation. [RECORD ON APPEAL, pp.27 - 28.] Dereliction on her part is refuted by her Affidavit. Further, it is axiomatic that any alleged dereliction on the part of the Appellant's mother cannot be ascribed to the Appellant.

No credible or cognizable evidence exists to impute a lack of due diligence to the Appellant DAVID J. MATTOX in the discovery or presentation of the original Will of JONATHAN RAY MATTOX. The grounds cited by the Honorable Probate Court for a lack of due diligence cannot be sustained.

ARGUMENT

II. Is the Appellant precluded from litigation by the doctrine of *res judicata*?

The November, 2018 Order of the Honorable Probate Court finds [Finding of Fact No. 10] and concludes [Conclusion of Law No. 5] that the decedent "made no in-lieu provisions for" the decedent's widow, the Respondent herein. It goes on to conclude that this issue is precluded by *res judicata* by reason of the previous Order of the Probate Court issued on September 27,

2017. In fact, that earlier Order denied relief based upon the presented copy of the Deceased's Will. The September, 2017 Order went on to state as follows:

> H. Even if the Court were to rule on the omitted spouse issue there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the will or in lieu of a testamentary disposition.
>
> [*Underlining added.*]

The first question as to the cited language is whether this is, in fact, a ruling at all. It is obvious that for an issue to be precluded by *res judicata*, the issue must in fact be ruled upon. A litigant cannot be bound by a mere expression of opinion, or by a statement in a subjunctive voice. Thus, the commentators of AMERICAN JURISPRUDENCE 2D state:

> It is said that the defense of collateral estoppel is to be allowed with caution, and it must rest upon a more solid basis than mere speculation as to what was actually adjudicated in the prior action.
>
> [Ftn. 92, *citing JeToCo Corp.* v. *Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980); *Casad* v. *Qualls*, 70 Cal.App.3d 921, 139 Cal.Rptr. 243 (Cal.App. 1977); *Riverbluff Dev. Co.* v. *Insurance Co. of North America*, 412 N.W.2d 792 (Minn.App. 1987).]
>
> There can be no preclusion where there is a reasonable doubt whether a fact was actually adjudicated.
>
> [Ftn. 93, *citing Burchett* v. *Bower*, 355 F.Supp. 1278 (D.Ariz. 1973); *Boyles* v. *State*, 647 P.2d 1113 (Alaska App. 1982), *cert. den.* 460 U.S. 1042, 75 L.Ed.2d 795, 103 S.Ct. 1437 (1983); *JeToCo Corp.* v. *Hailey Sales Co.*, *supra*; *Wolfson* v. *Northern States Management Co.*, 221 Minn. 474, 22 N.W.2d 545 (Minn.App. 1946); *Hughes* v. *Miner*, 15 Ohio App.3d 141, 473 N.E.2d 53 (Ohio App. 1984); *Gregory* v. *Gregory*, 803 S.W.2d 242 (Tenn.App. 1990).]
>
> Any doubt as to what was decided in the prior action will generally be resolved against the application of collateral estoppel or res judicata.
>
> [Ftn. 94, *citing Welch* v. *Johnson*, 907 F.2d 714 (7th Cir. 1990); *Torres* v. *Rebarchak*, 814 F.2d 1219 (7th Cir. 1987); *Republic of Philippines* v. *Westinghouse Elec. Corp.*, 782 F.Supp. 972 (D. N.J. 1992), *later proceeding* 821 F.Supp. 292 (D. N.J. 1993);

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Hittel v. *Rosenhagen,* 492 So.2d 1086 (Fla.App. 1986), *later proceeding* 522 So.2d 1036 (Fla.App. 1988); *Northern Trust Co.* v. *Aetna Life & Surety Co.*, 192 Ill.App.3d 901, 549 N.E.2d 712 (Ill.App. 1989), *app. den.* 132 Ill.2d 546, 555 N.E.2d 378 (1990); *Emory* v. *Gardner,* 415 So.2d 339 (La.App. 1982).]

[47 AM.JUR.2D *Judgments* § 727 (2002); *paragraphing added.*]

An issue cannot be treated as *res judicata* in a different cause of action when the Court has not been passed on by the Court in its earlier decision. In order to bind the parties, the earlier Order must pass on the issue in question and do so in a clear and final manner. The quoted language of the September 27, 2017 Order is, at best, *dicta* on the question at hand.

RESTATEMENT (SECOND) OF JUDGMENTS, § 27, comment o. (1977) also makes the point that where, as here, a judgment was not dependent on the determination of a particular issue, such determination is akin to *dicta,* and its relitigation is not precluded.

If it should be argued that the Probate Court is the best judge of the intention of the earlier Order quoted above, the Appellant would point out that this is not the standard: as stated in the above-cited authority, the question is whether the earlier language was so clear as to bind the parties to the litigation or, to state the matter in different form, to show its clear meaning to a third party. Here, it is not, and that lack cannot now be supplied.

The Appellant has argued and preserved this issue by his Memorandum submitted to the Probate Court and by argument at the hearing. [RECORD ON APPEAL, pp.38 – 41; TRANSCRIPT OF HEARING, p. 4 – 5; 6 – 10; 22 – 23; 26 - 27..] Under the body of precedent cited above, the cited language of the earlier, September, 2017 Order cannot constitute *res judicata* or preclude a litigation of this issue.

ARGUMENT

III. Has the Appellant demonstrated *prima facie* evidence for the equitable relief sought?

In further response to the referenced factual finding of the Order on Appeal as to provision for the decedent's spouse, the Appellant notes that he argued and produced evidence at

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the hearing on October 5, 2018 that:

a. By deed dated June 29, 2015, the Decedent caused the residence of his aunt, Nancy Mildred Hayes, to be titled to himself and the Respondent, his wife, as joint tenants with the right of survivorship;

b. Upon the Deceased's death, the said house passed to the Respondent wife;

c. On knowledge and information, these transfers to the Respondent wife referenced herein were made gratuitously, and without monetary payment on her part;

d. The said residence was last valued by the York County Tax Assessor at $395,000.00; on knowledge and information, Tax Assessor values in York County are lower than true market value;

e. On knowledge and information, the above actions of the Deceased gifted the Respondent with property outside his Will worth at least $400,000.00; this property transfer was not listed on the Inventory and Appraisement submitted to this Court by the Respondent; and

f. On knowledge and information, the Deceased has gifted other property to the Respondent, which matter can only be determined by discovery.

[RECORD ON APPEAL, pp. 22 – 28; 42 – 47; 48 – 50; TRANSCRIPT OF HEARING, p. 4 – 5; 6 – 10; 22 – 23; 26 - 27.]

The evidence set out above and the inferences therefrom, as presented or raised, demonstrates, or can demonstrate, that the decedent, pursuant to the requirements of S.C. Code § 62-2-301(a)(2). That is, that he:

> . . . provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown . . . from the amount of the transfer or other evidence.

The weight of this evidence can be established only by litigation and discovery. The Appellant has the right to proceed to that end.

