THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Jennifer B. McCoy, Circuit Court Judge
Case No.: 2019-CP-10-01932

RECEIVED
Aug 12 2024
SC Court of Appeals

Appellate Case No. 2019-002124

IN RE: ESTATE OF STEPHEN DAY WARD, JR.

MARY K. WARD A/K/A MARY KIMBERLY WARD .....Respondent,

vs.

STEPHANIE WARD CIBINIC, DAVID D. WARD, AND BRIAN C. WARD, Personal Representatives ..... Appellants.

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 221(a) SCACR, Appellants Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward, as Co-Personal Representatives of the Estate of Stephen Day Ward, Jr. (collectively, "Appellants"), petition for rehearing of this Court's majority opinion, filed July 24, 2024. See In Re: Estate of Ward, Op. No. 6073 (Ct. App. filed July 24, 2024) (Howard Adv. Sh. No. 28 at 39-53) (the "Opinion").[1]

The majority opinion affirms orders of the probate court and circuit court finding that Respondent Mary K. Ward, also known as Mary Kimberly Ward ("Respondent" or "Mary"), is

[1] Reference to the "Opinion" includes both the majority opinion and the dissenting opinion. References to a specific portion of the Opinion will be to the pertinent page number in the referenced Advance Sheet.

entitled to an omitted spousal share from the Estate of Stephen Day Ward, Jr. ("Decedent" or "Stephen") under section 62-2-301 of the South Carolina Code (the "Omitted Spouse Statute").

The majority opinion mistakenly suggests that Mary may prevail by demonstrating that any of the four conditions in Green ex rel. Est. of Cottrell v. Cottrell ex rel. Est. of Cottrell, 346 S.C. 53, 550 S.E.2d 324, 329 (Ct. App. 2001), have been met. **Opinion, p. 49, note 7**. Green is clear that a surviving spouse must demonstrate that all four of the conditions have been met to receive an omitted spousal share.

The majority opinion further concludes that Stephen's failure to specifically identify and exclude Mary, in her capacity as a future spouse, in his Last Will and Testament (the "Will") permits Mary to claim the share of an omitted spouse. **Opinion, p. 49**. In doing so, the majority opinion incorrectly relies on case law involving a specific devise to an individual. **Opinion, p. 49**. In such circumstances, case law emphasizes that the specific devise must be made in "contemplation of marriage" to the individual. Here, Stephen made no specific devise to Mary in any capacity. Instead, the Will intentionally excludes *any* future spouse.

The majority opinion also mistakenly considered Stephen's inaction well after the Will had been executed as evidence supporting the probate court's finding that Stephen unintentionally omitted Mary from the Will. **Opinion, p. 49**. Specifically, this Court relied on Stephen's failure to comply with affirmative covenants in Section 4.2 of the Agreement for Mutual Wills and Trusts (the "Agreement") as evidence supporting the probate court's decision that Stephen did not intentionally omit Mary from the Will. **Opinion, p. 49.** Appellants assert that this purported evidence has nothing to do with Stephen's intent at the time he executed the Will.

The plain, unambiguous language in the Will—and all of the evidence admitted at trial—show that Stephen intended to omit *any* subsequent spouse, which would include Mary, from

taking under the Will. As the dissent emphasizes: "The only evidence in the present case shows that years before he met Mary, Stephen made it clear that he meant to leave a subsequent spouse *nothing*." **Opinion, p. 51** (emphasis in original).

Based on the foregoing, as further set forth herein, Appellants respectfully petition the Court to grant rehearing; enter an opinion reversing the circuit court's order affirming the probate court; and remand the matter with instructions to dismiss Respondent's claim under the Omitted Spouse Statute.

Factual and Procedural Background

Prior to his death, Stephen had been married four times. **(R. p. 488, lines 7-13)**. Appellants are Stephen's children from his first marriage. **(R. p. 488, lines 16-18)**. Stephen also had two children from his second marriage, who were omitted from the Will. **(R. p. 488, lines 19-21)**. In 1998, Stephen married Nancy Ward ("Nancy"). **(R. p. 488, lines 11-12)**. Stephen and Nancy had no children together, but Nancy had two children from a prior marriage—Elizabeth Diemer and Garrett Diemer. **(R. p. 488, line 22-p. 489, line 4)**.

On April 21, 2005, Stephen and Nancy executed their estate planning documents, including the Will **(R. pp. 680-86)** and the Agreement **(R. pp. 734-44)**. The Will expressly incorporates the Agreement by reference. **(R. p. 685, Item XIII)**.

