

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. William A. McKinnon, Circuit Court Judge

Civil Case No.: 2018-CP-46-03672
Appellate Case No. 2019-001827

David J. Mattox,

Appellant,

v.

Lisa Jo Bare Mattox,

Respondent.

PROOF OF SERVICE

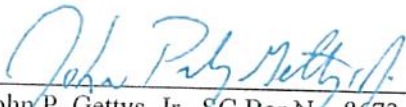
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. William A. McKinnon, Circuit Court Judge

Civil Case No.: 2018-CP-46-03672
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Jul 21 2020

SC Court of Appeals

David J. Mattox,

Appellant,

v.

Lisa Jo Bare Mattox,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules.

July 20, 2020



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

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Oct 02 2020

SC Court of Appeals

DAVID J. MATTOX,

Appellant,

vs.

LISA JO BARE MATTOX,

Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT:
AS TO RULE 60(b)(1)

In Respondent's Brief, under discussion of Rule 60(b)(1), S.C.R.C.P. allowing relief for mistake, inadvertence or excusable neglect, the argument is made that:

"This Rule is intended to allow a party relief based on errors committed by the party's counsel. [Citing to FEDERAL PRACTICE AND PROCEDURE.] There is no mistake by counsel alleged in this instance and "it would be a perversion of [Rule 60(b)(1)] and its purpose to permit it to be used to circumvent another rule." *Id.*

Whatever its derivation, this is a misstatement of the existing precedent. In *Associated Discount Corp. v. Goldman*, 524 F.2d 1051, 1053-1054 (3d Cir. 1975), the Third Federal Circuit held that the grounds for relief under this rule "may be invoked whether they apply to counsel or to client." *Associated Discount* is cited by the Fourth Circuit in *Tauber v. E.F. Hutton & Co., Inc.*, 813 F.2d 403 (4th Cir. 1986).

Appellant would note that it has even been held that the error forming a basis for relief under Rule 60(b)(1) can be that of the Court itself. *Cappillino v. Hyde Park Cent. Sch. Dist.*, 135 F.3d 264, 265-266 (2d Cir. 1998), cited in *IN RE Moore*, C/A No. 04-15363-HB (Bankr. S.C. 3/26/2008) (Bankr. S.C. 2008). *Oliver v. Home Indemnity Co.*, 470 F.2d 329, 330 (5th Cir. 1972), cited in *Phillips v. Consol. Publ'g Co.* (S.D. Ga. 2015).

The proposition that any mistake allowing relief under Rule 60(b)(1) must be that of counsel cannot be maintained.

ARGUMENT:
AS TO RULE 60(b)(2)

In responding to the Appellant's claim under Rule 60(b)(2) as to newly-discovered evidence, the Respondent states:

In her affidavit, Peggy M. Mattox ("Peggy") the mother of the Appellant and Decedent attests she found the Decedent's original will in a safe in Peggy's house on or around October 2017. Aff. Peggy M. Mattox ¶ 5.

Respondent goes on to argue that the Appellant's filing of his Petition and Motion herein on July 13, 2018 demonstrates a lack of promptness in seeking relief. This argument is based on a mis-reading of Peggy Mattox' affidavit. The actual language is as follows:

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.
- [RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.].

Mrs. Mattox recites the events leading to her discovery; she does not recite the time of discovery, because she could not. All her affidavit states is that the discovery occurred after her purchase of a new car.

The Respondent asserts that a new trial is pointless, given her rights as an omitted spouse. There is no question that, under the discovered will, she is an omitted spouse. The evidence set out in the record before the Probate Court, and recited in Appellant's Brief before the Circuit Court, demonstrates, or can demonstrate at trial, that the Decedent, pursuant to the requirements of S.C. Code § 62-2-301(a)(2):

. . . 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.

Finally, the Respondent argues, again citing Peggy Mattox' affidavit:

The will was discovered in the Appellant and Decedent's mother's house, in a safe for which the Appellant was one of the three who knew the location and combination, the other two being the Decedent and the Decedent's mother.