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CONCLUSION

To conclude,: there is no evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of JONATHAN RAY MATTOX. The Appellant is not precluded from litigation by the doctrine of *res judicata.* He has set out a *prima facie* case showing his right to pursue the equitable relief sought. The Appeal should be granted and the Appellant's case should be allowed to proceed in the Probate Court.

Respectfully submitted,

Michael L. Brown, Jr.
Zachary M. Merritt
Post Office Box 1025
Rock Hill, SC 29731
803 328-8822

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorneys for Appellant

By: /s/ John Martin Foster

June 10, 2019

Rock Hill, South Carolina

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY PROBATE COURT

THE HONORABLE CAROLYN W. ROGERS, PROBATE JUDGE

York County Civil Action Number 2016-ES-46-01230

Appellate Case No.: 2018-CP-46-03672

DAVID J. MATTOX, ...Appellant,

v.

LISA JO BARE MATTOX,.....Respondent.

BRIEF OF RESPONDENT

---

s/ John P. Gettys, Jr.
John P. Gettys, Jr., S.C. Bar No. 8673
J. Nathanial Pierce, S.C. Bar No. 102803
Morton & Gettys, LLC
Attorneys for Respondent
P.O. Box 707, Rock Hill, SC 29731
T: 803.366.3388; F: 803.366.4044
john.gettys@mortongettys.com
nate.pierce@mortongettys.com

June 25, 2019
Rock Hill, South Carolina

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STATEMENT OF ISSUES ON APPEAL

1. Is there evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of Jonathan Ray Mattox?

2. Is the Appellant precluded from litigation by the doctrine of *res judicata?*

3. Has the Appellant demonstrated prima facie evidence for the equitable relief sought?

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STATEMENT OF THE CASE

The underlying matter in this case was initiated by the filing of a Summons and Petition for Formal Appointment on April 28, 2017. The Petition demanded David J. Mattox ("Appellant") be appointed as personal representative of the Estate of Jonathan Mattox ("Decedent") based on the existence of a purported original will wherein Appellant was allegedly named as Personal Representative. Additionally, Appellant sought to restrain Lisa Jo Bare Mattox ("Respondent"), the Personal Representative of Decedent's estate.

A hearing was held before the Honorable Carolyn W. Rogers on August 9, 2017. Appellant and Respondent were the only witnesses called at the hearing. The purported original will was not presented at the hearing. Following the hearing, and per the Court's Order September 26, 2017, Judge Rogers denied Appellant's Petition for Appointment as Personal Representative as well as his request to restrain the Personal Representative.

On July 13, 2018, some ten months later, Appellant, by and through counsel, filed a Summons, Notice, Motion, and Petition for Relief from Judgment and Stay of Enforcement pursuant to Rule 60 of the South Carolina Rules of Civil Procedure ("SCRCP"). Appellant also filed multiple lis pendens against properties owned wholly by Respondent. At a hearing held October 5, 2018, Appellant and Respondent argued Appellant's SCRCP 60 motion, along with Respondent's Motion to Quash the lis pendens, before Judge Rogers. On November 21, 2018, Judge Rogers issued an order denying Appellant's motion for relief under SCRCP 60 and Respondent's Motion to Quash the remaining lis pendens.

This appeal followed. As discussed further below, Appellant's Statement of Issues on Appeal far exceeds the sole issue on appeal: Judge Rogers's denial of Appellant's motion under SCRCP 60.

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An appeal from the probate court is governed by the provisions of the South Carolina Probate Code. *Golini v. Bolton*, 326 S.C. 333, 338, 482 S.E.2d 784, 786-87 (Ct. App. 1997) (citing *Howard v. Mutz*, 315 S.C. 356, 434 S.E.2d 254 (1993)). The Probate Code provides that a final order or decree of the probate court may by appealed to the Circuit Court. *Id* (citing S.C. Code Ann. § 62-1-308(a) (Supp. 1996)). The circuit court must hear and determine the appeal "according to the rules of law. *Id* (citing S.C. Code Ann. § 62-1-308(d) (1987)). The phrase "according to the rules of law" means according to the rules governing appeals. *Id* (citing *Howard*, 315 S.C. at 360, 434 S.E.2d at 257)). On appeal from the final order of the probate court, the circuit court should apply the same standard of review that the Court of Appeals would apply on appeal. *Id.*

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Smith v. Fedor*, 422 S.C. 118, 124, 809 S.E.2d 612, 615 (Ct. App. 2017) (citing *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007)). An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. *Id.*

ARGUMENT

I. There is evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of Johnathan Ray Mattox.

In his motion for relief from judgment, Appellant cited Rules 60(b)(1), 60(b)(2), and 60(b)(5). Appellant argued each of these in front of Judge Rogers at the October 2, 2018, hearing and the same are discussed individually below.

Rule 60(b)(1)

SCRCP 60(b)(1) permits the court to relieve a party from a final judgment, order, or proceeding based on "mistake inadvertence, surprise, or excusable neglect." In determining

whether to grant relief under SCRCP 60(b)(1), the court must consider the following factors: (1) the promptness within which the relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (citing *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001)).

First, Respondent argued Appellant failed to seek relief promptly. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 12, l. 3 through p. 13, l. 18. In her affidavit, Peggy M. Mattox ("Peggy"), the mother of the Appellant and Decedent attests that she found the original copy of the Decedent's will in a safe in Peggy's house on or around October 2017. Aff. Peggy M. Mattox ¶ 5. Peggy further attests that upon discovering the original will, she contacted Appellant and gave the original will to him. As such, Appellant was in possession of the original will for approximately ten months prior to making the motion for a new trial. Additionally, based on Peggy's affidavit, Appellant came into possession of the original will less than one month after the final Order of the Court was filed September 26, 2017. Appellant has not, and likely cannot, provide a suitable reason for failing to act promptly. The crux of the underlying case was the non-existence of an original will. Within weeks of the Court's final Order, Peggy located the original will and provided it to Appellant.

Next, Respondent argued she possesses a meritorious defense. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 12, ll. 24-25 through p. 13, ll. 1-8. In the underlying case, the Court concluded as a matter of law that "there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition." As such, even if Appellant were to be granted a new trial, Respondent would still prevail on an omitted spouse claim under S.C. Code Ann. § 62-2-301. *Id.* Appellant had his day in court and failed to persuade the finder of fact that the Decedent provided for Respondent outside of his will.

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Finally, Respondent argued she would be prejudiced should the Court grant Appellant's motion based on then-existing contractual obligations. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 13, ll. 9-18. For this reason and other discussed above, Respondent presented ample evidence that Appellant is not entitled to relief under SCRCP 60(b)(1), which Judge Rogers found to be persuasive.

Rule 60(b)(2)

Pursuant to SCRCP 60(b)(2), the Court may relieve a party from a final judgment, order, or proceeding based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial...." Due diligence is defined not as what a litigant actually discovered, but what the litigant could have discovered. *See Lanier v. Lanier*, 354 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005). Appellant specifically argues Judge Rogers's order denying relief under SCRCP 60 is without evidentiary support. Specifically, Appellant argues "[n]o evidence as to [Appellant's] present residence nor of his control of [Appellant's] mother's premises, was presented." Appellant Statement of Issue on Appeal, ¶ 1.