Section 2.3 of the Agreement provides:

> Husband and Wife mutually desire for the Survivor to have full use of the Property during his or her life with the Property after the death of the Survivor to be distributed as provided for in the Trust Agreement of Stephen D. Ward (dated as of even date herewith) and the First Amendment and Restatement of Trust Agreement of Nancy L. Ward (dated as of even date herewith).

(R. p. 735). Section 2.6 of the Agreement states that the Agreement was made "to insure that the mutual plan of the Parties shall not be altered by acts subsequent to date hereof, except as agreed

upon between the parties." **(R. p. 735)**. Section 3.2 of the Agreement explains: "Upon the Predecessor's death, this Agreement and the Survivor's Will and Trust shall become irrevocable and the Survivor shall have no right or power to thereafter alter, amend or revoke this Agreement or his or her Will or Trust." **(R. p. 735)**.

The Agreement clearly contemplates the potential remarriage of the Survivor—defined as "that person, as between the Husband and the Wife, who is last to die"—after the Predecessor's[2] death. **(R. pp. 734-35)**. Section IV of the Agreement, entitled "SURVIVOR'S AFFIRMATIVE COVENANTS," includes mutual promises between Stephen and Nancy to help ensure their estate plans remain in place. **(R. pp. 735-36)**. Section 4.1 provides that the Survivor will "take such measures as may be necessary or required to maintain his or her Will and Trust in full force until his or her death and will maintain title to the Property in a form that shall cause the same, at the Survivor's death, to be disposed of according to the terms and provisions of his or her Will and Trust annexed hereto." **(R. p. 736)**.

Section 4.2 provides that if the Survivor "remarries after the death of the Predecessor, [the Survivor] will:

> 4.2.1 Thereafter ratify his or her Will and Trust in the form and with the provisions contained in his or her Will and Trust annexed hereto; and
>
> 4.2.2 As a condition of such re-marriage, require any person [the Survivor] remarries to legally and unconditionally waive his or her right to an Elective Share in the Property provided to them under S.C. Code Ann. Section 62-2-201 (1976, as amended from time to time."

(R. pp. 735-36).

[2] The Predecessor is "that person, as between the Husband and the Wife, who is first to die." **(R. p. 734)**.

Nancy died in 2011. **(R. p. 554, lines 18-19).** Under the Will, including the Agreement, Stephen received the benefit of the marital estate and Nancy's assets during his lifetime to the exclusion of her children. **(R. p. 446, lines 4-19)**. In 2013, Stephen wed Mary. **(R. p. 71; R. p. 405, lines 13-18)**.

On September 16, 2016, Stephen died. **(R. p. 71; R. p. 406, lines 5-9)**. On September 29, 2016, Appellants filed a Petition for Informal Probate of Will and Appointment. **(R. pp. 64-70)**. The following day, Appellants were appointed as Co-Personal Representatives of Stephen's estate. **(R. pp. 5)**. On January 18, 2017, Ann Noble-Kiley, as Conservator for Mary K. Ward, petitioned to take a share of Stephen's estate, purportedly as an omitted spouse. **(R. p. 71)**.

On August 9, 2018, the probate court entered an order granting Mary's petition after a final hearing. **(R. pp. 20-27; R. pp. 396-568)**. Appellants timely moved for reconsideration. **(R. pp. 162-168)**. On January 18, 2019, the probate court substantially altered and amended its original order, while ultimately upholding its decision to grant Mary's petition. **(R. pp. 28-39)**. Appellants timely moved to reconsider the probate court's new order. **(R. pp. 169-176)**. The probate court denied the motion by order entered April 2, 2019. **(R. pp. 40-41)**.

On April 15, 2019, Appellants filed and served their notice of appeal of the probate court's order to the circuit court. **(R. pp. 46-47)**. On December 20, 2019, the circuit court entered judgment affirming the probate court. **(R. pp. 42-44)**. Appellants received written notice of entry of the circuit court's order on December 20, 2019. **(R. p. 55).** On December 30, 2019, Appellants served their notice of appeal of the orders of the circuit court and probate court. **(R. pp. 55-62)**.

On July 24, 2024, the Court of Appeals filed an opinion affirming the orders of the circuit court and probate court. The majority opinion held, in pertinent part:

> There is no mention of Mary in the Will—Stephen and Mary did not even known each other when Stephen and Nancy executed their

> documents in 2005. Thus, the Agreement and Will could not have been prepared to intentionally omit Mary (as opposed to some unnamed potential future spouse), as our case law appears to require. *See, e.g., Miles v. Miles*, 312 S.C. 408, 411, 440 S.E.2d 882, 883-84 (1994) (holding "a spouse has not been 'provided for' within the meaning of section 62-2-301 unless the decedent considered the surviving spouse *in that capacity* at the time the will was executed").
>
> Had Stephen simply executed the documents required by section 4.2 of the Agreement, Appellants would be in a better position to challenge this outcome. As it stands, evidence supports the probate court's finding as to this factor, and we find no error of law.