Again, this is a mis-reading of the Affidavit. The actual language used is:

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.

[RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.].

To say the that Appellant knew where to find the combination of the safe in his mother's house is not to say he knew the combination. To say that it was his house is, again, to perpetuate a finding made outside the record and as to which no evidence exists.

CONCLUSION

All evidence in this matter evidences the Appellant's lack of possession and lack of knowledge as to the whereabouts of the original will of the Decedent. There is no basis to find a lack of due diligence on his part in discovering the will. He is entitled to relief under both Rule 60(b), S.C.R.C.P. and S.C. Code § 62-3-412. He is entitled to enter his brother's will into Probate and proceed with the Estate.

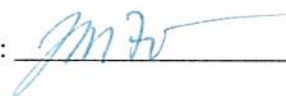
October 2, 2020

Respectfully submitted,

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Oct 02 2020

SC Court of Appeals

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The undersigned certifies that the final Reply Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

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By:  _____

October 2, 2020

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Jun 26 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001827

DAVID J. MATTOX,

v.

LISA JO BARE MATTOX,

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STATE OF SOUTH CAROLINA

IN THE PROBATE COURT
CASE FILE NO. 2017-08-04601230-40

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:

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: 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

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

Attorney(s) for the Petitioner(s)

Attorney(s) for the Respondent(s)

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.

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Mattox Order Page 2 of 4
2016-ES-46-01230

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.

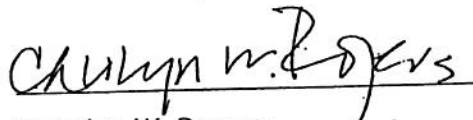
#3 of 4 cwr

Mattox Order Page 3 of 4
2016-ES-46-01230

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 CW

Mattox Order Page 4 of 4
2016-ES-46-01230

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

CASE FILE NO.: 2016ES4601230

COUNTY OF YORK

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

David J. Mattox

Lisa Jo Bare Mattox

PETITIONER(S)

RESPONDENT(S)

CHECK ONE:

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: 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:

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NOV 26 2018

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

21 NOV 21 AM 10:00

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STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN RE: Estate of Jonathan Mattox
David J. Mattox,

PETITIONER

vs.

Lisa Jo Bare Mattox,

RESPONDENT

IN THE PROBATE COURT

Case No: 2016-ES-46-01230

ORDER ON
OMITTED SPOUSE CLAIM

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

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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. Nathaniel 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
CWK

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.

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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).

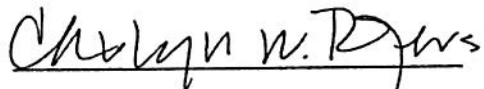
5. Because the Respondent established her entitlement to an omitted spouse share pursuant to S.C. Code Ann. § 62-3-301 in that she proved (1) the omission was not intentional as Mr. Mattox and Respondent did not know each other when the Will was executed, and (2) Mr. Mattox made no in-lieu provisions

#3 of 4
CWR

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.

Mattox Order Page 4 of 4
2016-ES-46-01230

#4 of 4
CWR

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
David J. Mattox,)
)
Appellant)
v.)
)
Lisa Jo Bare Mattox, LLC,)
)
Respondent.)
_____)

**IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT**

Case No.: 2018-CP-46-03672

ORDER AFFIRMING PROBATE COURT

PRESIDING JUDGE: The Honorable William A. McKinnon
DATE OF HEARING: July 31, 2019
APPELLANTS'S ATTORNEY: Michael L. Brown Jr.; John M. Foster;
Zachary M. Merritt;
RESPONDENT'S ATTORNEY: John P. Gettys, Jr.; J. Nathaniel Pierce

This matter came before the Court on appeal after the Probate Court denied the Appellant's Motion for relief under South Carolina Rule of Civil Procedure 60. For the reasons set forth below, the judgment of the Probate Court is AFFIRMED.