Respondent's argument regarding due diligence was based largely on Peggy's affidavit, which was attached to Appellant's memorandum in support of his motion. In pertinent part, the affidavit provides the following: (1) that Peggy, the affiant and mother of the Appellant and Decedent, knew the Decedent executed a will; (2) that during or after October of 2017, Peggy found the will in a safe in her home; and (3) that the Decedent, Appellant, and Peggy knew the location and the combination of Peggy's safe. Aff. Peggy M. Mattox, ¶ 2, 4, 5, 7.

As Appellant notes in his Statement of Issues on Appeal, Appellant's residence was only one of several arguments made regarding his lack of due diligence. Appellant Statement of Issue on Appeal, ¶ 1. At the October 5, 2018, hearing, Respondent, through the undersigned counsel,

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argued (1) the purported original will was known to the Decedent's personal representative; (2) that the safe was a natural and obvious place where important documents are kept and was located in a home where the Appellant currently or recently had resided; and (3) the Appellant, Decedent, and Petitioner each knew the combination and location of the safe. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 14, ll. 7-14. This testimony is in direct conflict with Respondent's arguments before this Court.

Further, Appellant's Statement of Issues on Appeal does not correctly represent Respondent's argument at the October 5, 2018, hearing. Respondent does not argue, as Appellant states, that Appellant's mother should have discovered the original will at an earlier date. That is not the standard prescribed by SCRCP 60(b)(2). SCRCP 60(b)(2) provides for relief where there is newly discovered evidence that could not, without diligence, have been discovered in time for trial. Respondent argued, as noted above, had Appellant acted with due diligence, the original will could have, and should have, been discovered prior to trial and well within the time to move for a new trial. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 13, l. 18 through p. 14, l. 17.

Rule 60(b)(5)

Finally, in addition to the above-described arguments, Respondent argued that Appellant is not entitled to relief pursuant to 60(b)(5). According to SCRCP 60(b)(5), the court may relieve a party from a final judgment, order, or proceeding if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Respondent argued to the Probate Court that relief under SCRCP 60(b)(5) is available only in cases of fraud upon the court or rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake, citing *Mullarkey v. Mullarkey*, 397 S.C. 182, 191, 723 S.E.2d

249, 254 (Ct. App. 2012)

As Respondent argued before the Probate Court, there is no allegation of fraud in this case. There are no rare, special, exceptional, or unusual prospects present. There is no accident or mistake. There is only an Appellant who did not look in a natural and obvious place for the one document necessary to bolster his case and, upon finding said document, failed to promptly avail himself of his post-judgment rights. Again, Appellant held onto this will outside of his time to request a new trial, for a period of nearly ten months, before availing himself of this court's jurisdiction. Granting relief under these circumstances prejudices only one party in this proceeding: the Respondent. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 14, ll. 17-25.

II. Appellant is precluded from litigation by the doctrine of *res judicata*.

The issue of *res judicata* is limited to the "meritorious defense" consideration under a SCRCP 60(b)(1) analysis. *See* SCRCP 60(b)(1); *Rouvet*, 388 S.C. at 309, 696 S.E.2d at 208. In determining whether to grant relief under SCRCP 60(b)(1), the court must consider the following factors: (1) the promptness within which the relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.

All factors having previously been discussed in this reply, the omitted spouse rule stands as a meritorious defense in the event the court were to grant relief from judgment and order a new trial. Respondent's argument at the October 5, 2018, hearing was that, even should the court grant relief from judgment and a new trial, the outcome would be the same based on the omitted spouse rule. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 12, ll. 24-25, p. 13, ll. 1-8. The Probate Court correctly ruled the omitted spouse issue was *res judicata* based on the evidence presented at the underlying trial.

The Supreme Court of South Carolina has held "absent specific language in the Will, or

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sufficient extrinsic evidence that a bequest was made 'in contemplation of marriage,' a spouse has not been 'provided for' under the "omitted spouse's statute." *Miles v. Miles*, 312 S.C. 408, 410-11, 440 S.E.2d 882, 883 (1994). In *Miles*, the Court held there was no evidence the bequest in question was made in contemplation of marriage because the purported omitted spouse had "rejected numerous marriage proposals from Decedent finally agreeing to marriage one year *after*, the Will was executed," meaning the Will made no provision for the purported omitted spouse in her capacity as spouse. *Id.* The Court ultimately held that "a spouse has not been "provided for" within the meaning of S.C. Code Ann. § 62-2-301 (2014) unless the decedent considered the surviving spouse *in that capacity* at the time with will was executed. *Id.* In the present case, the Decedent not only executed the will prior to Respondent accepting his marriage proposal, the Decedent executed the will prior to meeting the Respondent. Based on the Supreme Court's ruling in *Miles*, and the facts presented to the Probate Court in the underlying trial, the Respondent has a meritorious defense to any claim by Appellant under the omitted spouse statute.

Res judicata applies where there is (1) identity of the parties; (2) identity of the subject matter; and (3) an adjudication of the issue in the prior suit. *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina*, 259 S.C. 9, 362 S.E.2d 176 (1987). A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. *Id.*

The elements of *res judicata* have been met in this case. The parties are identical, the subject matter is identical, and the court ruled "there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the will or in lieu of a testamentary disposition."

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III. Appellant has not demonstrated *prima facie* evidence for the equitable relief sought.

Appellant argues the Probate Court incorrectly found the issue of the omitted spouse's share was *res judicata*. Appellant's Statement of Issues on Appeal, ¶ 3. Appellant goes on to enumerate the "evidence" presented at the October 5, 2018, hearing regarding the omitted spouses share. Appellant's Statement of Issues on Appeal, ¶ 4.

First, the evidence enumerated in paragraph 4 of Appellant's Statement of Issues on Appeal is of no value and has no bearing on the underlying case, Appellant's motion to the Probate Court for relief from judgment, nor this appeal. The purpose of a motion for relief from judgment under SCRCP 60 – the sole basis for relief pled by Appellant before the Probate Court – is not to allow a party to make arguments it could have or should have made at the underlying trial. Rule 60 provides a limited number of case-specific grounds entitling parties to relief from judgment. These limited grounds include (1) clerical mistakes; (2) mistake, inadvertence, surprise, or excusable neglect; (3) newly discovered evidence; (4) fraud, misrepresentation, or other misconduct of an adverse party; (5) void judgment; and (6) satisfied judgment.

All the evidence listed in Appellant's Statement of Issues on Appeal was available and existed at the time of the underlying trial. In no way, shape, or form does Appellant's entrance of this "evidence" into the record at a hearing on a SCRCP 60 hearing entitle Appellant to relief from judgment. The question at the October 5, 2018 hearing, was whether Appellant was entitled to relief pursuant to SCRCP 60 and the evidence referenced in Appellant's Statement of Issues does not affect whether Appellant is so entitled.