Opinion, p. 49 (emphasis added). The majority opinion also held that Appellants "cannot establish Stephen 'provided for' Mary by transfer outside the will." **Opinion, p. 50**.

The dissenting opinion concurred in the finding that Stephen did not provide for Mary outside the Will, but recognized as follows:

> The [Omitted Spouse Statute's] assumption is that a person *who has shown no contrary intent* likely means to leave their new spouse *something*. Here, the only probative evidence in the record shows a contrary intent—to omit a subsequent spouse.

Opinion, p. 51 (emphasis in original).

Standard of Review

"A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. "An action concerning the application of the omitted spouse statute is an action at law." In re Timmerman, 331 S.C. 455, 458–59, 502 S.E.2d 920, 921 (Ct. App. 1998). "In an action at law, this court and the circuit court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." Id. at 459, 502 S.E.2d at 921.

Arguments

I. Appellants respectfully assert that the majority opinion overlooks that Mary must establish all four of the conditions listed in Green to prevail as an omitted spouse.

In a footnote, the majority opinion mistakenly suggests that Mary may recover as an omitted spouse if she demonstrates *any* of the four conditions articulated in Green ex rel. Est. of Cottrell v. Cottrell ex rel. Est. of Cottrell, 346 S.C. 53, 62, 550 S.E.2d 324, 329 (Ct. App. 2001) have been met. **Opinion, p. 49, note 7**. Green is clear that Mary must demonstrate all four conditions have been met to recover as an omitted spouse.

"Determining the proper interpretation of a statute is a question of law, and [an appellate court] reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

Section 62-2-301(a) of the South Carolina Code provides as follows:

> (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless:
> (1) it appears from the will that the omission was intentional; or
> (2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

In Green ex rel. Est. of Cottrell v. Cottrell ex rel. Est. of Cottrell, 346 S.C. 53, 62, 550 S.E.2d 324, 329 (Ct. App. 2001), the South Carolina Court of Appeals explained:

> A surviving spouse who wishes to qualify as an "omitted spouse" must demonstrate: (1) the decedent spouse executed the will in question prior to the marriage; (2) the will does not provide for her as the surviving spouse; (3) the omission was unintentional; and (4) the decedent did not provide for the spouse with transfers outside of the will.

(Emphasis added). This interpretation is consistent with the Omitted Spouse Statute, which not only requires a surviving spouse to demonstrate conditions (1) and (2) to qualify as an omitted spouse, but also compels the surviving spouse to demonstrate that *neither* of the "exclusionary" conditions in (3) or (4) apply. See Green, 346 S.C. at 62, note 5, 550 S.E.2d at 329, note 5 ("The first two criteria are described as 'qualifying' conditions and the latter two as 'exclusionary' conditions.").

The majority opinion conflates the "or" found in the Omitted Spouse Statute with the "and" found in Green. The "exclusionary" conditions in the statute are written negatively, but the conditions in Green are written positively. Compare S.C. Code Ann. § 62-3-301(a)(1) (providing the omitted spouse may receive the specified share "*unless* . . . it appears from the will that the omission was intentional") with Green, 346 S.C. at 62, 550 S.E.2d at 329 (establishing that the surviving spouse must demonstrate "the omission was unintentional"). Green is clear that the surviving spouse must "demonstrate" that all four conditions have been met to recover as an omitted spouse.

In this appeal, Appellants contend that Mary cannot recover as an omitted spouse under the statute because "it appears from the will that the omission was intentional." Put another way, Appellants contend that, under Green, Mary failed to demonstrate "the omission was

unintentional." Therefore, Appellants should prevail regardless of whether any other condition applies.

II. Appellants respectfully assert that the majority opinion misapprehends the applicable case law by applying Miles beyond its intended scope.

The majority opinion also expressly relies on Miles v. Miles, 312 S.C. 408, 440 S.E.2d 882 (1994), to support the proposition that "the Agreement and Will could not have been prepared to intentionally omit Mary (as opposed to some unnamed potential future spouse) . . . ." Miles does not address whether a subsequent spouse has been intentionally omitted from a will. Miles applies only when a testator makes a specific devise to an individual and the individual later becomes the testator's spouse. The majority opinion's expansive application of Miles negates the testator's expressed intention in favor of a "default" rule.