Facts on Appeal:

This underlying matter in this appeal began on October 1, 2016 with the death of Jonathan Mattox ("Decedent"). Decedent had signed a valid Last Will and Testament ("will") in 2005, appointing his brother, David J. Mattox, as personal representative. After the signing of the will, Decedent then married Lisa Jo Bare Mattox ("Respondent"), but purportedly failed to execute another will. Additionally, the original 2005 will could not be located at the time of the Decedent's death. The Probate Court determined that the inability to locate the will indicated it had been intentionally revoked. As a result, the Probate Court found that the Decedent had died intestate and without children, leaving the Respondent as his sole heir. The Respondent was awarded the entirety of the Decedent's estate.

According to a July 12, 2018 affidavit filed by Peggy Mattox (the mother), the original will was discovered in her safe on or about October 2017. The affidavit also states both Decedent and Decedent's brother (the appellant) David Mattox knew of the safe and had access to the combination. On July 13, 2018, approximately nine months after discovery of the alleged original will, Appellant filed a Motion and Petition for Relief from Judgment and Stay of Enforcement under South Carolina Rule of Civil Procedure 60. Appellant argued that he had obtained newly discovered evidence in the form of the original will, requiring that the Decedent's assets be redistributed according to that will. The bases for the "Notice, Motion and Petition" were: SCRC 60(b)(1), (2), and (5) and S.C. Code. Ann. § 62-3-412(1). The "Notice, Motion and Petition" was also alleged to be an "independent action in equity." On November 21, 2018 Judge Rogers issued an order denying the Appellant's Motion. This appeal followed.

Standard on Appeal:

An appeal from the probate court is governed by the provisions of the South Carolina Probate Code. *Matter of Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). The probate code provides that a final order or decree of the probate court may be appealed to the circuit court, and the circuit court must hear and determine the appeal "according to the rules of law." S.C. Code Ann. § 62-1-308 (1987). This phrase means according to the rules governing appeals. *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 as the Court of Appeals. *Golini v. Bolton*, 326 S.C. 333, 338, 482 S.E.2d 784, 786-87 (Ct. App. 1997). 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 order was controlled by an error of law or based on factual conclusions that are without evidentiary support. *Id.*

Discussion:

- I. There is evidence that the Appellant did not act with due diligence in his attempt to locate the will of the Deceased, as it was found in his mother's safe, such that a Motion under Rule 60(b)(2) cannot be sustained.

Under SCRCP 60(b)(2) a court may relieve a party from a judgment on the basis of newly discovered evidence. SCRCP 60(b)(2): "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons...(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

A five part test is used to determine whether the evidence offered satisfies Rule 60(b)(2): (1) the evidence will probably change the result if a new trial is granted; (2) it has been discovered since the trial; (3) it could not have been discovered before the trial; (4) it is material to the issue; and (5) it is not merely cumulative or impeaching. *Jamison*, at 272, 644 S.E.2d at 767 (citing *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2005)). The movant has the burden of presenting evidence proving the facts essential to secure relief. *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991). To satisfy Rule 60(b)(2), and the third factor of the test, "newly discovered evidence" must be evidence which could not have been discovered with due diligence in time to move for a new trial under Rule 59(b). *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007). "Due diligence" is defined as the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Jamison* at 272, 644 S.E.2d at 767 (citing *Black's Law Dictionary*.)

When evidence is misplaced, a party must make a specifically targeted search to find the missing evidence in order for due diligence to be satisfied. *Lanier* at 220, 612 S.E.2d at 460. Additionally, in order for evidence to be newly discovered, it must not have been known to the parties or discovered by the parties at the time of the trial court's decision. *See Fasset v. Evans*, 364 S.C. 42, 50, 610 S.E.2d 841, 845 (Ct. App. 2005); *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct.App.2004) (where a party could have discovered the "new" evidence prior to trial, the party is not entitled to relief under Rule 60(b)(2).)