CONCLUSION

Based on the above, the transcript from the hearing, and the court record, it is clear Judge Rogers correctly decided to deny Appellant's Motion for Relief from Judgment and Stay of

Enforcement. Judge Rogers's order was not controlled by an error of law nor did it lack evidentiary support. Respondent hereby prays this Honorable Court affirm the Probate Court's ruling.

Respectfully submitted,

s/ John P. Gettys, Jr.

John P. Gettys, Jr., S.C. Bar No. 8673
J. Nathanial Pierce
Morton & Gettys, LLC
Attorney for Respondent
P.O. Box 707
Rock Hill, SC 29731
T: 803.366.3388
F: 803.366.4044
nate.pierce@mortongettys.com

June 25, 2019
Rock Hill, South Carolina

ELECTRONICALLY FILED - 2019 Jul 02 5:14 PM - YORK - COMMON PLEAS - CASE#2018CP4603672

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

THE STATE OF SOUTH CAROLINA
In The Circuit Court

APPEAL FROM YORK COUNTY PROBATE COURT

The Honorable Carolyn W. Rogers. Judge of Probate

Case File No. 2016-ES-46-01230

Case No. 2018-CP-46-03672

In the Matter of JONATHAN MATTOX,

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

RECORD ON APPEAL

Michael L. Brown, Jr.
Zachary M. Merritt
Post Office Box 1025
Rock Hill, SC 29731
803 328-8822

John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorneys for Appellant

John P. Gettys, Jr.
J. Nathaniel Pierce
Morton & Gettys
Post Office Box 707
Rock Hill, S.C. 29731
803 366-3388
Attorneys for Respondent

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

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ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

STATE OF SOUTH CAROLINA **IN THE PROBATE COURT**
CASE FILE NO.: 2016ES4601230

COUNTY OF YORK

IN THE MATTER OF JONATHAN MATTOX

FILED RECEIVED
2018 NOV 21 AM 10:00
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

JUDGMENT

David J. Mattox — PETITIONER(S)

Lisa Jo Bare Mattox — RESPONDENT(S)

CHECK ONE:

[X] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] ACTION DISMISSED _____

IT IS ORDERED AND ADJUDGED: [X] See attached order; [ ] Statement of judgment by the court.

Dated at York, South Carolina, this 21 day of November, 2018.

Carolyn W Rogers

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 21st day of November, 2018, and a copy mailed first class this 21st day of November, 2018, to attorneys of record or to parties (when appearing *pro se*) as follows:

John Martin Foster, Esquire
Post Office Box 106
Rock Hill, SC 29731

John P. Gettys, Jr., Esquire
Post Office Box 707
Rock Hill, SC 29731

Zachary M. Merritt, Esquire
Post Office Box 1025
Rock Hill, SC 29731

J. Nathanial Pierce, Esquire
Post Office Box 707
Rock Hill, SC 29731

NOV 26 2018

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	ORDER ON OMITTED SPOUSE CLAIM
PETITIONER	
vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

FILED RECEIVED
2018 NOV 21 AM 9:29
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

The within matter came before the Court on October 5, 2018, pursuant to the Notice, Motion and Petition for Relief from Judgment filed by David J. Mattox ("Petitioner"), represented by John Martin Foster and Zach Merritt. Present for the hearing were the Petitioner and his attorneys; and the Respondent, Lisa Jo Bare Mattox, and her attorneys, John P. Gettys, Jr. and J. Nathanial Pierce.

The hearing was initiated upon the filing of a Summons, Notice, Motion and Petition for Relief from Judgment and for Stay of Enforcement on July 13, 2018. A Notice of Hearing was mailed on September 7, 2018, with Proof of Delivery evidencing service upon the appropriate parties. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

I have reviewed the evidence and case law presented at the October 5, 2018, hearing, as well as the recording of the testimony given in the hearing held on August 9, 2017, and I make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a

NOV 26 2018

#1 of 4

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

resident of York County and passed away on October 1, 2016.

2. The Decedent met his wife, now widow, Lisa Mattox, in 2006 and they were wed in 2011.

3. The Respondent filed an informal application for appointment on October 13, 2016, indicating the Decedent had died without a Will.

4. The Respondent was appointed Personal Representative of the estate on October 13, 2016.

5. Petitioner filed a Summons, Complaint and Petition for Formal Appointment on April 28, 2017.

6. Petitioner offered for probate a copy of a Will signed in Gwinnett County, Georgia, in 2005 by the Decedent, but was unable to produce the original Will.

7. A hearing was held on August 9, 2017.

8. At the August 9 hearing, both the Petitioner and Respondent had the opportunity to address the omitted spouse issue and the issue was thoroughly addressed.

9. The Court issued an order on September 26, 2017 denying Petitioner's application to be appointed Personal Representative of the Estate (the "Order").

10. The Order further states in paragraph G that the question of the omitted spouse share was rendered moot because Jonathan Mattox died intestate, and further states in paragraph H that there was no credible evidence presented to the Court that Jonathan Mattox provided for his surviving spouse outside of the Will or in lieu of a testamentary disposition.

11. Subsequently, the purported original Will was found in Decedent's mother's house in Pawley's Island, South Carolina.

12. Petitioner testified at the hearing held on August 9, 2017, that he lived with his mother in Pawley's Island where the Will was discovered.

#2 of 4 CWK

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

CONCLUSIONS OF LAW

1. Jurisdiction of this Court in the above matter is properly established and venue is properly laid in York County, South Carolina, and all parties were timely served with the Summons, Petition and Notice of Hearing.

2. For the following reasons, Petitioner did not exercise due diligence in discovering the original Will and is not entitled to relief under South Carolina Rule of Civil Procedure 60:

a. Petitioner testified at the August 2017 hearing that he lived with his Mother in Pawley's Island, which is where the original Will was discovered;

b. The original Will was discovered in a safe in the Mother's residence – a natural and obvious place for important papers to be placed; and

c. Petitioner submitted an affidavit from his mother in which she affirms she knew the original Will existed.

3. It is well settled law in South Carolina that when a testator fails to provide by Will for his surviving spouse who married the testator after the execution of the Will, the omitted spouse shall receive the same share of the estate she would have received if the decedent left no Will. *See In Re Timmerman*, 331 S.C. 455, 502 S.E. 2d 920 (1998).

4. The Petitioner presented no credible evidence to the Court that the Decedent was contemplating marriage when the Will was executed in 2005. *See In Re Miles*, 440 S.E. 2d 882, 312 S.C. 408 (1994).

5. Because the Respondent established her entitlement to an omitted spouse share pursuant to S.C. Code Ann. § 62-3-301 in that she proved (1) the omission was not intentional as Mr. Mattox and Respondent did not know each other when the Will was executed, and (2) Mr. Mattox made no in-lieu provisions

for her, the discovery and probate of Mr. Mattox's original Will would not change the outcome of the 2017 proceeding. *See Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008).

6. All of the elements of *res judicata* as to the omitted spouse issue are satisfied – (1) the identity of the parties, (2) identity of the subject matter, and (3) a previous adjudication. *See Plum Creek Development Co., Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d (1999).

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Decedent died intestate without children, leaving his spouse as his sole heir pursuant to S.C. Code Ann. § 62-2-301 (1986, as amended). Petitioner's Notice, Motion and Petition for Relief from Judgment and For Stay of Enforcement is denied.

Carolyn W. Rogers
Judge of Probate, York County, SC

York, South Carolina
November 21, 2018.

#4 of 4

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

FILED RECEIVED

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT
CASE FILE NO: 2018ES4603230

COUNTY OF YORK

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

DAVID J. MATTOX — LISA JO BARE MATTOX

PETITIONER(S) — RESPONDENT(S)

CHECK ONE:

[X] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] ACTION DISMISSED _____

IT IS ORDERED AND ADJUDGED: [X] See attached order; [ ] Statement of judgment by the court.

Dated at York, South Carolina, this 26th day of September, 2017.

Carolyn W Rogers

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 26th day of September, 2017, and a copy mailed first class this 27th day of September, 2017 to attorneys of record or to parties (when appearing *pro se*) as follows:

Stephen D. Schusterman
Post Office Box 4211
Rock Hill, SC 29732

Attorney(s) for the Petitioner(s)

John P. Gettys, Jr.
Post Office Box 707
Rock Hill, SC 29731

Attorney(s) for the Respondent(s)

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

FILED RECEIVED
2017 SEP 26 PM 4:07
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	ORDER
PETITIONER	
Vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

The within matter came on for hearing August 9, 2017, on the Summons and Petition for Formal Appointment filed by David J. Mattox (hereinafter referred to as the Petitioner), represented by attorney Stephen D. Schusterman. Present were the Petitioner and his attorney; Lisa Jo Bare Mattox (hereinafter referred to as the Respondent), and her attorney, John P. Gettys Jr. The Petitioner and the Respondent were the only witnesses to provide testimony at trial.

PLEADINGS FILED IN ACTION

1. This matter was initiated by the filing of a Summon and Petition for Formal Appointment on April 28, 2017.

2. A Notice of Hearing was mailed on June 19, 2017 with Proof of Delivery evidencing service upon the appropriate parties.

3. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

Based on the pleadings, testimony and evidence presented at trial, I

#1 of 4 dwr

CERTIFIED TRUE COPY
Carolyn W Rogers
PROBATE JUDGE, YORK COUNTY, SC

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a resident of York County and passed away on October 1, 2016.

2. The Respondent is a resident of Lake Wylie, York County, South Carolina and is the surviving spouse of the Decedent.

3. The Court has jurisdiction pursuant to S. C. Code §62-1-302 and York County is the proper venue for this matter.

4. The Decedent signed a Last Will and Testament (hereinafter referred to as the Will) in 2005 in Gwinnett County, Georgia, a copy of which was submitted into evidence at the hearing.

5. The Decedent met his wife, the Respondent, in 2006 and they were wed in 2011.

6. The Respondent filed an informal application for appointment on October 13, 2016, indicating the Decedent died without a Will.

7. The Respondent was appointed Personal Representative of the estate on October 13, 2016.

8. No original Will has been presented to the Court.

9. The Petitioner's attorney has spent much time and research attempting to locate the original Will but has been unsuccessful.

10. The Petitioner testified that he had no knowledge of where the Decedent kept the original Will and had not seen or discussed the Will since 2005, but he understood the Decedent kept it in a safe place.

11. The Respondent testified she had no knowledge the Decedent had a Will, and his important papers were kept in his safe and neither a copy nor the original Will had been found.

#2 of 4 CWR

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

CONCLUSIONS OF LAW

Based on the record, the findings above, testimony and evidence provided at the hearing, the court concludes:

A. Jurisdiction of this Court is properly established and venue is properly laid in York County, South Carolina, and all parties were timely served with the Summons, Petition and Notice of Hearing.

B. It is well settled law in South Carolina that when a testator takes possession of his Will and it cannot be found after his death, a presumption arises that it was deliberately destroyed. Davis et al. v. Davis et al., 52 SE2d 192 (1949).

C. If the original Will cannot be found there is a presumption it was intentionally destroyed. Golini v. Bolton, 482 SE2d 784 (Ct. App. 1997).

D. The Petitioner presented no credible evidence to the court to rebut the presumption of intentional revocation, nor any evidence the Will was accidentally destroyed or unintentionally revoked as is required to be proven by clear and convincing evidence in order to rebut the presumption defined in the Golini case.

E. The Petitioner presented no evidence of the 2005 Will being inadvertently lost or destroyed nor any evidence to rebut the presumption said Will was intentionally revoked.

F. The Decedent died without a Will and had no children, and the Petitioner is his sole heir.

G. The Decedent's intestacy renders moot the Respondent's petition for the omitted spouse share.

H. Even if the Court were to rule on the omitted spouse issue there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition.

#3 of 4 cwr

I. There being no evidence presented by the Petitioner as to the unintentional revocation of the 2005 Will and no evidence the Decedent provided for his wife in lieu of a testamentary disposition and outside of the Will should one exist, I find that the Petitioner qualifies for relief under S. C. Code Ann. 62-1-111 which allows the court to award attorney's fees and costs as justice and equity may require, including reasonable attorney's fees.

J. The Petitioner shall pay one-half ($3,750.00) of the attorney's fees of Respondent (one-half of $7,500.00) as a result of Petitioner's failure to provide any credible proof of his allegations..

IT IS HEREBY ORDERED that the Decedent died intestate without children, leaving his spouse as his sole heir. Petitioner's request to restrain the Personal Representative from exercising her powers and the Petition for appointment as Personal Representative are denied. The Petitioner is ordered to remit the sum of $3,750.00 to the Respondent as payment of one-half (1/2) of the attorney's fees incurred in this matter.

Carolyn W. Rogers
Judge of Probate, York County, SC

York, South Carolina
September 26, 2017.

#4 of 4 CWR

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

STATE OF SOUTH CAROLINA	]	IN THE PROBATE COURT
	]	FILED RECEIVED
COUNTY OF YORK	]	PROBATE CASE FILE No. 2016-ES-46-01230
		2018 JUL 13 PM 4:55
In the Matter of JONATHAN MATTOX,	]	CAROLYN W. ROGERS JUDGE OF PROBATE YORK COUNTY, SC
DAVID J. MATTOX,	]	
Petitioner,	]	SUMMONS
vs.	]	
LISA JO BARE MATTOX,	]	
Respondent.	]	

TO THE RESPONDENT:

IF UPON AN INDIVIDUAL, OTHER THAN A MINOR, OR AN INCOMPETENT PERSON, CORPORATION, PARTNERSHIP, OR OTHER UNINCORPORATED ASSOCIATION WHICH IS SUBJECT TO SUIT UNDER A COMMON NAME:

YOU ARE REQUIRED to answer the Petition in this action and to serve a copy of your Answer on the subscriber of this Summons at 223 East Main Street, Suite 520, Post Office Box 106, Rock Hill, South Carolina 29731, within thirty (30) days after service of this Summons, exclusive of the day of service.

YOU ARE NOTIFIED that in case of your failure to appear and defend within thirty (30) days after service of this Summons, judgment by default will be rendered against you for the relief demanded in the Petition.