Here, the factors as they are set out in *Jamison* and *Lanier* are not met. The evidence shows Appellant did not act with due diligence in searching for the original will. Due diligence requires that a movant act with the diligence reasonably expected of a party seeking to fulfil a legal obligation, and that the movant make a targeted effort to locate missing evidence. The Appellant has offered no evidence to suggest that a targeted search for the will occurred, even though he was aware of its existence. The fact the will was discovered in the Appellant and Decedent's mother's safe, is, in fact, evidence of a lack of due diligence. Appellant argues that because the will was not found in his own residence, but his mother's residence under which he had no control, that he had no duty to attempt to search for the will there. However, His mother's own affidavit established that Appellant had access to his mother's safe and knew the combination to that safe. Further, a safe would be among the most likely places to store an important legal document. Because of the lack of due diligence in searching for the safe, the Probate Court correctly denied relief under Rule 60(b)(2).

II. There is no basis for a 60(b)(1) Motion.

Under Rule 60(b)(1) of the South Carolina Rules of Civil Procedure, a court may relieve a party from any final judgment, order, or proceeding if the party shows there has been "mistake,

inadvertence, surprise, or excusable neglect.” SCRCP 60(b)(1). This rule is intended to allow relief from errors by counsel. As Wright and Miller write regarding the analogous Federal Rule: “[C]ourts have held that a party should not be deprived of the opportunity to present the merits of the claim because of a technical error or slight mistake by the party’s attorney.” §2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.). There is no mistake by counsel here.

Further, it is inappropriate to allow the “excusable neglect” provision to apply when there are specific rules to the contrary – or else the “excusable neglect” exception would swallow the whole of the Rules. The “excusable neglect” in question in this matter is failure to discover the original will – and that is covered by Rule 60(b)(2), not Rule 60 (b)(1). “[I]t would be a perversion of [Rule 60(b)(1)] and its purpose to permit it to be used to circumvent another rule.” §2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.) (citing *Edwards v. Velvac, Inc.*, 19 F.R.D. 504 (E.D. Wis. 1956)). Rule 60(b)(1) has no application here.

III. There is no basis for a 60(b)(5) Motion.

Under Rule 60(b)(5) of the South Carolina Rules of Civil Procedure, a judgment may be set aside if it has been “satisfied, released, discharged, or a prior judgment upon which the judgment is based is reversed or vacated, or it is no longer equitable that the judgment should have prospective application.” This Rule has no application here, either. Rule 60(b)(5) only applies to judgments which have prospective application, such as a paternity order or an injunction. Executed orders, such as those which determine the ownership of property, are beyond the ambit of Rule 60(b)(5). See *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 49, 590 S.E.2d 502, 505 (Ct. App. 2003) (orders which “mandate a one-time change in the ownership of property are “wholly outside the scope of Rule 60(b)(5)”).

IV. Section 62-3-412(1) does not apply because the judgment below was one of intestacy. S.C. Code. Ann. § 62-3-412(1) is an exception to the finality of probate proceedings. It provides: “The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication” (emphasis added). It is clear from this language (“later-offered will” and “another will”) that this provision applies when the probate court distributed property to a will. Intestate distributions, such as the instant one, are governed by S.C. Code. Ann. § 62-3-412(2). S.C. Code. Ann. § 62-3-412(1) has no bearing on this matter.

V. Appellant cannot obtain relief as an “independent action”

Finally, Appellant asserts an “independent action” in equity. Such action are permitted in the case of a fraud on the court, or “rare, special, exceptional or unusual circumstances that may warrant equitable relief.” Mr. T v. Ms. T, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008). No such fraud or “rare or unusual” issue is present here – this matter is an issue of after-acquired evidence, which is properly handled pursuant to Rule 60 (b)(2).

Conclusion:

For the reasons set forth above, the judgment of the Probate Court is AFFIRMED.

JUDGMENT AFFIRMED. IT IS SO ORDERED.

THIS THE ____ DAY OF _____, 2019.

THE HONORABLE WILLIAM A. MCKINNON



York Common Pleas

Case Caption: David J Mattox VS Lisa Jo Bare Mattox

Case Number: 2018CP4603672

Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Electronically signed on 2019-09-03 10:07:24 page 7 of 7

ELECTRONICALLY FILED - 2019 Sep 03 10:51 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP4603672

David J Mattox
PLAINTIFF(S)

Lisa Jo Bare Mattox
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- 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 (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Following a hearing yesterday, Plaintiff-Appellant's Motion to Reconsider is GRANTED IN PART and DENIED IN PART. The motion is granted with respect to the correction of two factual issues in the Court's prior Order.