IF UPON A MINOR, A PERSON JUDICIALLY DECLARED INCAPABLE OF CONDUCTING HIS OWN AFFAIRS, OR AN INCOMPETENT PERSON:

YOU ARE NOTIFIED if you have a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may defend on your behalf.

If you are not otherwise represented in this civil action or the Court shall deem it proper, the Court shall appoint a Guardian *ad litem* for you.

If you are a minor party of the age of 14 years or over, you may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

If you are a minor party under the age of 14 years, your parent, general or testamentary guardian, relative or friend may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

If you are an imprisoned person, you, your relative or friend may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

If no application for the appointment of a Guardian *ad litem* is made by or in your behalf within Thirty (30) days after service of this Summons upon you, then the undersigned as attorney for the Plaintiff will make application for the appointment of such Guardian *ad Litem*, after first giving notice of such application to the person or persons to whom such notice must be given under Rule 17(d)(3), (4), or (5), S.C.R.C.P.

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

IF UPON THE UNITED STATES OF AMERICA:

YOU ARE REQUIRED to answer the Petition in this action and to serve a copy of your Answer on the subscriber of this Summons at 223 East Main Street, Suite 520, Post Office Box 106, Rock Hill, South Carolina 29731, within Sixty (60) days after service of this Summons, exclusive of the day of service.

YOU ARE NOTIFIED that in case of your failure to appear and defend within Sixty (60) days after service of this Summons, judgment by default will be rendered against you for the relief demanded in the Petition.

Michael L. Brown, Jr.
SC Bar No. 943
Zachary M. Merritt
SC Bar No. 102079

403 East White Street
Post Office Box 1025
Rock Hill, S.C. 29731

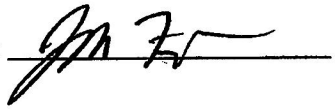
803 328-8822
803328-0523: Fax
lynn@mlblaw.com
zachmer@gmail.com

John Martin Foster
SC Bar No. 2086

The Guardian Building
223 East Main Street, Suite 520
Post Office Box 106
Rock Hill, S. C. 29731

803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

Attorneys for Petitioner

By: 

July 13, 2018

Rock Hill, South Carolina

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

STATE OF SOUTH CAROLINA	]	IN THE PROBATE COURT
	]	
COUNTY OF YORK	]	PROBATE CASE FILE No. 2016-ES-46-01230
	]	
In the Matter of JONATHAN MATTOX,	]	NOTICE, MOTION and PETITION:
	]	
DAVID J. MATTOX,	]	FOR RELIEF FROM JUDGMENT
	]	
Petitioner,	]	and FOR STAY OF ENFORCEMENT
vs.	]	
	]	Pursuant to:
LISA JO BARE MATTOX,	]	S.C. Code § 62-3-412,
	]	RULE 60(b)(1) and (2), S.C.R.C.P.,
Respondent.	]	and RULE 62(b) and (c), S.C.R.C.P.

FILED RECEIVED
2019 JUL 13 PM 4:57
SARAH W. ROGERS
CLERK OF PROBATE
YORK COUNTY, SC

To: The Respondent above named and
John P. Gettys, Jr.
Morton & Gettys, LLC
Post Office Box 707
Rock Hill, South Carolina 29731

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion and Petition herein, as follows:

DATE AND TIME: To be set by the Judge or Clerk of the Probate Court, or as soon thereafter as counsel may be heard.

PLACE: The Probate Court
York County Courthouse
1 South Congress Street
York, South Carolina 29745,
or at such other place as the Court may designate

Pursuant to Rule 60(b), S.C.R.C.P., the Petitioner DAVID J. MATTOX, by and through his attorneys, moves this Court for an Order:

1) Relieving the Movant from the Order filed September 26, 2017 in the above-captioned action in the Probate Cased indicated; a copy of the said Order is attached hereto and incorporated herein as Exhibit "A".

Or, in the alternative,

2) To treat this Motion and Petition and its requested relief as an independent action to

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

relieve the said person from the above-referenced judgment, order or proceeding;

And, in either event,

3) Staying any execution of, or any proceedings to enforce, the said judgment of this Court,
   a) pending the disposition of Movant's Motion and Petition for Relief from the said judgment, order or proceeding made pursuant to Rule 60(b), S.C.R.C.P., now pending in this Court, and
   b) permanently; and

4) For such other and further relief as this Court may deem just and proper.

Pursuant to Rule 11(a), S.C.R.C.P., counsel for the Movant are under no duty, prior to filing this Motion and Petition, to consult with opposing Counsel or to attempt in good faith to resolve the matter contained in this Motion and Petition due to the conclusory nature hereof. Counsel for the Movant further certifiy that such consultation would serve no useful purpose, as defined by the said Rule.

This Motion and Petition is based upon the applicable law, the matter set out herein below in this Motion and Petition by way of affidavits and other attachments hereto, and on the files, papers and pleadings in this Probate action.

1. By its Order of September 26, 2017, this Court determined that the late JONATHAN RAY MATTOX signed a Last Will and Testament in 2005 in Gwinett County, Georgia, a copy of which was entered into evidence at the hearing of this matter on June 19, 2017. [Finding of Fact 4.]
2. The said Order further found that both the Petitioner DAVID J. MATTOX and the Respondent LISA JO BARE MATTOX testified to their lack of knowledge as to where the original Will of the deceased was kept. [Findings of Fact 10. and 11.]
3. The said Order further found that no original will had been located [Finding of Fact 11. and generally], and concluded that there was no evidence that the original will had been inadvertently lost or destroyed. [Conclusion of Law No. D.]
4. The said Order concluded that in the absence of evidence that the Will had been inadvertently lost or destroyed, the legal presumption was was the Will had been intentionally revoked. [Conclusion of Law E.]

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

5. In light of that legal presumption, the decedent was found to be intestate without children, leaving his wife, the Respondent as his sole heir. [Conclusion of Law F. and the Order proper]
6. The original Will, conforming in all respects to the copy submitted as evidence, has lately been discovered in the possession of Mrs. Peggy M. Mattox. A copy of the said Will, as placed in evidence at the hearing on August 9, 2017, is attached hereto and incorporated herein as Exhibit "B".
7. Simultaneously with this Motion and Petition, the original Will is filed with this Court.
8. Mrs. Mattox has executed an Affidavit setting out the circumstances of her finding the original Will. This Affidavit is attached hereto and incorporated herein, unmarked but refererenced as Exhibit "C".
9. This Motion under Rule 60, S.C.R.C.P., and Petition under S.C. Code § 62-3-412, is filed within one year after the judgment contained in the said Order filed September 26, 2017.
10. A *Lis Pendens* relating to the real property of the Estate of JONATHAN RAY MATTOX has been filed on behalf of the Petitioner as 2018-LP-46-00407. A copy thereof is attached hereto and incorporated herein as Exhibit "D".
11. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, allow this Court to entertain a Petition for modification or vacation of its order filed September 26, 2017 in that the proponent of the original Will of JONATHAN RAY MATTOX was unaware of its existence at the time of the earlier proceeding, as defined under S.C. Code § 62-3-412(1).
12. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, constitute mistake, inadvertence, surprise, or excusable neglect on the part of Petitioner, as defined by Rule 60(b)(1), S.C.R.C.P.
13. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, constitute newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), S.C.R.C.P., as defined by Rule 60(b)(2), S.C.R.C.P.
14. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, show that it is no longer equitable that the judgment should have prospective application, as defined by Rule 60(b)(5), S.C.R.C.P.
15. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, show that the Petitioner herein is entitled to stay the execution or any proceedings to enforce any judgment, order or proceeding resulting in, or represented by, the civil action and

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

judgment herein, pending the disposition of his Motion and Petition for relief made pursuant to Rule 60(b), S.C.R.C.P.