First, the Court clarifies that it understood that the evidence reflected the safe belonged solely to decedent's mother. Second, the Court corrects the sentence in the prior order which erroneously stated Plaintiff-Appellant "knew" the combination to the safe, when the evidence reflected that he only had access to the combination.

The motion is DENIED in all other respects, for the reasons stated in the prior order, and the decision of the Probate Court remains AFFIRMED.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/02/2019 .

Case Party Info Protected

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2019 Oct 02 1:56 PM - YORK - COMMON PLEAS - CASE#2018CP4603672

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCF.

ELECTRONICALLY FILED - 2019 Oct 02 1:56 PM - YORK - COMMON PLEAS - CASE#2018CP4603672



York Common Pleas

Case Caption: David J Mattox VS Lisa Jo Bare Mattox

Case Number: 2018CP4603672

Type: Order/Electronic Form 4

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Electronically signed on 2019-10-02 11:35:01 page 3 of 3

ELECTRONICALLY FILED - 2019 Oct 02 1:56 PM - YORK - COMMON PLEAS - CASE#2018CP4603672

20

COUNTY OF: YORK

INVENTORY AND APPRAISEMENT: PROBATE PROPERTY

FILED RECEIVED

ORIGINAL

SUPPLEMENTARY, AMENDED OR CORRECTED #

(must restate the unchanged information from the original inventory)

IN THE MATTER OF: JONATHAN RAY MATTOX

2017 FEB 22 AM 11:57

CASE NUMBER: 2016ES4601230

(Decedent)

CAROLYN W. ROGERS
JUDGE OF PROBATE

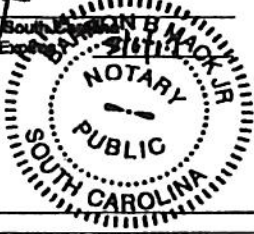
File the original inventory and appraisal with the Probate Court within ninety (90) days following the fiduciary appointment. A copy shall be sent to each interested person who has demanded it. A Proof of Delivery must be filed with the Court. The gross fair market value of all probate assets, regardless of location (whether in this state or elsewhere), should be listed as of the date of death. Continue on additional sheets if necessary. A Supplementary, Amended, or Corrected Inventory should be utilized for correcting, adjusting or adding to an original inventory, and must restate the unchanged information from the original inventory. A qualified and disinterested appraiser may be employed to ascertain the value of any asset. If an appraiser is employed, his/her name and address must be indicated with the item or items he/she appraised.

RECAPITULATION

| | |
|--|------------------------|
| Schedule A - Real Estate | \$2,274,900.00 |
| Schedule B - Stocks and Bonds | |
| Schedule C - Notes Due Decedent and Cash | 2283.65 |
| Schedule D - Insurance of Decedent's Life Payable to the Estate | |
| Schedule E - Jointly Owned Property | |
| Schedule F - Other Miscellaneous Assets | 72125.00 |
| Schedule G - Transfers during Decedent's Life Payable to the Estate | |
| Schedule H - Powers of Appointment Payable to the Estate | |
| Schedule I - Annuities and Retirement Accounts Payable to the Estate | |
| TOTAL GROSS VALUE OF DECEDENT'S ESTATE | \$ 2,349,308.65 |

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisal of all probate real and personal property of this estate so far as the undersigned is informed; that he/she has estimated and/or appraised all listed property at its fair market value, according to the best of his/her knowledge and ability.

SWORN to me this 14th day of February, 2017

Notary Public for South Carolina
My Commission Expires 2/11/2018


Attorney:
Address:
E-Mail:
Telephone:

Personal Representative
Signature: *Lisa J. Mattox*
Print Name: LISA J. MATTOX
Address: 321 RIVER POINT RD.
LAKE WYLIE, SC 29710
E-Mail:
Telephone (Work):
(Home): 704-788-7937
(Cell):
(Email):

Co-Personal Representative
Signature:
Name:
Address:
E-Mail:
Telephone (Work):
(Home):
(Cell):
(Email):

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

(if none, so state)

A. REAL ESTATE in Decedent's name alone or tenants in common (not as joint with right of survivorship). Describe each property by listing its full address, tax map number, deed book and page and description consistently (house, lot, buildings, acreage). Also list oil / mineral rights and time shares, if it is real property. If the property is encumbered, list the full fair market value of the property here and the encumbrance on Encumbrance section below

% Owned by Decedent

Fair Value of Decedent's Interest

| | | | |
|----|--|------|----------------|
| 1. | 26.055 ACRES, CHARLOTTE HWY, LAKE WYLIE, SC MAP#575-00-00-016 | 100% | \$2,274,900.00 |
| 2. | | | |
| 3. | | | |

B. STOCKS, BONDS in Decedent's name alone or tenants in common (not as joint with right of survivorship). List each type of security and number of shares.

| | | | |
|----|--|--|--|
| 1. | | | |
| 2. | | | |
| 3. | | | |

C. CASH, BANK ACCOUNTS, NOTES RECEIVABLES in Decedent's name alone or as tenants in common. List each separate account type and institution and the last two digits of each account. List all bank accounts owned by Decedent alone or as tenants in common (checking, savings, CDs, money market, brokerage, employment bonus, cash award, final paycheck etc.), cash on hand, notes payable to Decedent, and survival action proceeds.

| | | | |
|----|--|------|----------|
| 1. | FAMILY TRUST FEDERAL CREDIT UNION (CHECKING) | 100% | 1,259.67 |
| 2. | FAMILY TRUST FEDERAL CREDIT UNION (SAVINGS) | 100% | 1,023.98 |
| 3. | | | |

D. LIFE INSURANCE payable to the Decedent's estate.

| | | | |
|----|--|--|--|
| 1. | | | |
| 2. | | | |

E. JOINTLY OWNED PROPERTY - REPORTING IS NOT REQUIRED

N/A

F. ALL OTHER MISCELLANEOUS PERSONAL PROPERTY in Decedent's name alone or as tenants in common. List below any tangible personal property, including household goods & furnishings, vehicles, boats/motors/trailers, mobile homes that are not de-titled, airplanes, equipment, interest in a partnership or unincorporated business, articles or collections having either artistic or intrinsic value, including coins, guns, artwork, jewelry, etc., and any other miscellaneous probate items not listed elsewhere, including any digital assets

| | | | |
|----|----------------------|------|-----------|
| 1. | 2015 DODGE RAM TRUCK | 100% | 26,000.00 |
| 2. | 2016 HARLEY DAVIDSON | 100% | 27,325.00 |
| 3. | 2004 BOAT AND MOTOR | 100% | 18,800.00 |
| 4. | | | |

G. TRANSFERS DURING DECEDENT'S LIFE PAYABLE TO ESTATE ONLY Any transfers intended to take effect at death if payable to the Estate shall be reported. A trust created by Decedent in which income for life was retained by the Decedent, power to revoke or other incidents of ownership retained by the Decedent, lifetime transfers of real property in which Decedent retained life estate, etc.

| | | | |
|----|--|--|--|
| 1. | | | |
| 2. | | | |

H. POWERS OF APPOINTMENT PAYABLE TO THE ESTATE ONLY List property, both real and personal, over which Decedent possessed a Power of Appointment whether testamentary or otherwise, if such property is payable to the Estate.

| | | | |
|----|--|--|--|
| 1. | | | |
|----|--|--|--|

(If none, so state)

I. ANNUITIES AND IRA, ETC. PAYABLE TO THE ESTATE ONLY List any annuities or retirement accounts owned by the Decedent and payable to the Estate.

- 1. _____
- 2. _____

TOTAL PROBATE ESTATE VALUE

\$ _____

ENCUMBRANCES (e.g., mortgages, liens, judgments, etc., but not general debts of the estate). List debts of the Decedent secured by assets on the above schedule and describe the debt and the specific asset encumbered.