16. On knowledge and information, the facts alleged herein, considered as an Independent Action in Equity, and the reasonable inferences thereof, constitute a good, meritorious, and sufficient defense to the judgment, order or proceeding complained of, to the extent the same is required pursuant to Rule 60(b), S.C.R.C.P.

Michael L. Brown, Jr.
SC Bar No. 943
Zachary M. Merritt
SC Bar No. 102079

403 East White Street
Post Office Box 1025
Rock Hill, S.C. 29731

803 328-8822
803328-0523: Fax
lynn@mlblaw.com
zachmer@gmail.com

John Martin Foster
SC Bar No. 2086

The Guardian Building
223 East Main Street, Suite 520
Post Office Box 106
Rock Hill, S. C. 29731

803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

Attorneys for Petitioner

By: _____

July 13, 2018

Rock Hill, South Carolina

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

FILED RECEIVED

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE PROBATE COURT
CASE FILE NO: 2018CP4603672

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

DAVID J. MATTOX — LISA JO BARE MATTOX

PETITIONER(S) — RESPONDENT(S)

CHECK ONE:

[X] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] ACTION DISMISSED _____

IT IS ORDERED AND ADJUDGED: [X] See attached order; [ ] Statement of judgment by the court.

Dated at York, South Carolina, this 26th day of September, 2017.

Carolyn W Rogers

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 26th day of September, 2017, and a copy mailed first class this 27th day of September, 2017 to attorneys of record or to parties (when appearing *pro se*) as follows:

Stephen D. Schusterman
Post Office Box 4211
Rock Hill, SC 29732

Attorney(s) for the Petitioner(s)

John P. Gettys, Jr.
Post Office Box 707
Rock Hill, SC 29731

Attorney(s) for the Respondent(s)

Exhibit "A" 1

ELECTRONICALLY FILED - 2019 Jun 13 9:40 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

FILED RECEIVED
2017 SEP 26 PM 4:07
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	ORDER
PETITIONER	
Vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

The within matter came on for hearing August 9, 2017, on the Summons and Petition for Formal Appointment filed by David J. Mattox (hereinafter referred to as the Petitioner), represented by attorney Stephen D. Schusterman. Present were the Petitioner and his attorney; Lisa Jo Bare Mattox (hereinafter referred to as the Respondent), and her attorney, John P. Gettys Jr. The Petitioner and the Respondent were the only witnesses to provide testimony at trial.

PLEADINGS FILED IN ACTION

1. This matter was initiated by the filing of a Summon and Petition for Formal Appointment on April 28, 2017.

2. A Notice of Hearing was mailed on June 19, 2017 with Proof of Delivery evidencing service upon the appropriate parties.

3. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

Based on the pleadings, testimony and evidence presented at trial, I

#1 of 4 pgs

CERTIFIED TRUE COPY
Carolyn W Rogers
PROBATE JUDGE, YORK COUNTY, SC

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Exhibit "A" 2

make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a resident of York County and passed away on October 1, 2016.

2. The Respondent is a resident of Lake Wylie, York County, South Carolina and is the surviving spouse of the Decedent.

3. The Court has jurisdiction pursuant to S. C. Code §62-1-302 and York County is the proper venue for this matter.

4. The Decedent signed a Last Will and Testament (hereinafter referred to as the Will) in 2005 in Gwinnett County, Georgia, a copy of which was submitted into evidence at the hearing.

5. The Decedent met his wife, the Respondent, in 2006 and they were wed in 2011.

6. The Respondent filed an informal application for appointment on October 13, 2016, indicating the Decedent died without a Will.

7. The Respondent was appointed Personal Representative of the estate on October 13, 2016.

8. No original Will has been presented to the Court.

9. The Petitioner's attorney has spent much time and research attempting to locate the original Will but has been unsuccessful.

10. The Petitioner testified that he had no knowledge of where the Decedent kept the original Will and had not seen or discussed the Will since 2005, but he understood the Decedent kept it in a safe place.

11. The Respondent testified she had no knowledge the Decedent had a Will, and his important papers were kept in his safe and neither a copy nor the original Will had been found.

#2 of 4 DWR

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Exhibit "A" 3

CONCLUSIONS OF LAW

Based on the record, the findings above, testimony and evidence provided at the hearing, the court concludes:

A. Jurisdiction of this Court is properly established and venue is properly laid in York County, South Carolina, and all parties were timely served with the Summons, Petition and Notice of Hearing.

B. It is well settled law in South Carolina that when a testator takes possession of his Will and it cannot be found after his death, a presumption arises that it was deliberately destroyed. Davis et al. v. Davis et al., 52 SE2d 192 (1949).

C. If the original Will cannot be found there is a presumption it was intentionally destroyed. Golini v. Bolton, 482 SE2d 784 (Ct. App. 1997).

D. The Petitioner presented no credible evidence to the court to rebut the presumption of intentional revocation, nor any evidence the Will was accidentally destroyed or unintentionally revoked as is required to be proven by clear and convincing evidence in order to rebut the presumption defined in the Golini case.

E. The Petitioner presented no evidence of the 2005 Will being inadvertently lost or destroyed nor any evidence to rebut the presumption said Will was intentionally revoked.

F. The Decedent died without a Will and had no children, and the Petitioner is his sole heir.

G. The Decedent's intestacy renders moot the Respondent's petition for the omitted spouse share.

H. Even if the Court were to rule on the omitted spouse issue there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition.

#3 of 4 mvr

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Exhibit "A" 4

I. There being no evidence presented by the Petitioner as to the unintentional revocation of the 2005 Will and no evidence the Decedent provided for his wife in lieu of a testamentary disposition and outside of the Will should one exist, I find that the Petitioner qualifies for relief under S. C. Code Ann. 62-1-111 which allows the court to award attorney's fees and costs as justice and equity may require, including reasonable attorney's fees.

J. The Petitioner shall pay one-half ($3,750.00) of the attorney's fees of Respondent (one-half of $7,500.00) as a result of Petitioner's failure to provide any credible proof of his allegations..

IT IS HEREBY ORDERED that the Decedent died intestate without children, leaving his spouse as his sole heir. Petitioner's request to restrain the Personal Representative from exercising her powers and the Petition for appointment as Personal Representative are denied. The Petitioner is ordered to remit the sum of $3,750.00 to the Respondent as payment of one-half (1/2) of the attorney's fees incurred in this matter.