- 1. TRUCK
- 2. MOTORCYCLE
- 3. Boat 2004 Sea Ray

32,080.35
 30,657.52
 20,337.17

TOTAL ENCUMBRANCES

\$ 89,075.04

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

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STATE OF SOUTH CAROLINA)

2017 APR 28 PM 1:38 THE PROBATE COURT

COUNTY OF YORK)

CAROLYN W. ROGER Case No.: 2017-
JUDGE OF PROBATE 2016ES4601230
YORK COUNTY, SC)

DAVID J. MATTOX)

SUMMONS

Petitioner,)

vs.)

Lisa Jo Bare Mattox, David A. Mattox)
Respondents.)

YOU ARE HEREBY SUMMONED and required to answer the Summons and Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said Summons and Complaint on the subscribed at his office at 541 E. Main Street, Rock Hill, SC 29730, within thirty (30) days after the service hereof, exclusive of the day of such service; and, if you fail to answer the Summons and Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.



Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
PO Box 4211
Rock Hill, South Carolina 29732
Telephone: (803) 325-7788
Facsimile: (803) 325-7889

ATTORNEY FOR PETITIONER

April 28 2017

FILED RECEIVED

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 IN RE THE MATTER OF: CAROLYN W. ROGER Case No.: 2017-2016 ES#101230
 JUDGE OF PROBATE
 YORK COUNTY, SC
 Jonathon Ray Mattox)
 (Decedent))
)
 DAVID J. MATTOX) **COMPLAINT**
)
)
)
)
)
)
 vs.)
)
)
)
 Lisa Jo Bare Mattox,)
 Respondent.)

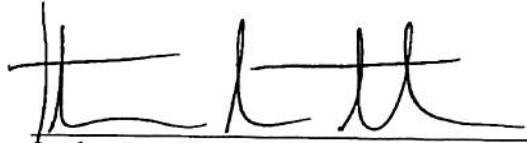
NOW COMES the Petitioner, above-named, does allege and show unto this Honorable Court as follows:

1. The Petitioner is a resident of Pawleys Island, Georgetown County, South Carolina and is the brother of the Decedent and is an interested party in this matter as he is named as a beneficiary in the Decedent's Last Will and Testament.
2. The Respondent, Lisa Jo Bare Mattox is a resident of Lake Wylie, York County, South Carolina and is the surviving spouse of the Decedent.
3. The Decedent, Jonathon Ray Mattox, was a resident of Lake Wylie, York County, South Carolina at the time of his death.
4. This Court has jurisdiction of this matter pursuant to S. C. Code §62-1-302 and York County is the proper venue of this matter.
5. The Decedent died on October 1, 2016 of natural causes in Georgetown County, South Carolina. (Copy of Death Certificate is attached hereto and incorporated herein by reference).

-
6. Respondent, Lisa Mattox is the surviving spouse of the Decedent. The parties were married on June 11, 2011.
 7. Based upon information and belief, this Court has not been notified by any party regarding the death of the Decedent.
 8. Based upon information and belief, the Respondent, Lisa Mattox has not brought any informal probate proceed, either intestacy or testacy.
 9. Based upon information and belief, no personal representative has been appointed on behalf of the Decedent.
 10. The Last Will and Testament was executed by the Decedent on February 17, 2005 in Gwinnett County, Georgia. A copy of this Last Will and Testament is attached hereto and incorporated herein by reference.
 11. The Decedent provided Petitioner with a copy of his Last Will and Testament.
Subsequent to the death of the Decedent, the Petitioner, upon going through his briefcase in January, 2017, located the copy of the Will that was provided to him by the Decedent.
 12. Since discovering the copy of Decedent's Will, the Petitioner has contacted the law firm that was responsible for drafting the Will and they were not cooperative in providing any information over the telephone.
 13. Pursuant to the terms of the Last Will and Testament, all real and personal property of the Decedent was bequeathed and devised to the Petitioner in fee simple and forever *per stirpes*. The Respondent, Mark Anthony Mattox was intentionally omitted from said Last Will and Testament due to personal reasons.
 14. Pursuant to the terms of the Last Will and Testament, in the event the Petitioner did not predecease the Decedent, and left no lineal descendants, then the rest and remainder of

the all property was bequeathed and devised to Decedents mother, Peggy Yvonne Mattox.

15. Pursuant to the terms of the Last Will and Testament, all the rest, residue and remainder of Decedent's estate would be given to the persons so entitled under the Laws of Georgia as if the Decedent had died intestate.
16. The Petitioner has been unable to locate the original Last Will and Testament of the Decedent despite due diligence in doing so.
17. The Petitioner seeks an Order of this Court declaring the Last Will and Testament of the Decedent, dated February 15, 2005 as a valid Last Will and Testament and that the Decedent died testate and to administer Decedent's estate pursuant to said Last Will and Testament.
18. In the event an informal proceeding has been commenced, the Petitioner seeks an Order suspending the informal proceeding pending the adjudication of this matter.
19. In the event a personal representative has been appointed, the Petitioner seeks an Order restraining such personal representative from exercising any powers granted to him/her to make any distributions from the estate.
20. Subsequent to the death of the Decedent, the Respondent has sold a piece of Decedents property and received all the proceeds from that sale. The Petitioner requests a full accounting of all funds disbursed from that property and seeks an Order restraining the Petitioner from disposing any funds that may still be in existence or in the alternative, upon disposition of the Decedent's estate, Respondent's share would be diminished by any funds she has received or any property she has disposed of.



Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
PO Box 4211
Rock Hill, South Carolina 29732
Telephone: (803) 325-7788
Facsimile: (803) 325-7889

ATTORNEY FOR PETITIONER

April 28, 2017

STATE OF SOUTH CAROLINA]
COUNTY OF YORK]

IN THE PROBATE COURT
PROBATE CASE FILE No. 2016-ES-46-01230

In the Matter of JONATHAN MATTOX,]
DAVID J. MATTOX,]
Petitioner,]
vs.]
LISA JO BARE MATTOX,]
Respondent.]

NOTICE, MOTION and PETITION:
FOR RELIEF FROM JUDGMENT
and FOR STAY OF ENFORCEMENT

Pursuant to:
S.C. Code § 62-3-412,
RULE 60(b)(1) and (2), S.C.R.C.P.,
and RULE 62(b) and (c), S.C.R.C.P.

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

FILED RECEIVED
2018 JUL 13 PM 4:56
CAROLYN W. ROBERTS
JUDGE OF PROBATE
YORK COUNTY, SC

You or your attorney should appear before this Court to present evidence of 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

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 certify 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 that the Will had been intentionally revoked. [Conclusion of Law E.]

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 referenced 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

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.

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Attorneys for Petitioner

By:  _____

July 13, 2018

Rock Hill, South Carolina

FILED RECEIVED

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE PROBATE COURT
CASE FILE NO. 2017-08-027-040

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:

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: 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

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

Attorney(s) for the Petitioner(s)

Attorney(s) for the Respondent(s)

Exhibit "A" 2

FILE RECEIVED

STATE OF SOUTH CAROLINA)

2017 SEP 26 PM 4: 07)

COUNTY OF YORK)

CAROLYN W. ROGERS)

JUDGE OF PROBATE)

IN RE: Estate of Jonathan York)

YORK COUNTY, SC)

David J. Mattox,)

PETITIONER)

Vs.)

Lisa Jo Bare Mattox,)

RESPONDENT)

IN THE PROBATE COURT

Case No: 2016-ES-46-01230

ORDER

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 dvr
Mattox Order Page 1 of 4
2016-ES-46-01230

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

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 *OWR*
Mattox Order Page 2 of 4
2016-ES-46-01230

Exhibit "A"*

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 *mw*

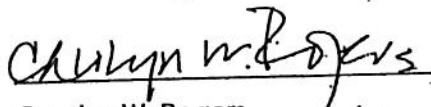
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Exhibit "A"

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
Mattox Order Page 4 of 4
2016-ES-46-01230

Exhibit "A"