Carolyn W. Rogers
Judge of Probate, York County, SC

York, South Carolina
September 26, 2017.

#4 of 4 MWR

Exhibit "A"

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LAST WILL AND TESTAMENT

OF

JONATHAN RAY MATTOX

STATE OF GEORGIA:
COUNTY OF GWINNETT

I, **JONATHAN RAY MATTOX**, of the said county and state, being of sound and disposing mind and memory, do hereby make and publish this my Last Will and Testament, hereby revoking all other Wills and Codicils heretofore made by me.

ITEM I

I wish my body buried in a suitable manner and a suitable memorial erected and the costs thereof paid out of my estate.

I direct that all of my legal debts be paid out of my estate as soon as practicable.

ITEM II

I give, bequeath and devise all of my property, both real and personal, of whatever kind and wherever situated to my brother, **DAVID JAMES MATTOX**, in fee simple and forever, *per stirpes*. As for my brother, **MARK ANTHONY MATTOX**, I have intentionally made no provision for said brother hereunder and I purposefully exclude him as a beneficiary hereunder for personal reasons.

ITEM III

Should my brother, **DAVID JAMES MATTOX**, predecease me leaving no lineal descendants, then I give, bequeath and devise all the rest and remainder of my property of whatever kind and wherever situated to my mother, **PEGGY YVONNE MATTOX**, in fee simple and forever *per stirpes*.

J. R. M.
Initials

Exhibit "B" 1

ITEM IV

I give, bequeath and devise all the rest, residue and remainder of my property of every kind and description. and wherever located, including any lapsed or void legacy or devise to the persons who would have been entitled thereto under the laws of descent and distribution of the State of Georgia if I had died intestate at that time owning such property in fee simple.

ITEM V

I hereby constitute and appoint my mother, **PEGGY YVONNE MATTOX**, as Executor of this Will, relieving her of the necessity of making returns or giving bond to any court, and I specifically empower her to sell any and all of my property, at public or private sale, with or without notice, and without order of any court, for the purpose of paying debts of my estate or carrying out the provisions of this Will.

ITEM VI

In the event my mother, **PEGGY YVONNE MATTOX**, shall predecease me or fail to serve as Executrix of this Will, then and in that event I name and appoint my brother, **DAVID JAMES MATTOX**, as Executor of this Will.

ITEM VII

In the management, care and disposition of my estate and any trust created hereunder, I confer upon the Executrix and the survivors and successors in office, the power to do all things in each instance as may be, in the sole discretion of my Executrix, necessary, proper or advisable, including the powers contained in *O.C.G.A.*, § 53-12-232, as they now exist, that is, as such powers may have been amended up to and through the date of execution of this Will, which powers are expressly incorporated into this Will by reference, with the same effect as though such language were set forth verbatim herein.

J.R.M.

Exhibit "B"

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IN WITNESS HEREOF, I have hereunto set my hand and affixed my seal to this my Last Will and Testament consisting of 3 pages, including this page, identifiable by my signature or initials.

Jonathan Ray Mattox
JONATHAN RAY MATTOX

Stacey Brown
Witness

Justin Skaggs
Witness

Sworn to and subscribed before me by **JONATHAN RAY MATTOX**, and sworn to and subscribed before me by Stacey Brown and Justin Skaggs, witnesses, this 17th day of February, 2005.

Candi Knight
NOTARY PUBLIC

My Commission Expires:
10-22-07

Exhibit "B" 3

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AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared **JONATHAN RAY MATTOX**, Stacey Brown and Justin Skaggs, known to me to be the Testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn. **JONATHAN RAY MATTOX,** declared to me and to the said witnesses in my presence and that said instrument is his Last Will and Testament and that he had willingly made and executed it as his free act and deed for the purpose therein expressed. The witnesses, each on his or her oath, stated to me in the presence and hearing of the Testator that the Testator had declared to them that the instrument is his Last Will and Testament and that he executed same as such and wanted each of them to sign it as a witness; and upon his or her oath each witness stated further that he or she did sign the same as a witness in the presence of the Testator and at his request; that he or she was at that time fourteen (14) years of age or over and was of sound mind; and that each of said witnesses was then at least fourteen (14) years of age.

Jonathan Ray Mattox
JONATHAN RAY MATTOX

Stacey Brown
Witness

Justin Skaggs
Witness

Sworn to and subscribed before me by **JONATHAN RAY MATTOX**, and sworn to and subscribed before me by Stacey Brown and Justin Skaggs, witnesses, this 17th day of February, 2005.

Carolin Knight
NOTARY PUBLIC

My Commission Expires:
10-22-07

Exhibit "B"

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Exhibit "B"

Last Will

and

Testament

of

JONATHAN RAY MATTOX

NELSON H. TURNER
ATTORNEY AT LAW
FIVE HURRICANE SHOALS ROAD
LAWRENCEVILLE, GEORGIA 30045
(770) 962-8111

STATE OF SOUTH CAROLINA	]	IN THE PROBATE COURT
	]	
COUNTY OF YORK	]	PROBATE CASE FILE No. 2016-ES-46-01230
	]	
In the Matter of JONATHAN MATTOX,	]	
	]	
DAVID J. MATTOX,	]	
	]	AFFIDAVIT
Petitioner,	]	
vs.	]	IN SUPPORT OF MOTION
	]	
LISA JO BARE MATTOX,	]	
	]	
Respondent.	]	

PERSONALLY appeared before me, a notary public, the undersigned affiant, who being duly sworn, deposes and says that:

1. I am Peggy M. Mattox. I am the mother of the late JONATHAN RAY MATTOX and of DAVID J. MATTOX. I live at 218 Shore Line Drive, Town of Pawley's Island in Georgetown County, South Carolina.
2. I knew my son JONATHAN RAY MATTOX had executed a will; I saw it in his truck the day it was executed. I did not see it again until the events described below.
3. During the litigation between DAVID J. MATTOX and LISA JO BARE MATTOX above, no one contacted me about the location of JONATHAN RAY MATTOX' will. Had anyone done so, I would have had no information to give them.
4. In or about October, 2017, I bought a new car. I then looked into selling my old car, which was then 17 years old.
5. I went into my safe to find the title to the old car. While looking for the title, I found the original will of JONATHAN RAY MATTOX in my safe.
6. Until I found this document, I had no knowledge of its presence in my safe. I very seldom use my safe or go into it.
7. JONATHAN RAY MATTOX, DAVID J. MATTOX and I know the location of the combination to my safe. I can only speculate that JONATHAN RAY MATTOX placed it there because the will named me as Personal Representative.
8. No one had told me the will had been placed in the safe.

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9. Upon discovering the will, I contacted my son DAVID J. MATTOX and gave the original to him.

Peggy M. Mattox
PEGGY M. MATTOX

SWORN TO and subscribed before me
this day of July 12, 2018.

JAMIECE C ARCHIE
My Commission Expires
NOTARY PUBLIC
09-27-2027
STATE OF SOUTH CAROLINA

NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires: 9-27-2027

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