As the dissenting opinion explains:

> Honoring the testator's intent is consistent with the omitted spouse statute . . . . The omitted spouse statute is meant to ensure that a decedent—who did not update a pre-marriage will to include a new spouse—can have what society believes to be his or her likely intent honored . . . . Importantly, the statute is not meant to supplant the testator's intent; hence, the legislature included in the statute a provision excluding the new spouse from the estate when the omission is intentional.

"The issue of interpretation of a statute is a question of law for the court." Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). "We are free to decide a question of law with no particular deference to the circuit court." Id.

"Sections 62-1-101 et seq. shall be known and may be cited as the South Carolina Probate Code." S.C. Code Ann. § 62-1-101. "References in Sections 62-1-101 et seq. to the term "Code", unless the context clearly indicates otherwise, shall mean the South Carolina Probate Code." Id. "This Code shall be liberally construed and applied to promote its underlying purposes and

policies." S.C. Code Ann. § 62-1-102(a). "The underlying purposes and policies of this Code are . . . to discover and make effective the intent of a decedent in the distribution of his property . . . ." S.C. Code Ann. § 62-1-102(b)(2).

Section 62-2-301(a)(1) of the South Carolina Code provides as follows:

> (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless:
> (1) it appears from the will that the omission was intentional . . . .

In Green ex rel. Est. of Cottrell v. Cottrell ex rel. Est. of Cottrell, 346 S.C. 53, 62, 550 S.E.2d 324, 329 (Ct. App. 2001), the South Carolina Court of Appeals explained the conditions under which a surviving spouse will be entitled to recover an omitted spouse:

> A surviving spouse who wishes to qualify as an "omitted spouse" must demonstrate: (1) the decedent spouse executed the will in question prior to the marriage; (2) the will does not provide for her as the surviving spouse; (3) the omission was unintentional; and (4) the decedent did not provide for the spouse with transfers outside of the will.

Miles solely addresses the second "qualifying" condition to take under section 62-2-301(a)—whether Stephen failed to "provide by" will for Mary. Put another way, Miles applies in determining whether Mary demonstrated that the Will "does not provide for her as the surviving spouse." Miles does not apply when, as in the present case, the surviving spouse must demonstrate that her "omission was unintentional."

In Miles, the decedent executed a will in 1989, leaving to his "friend," Georgia Mae Hall, certain property. Id. at 409, 440 S.E.2d at 883. Decedent married Hall in 1991. Id. Decedent died several months later, leaving his 1989 will in effect. Id. Hall claimed to be entitled to Decedent's estate as an "omitted" spouse. Id.

As the Supreme Court of South Carolina explained: "Here, the Will makes provision for [Hall] by leaving to her Decedent's car and a life estate in his home." Id. at 410, 440 S.E.2d at 883. "The issue then becomes whether this provision suffices to negate application of the 'omitted spouse' statute." Id. "We accord with those jurisdictions which hold that, absent specific language in the Will, or 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.'" Id. at 410-11, 440 S.E.2d at 883 (emphasis added). The Court did not address whether Hall was intentionally omitted by the 1989 will.

In the present case, Stephen did not make a specific devise to Mary in any capacity. As the majority opinion emphasizes, "Stephen and Mary did not even know each other when Stephen and Nancy executed their documents in 2005." **Opinion, p. 49.**

Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013), relied upon by the dissenting opinion, emphasizes that a testator's intent expressed in his or her estate planning documents controls the analysis of whether a surviving spouse has been "intentionally omitted" under a will. Wilson addressed the administration of the Estate of James Brown. Id. at 416, 743 S.E.2d at 749.

On August 1, 2000, Brown executed his estate planning documents. Id. His personal and household effects were devised to his six named adult children. Id. "Brown left the remainder of his estate to The James Brown 2000 Irrevocable Trust via a pour-over provision in his will." Id. "Brown's estate planning documents indicate Brown intended the bulk of his wealth to be used to support the Charitable Trust [the James Brown 'I Feel Good' Trust]." Id. at 417, 743 S.E.2d at 750. "In the trust agreement, Brown declared that he was not then married and that he did not want the trust estate to ever go to a spouse: 'It is the Grantor's intention that the trust estate be available

only to the beneficiaries and not . . . the Grantor's past or future spouse." Id. at 418, 743 S.E.2d at 750.

In December 2001, Brown married Tommie Rae Hynie. Id. After Brown's death, Tommie Rae claimed she was entitled to an elective share or an omitted spouse's share of Brown's estate. Id. at 418, 743 S.E.2d at 751. In 2008, Tommie Rae and other parties, including Brown's children and grandchildren, entered into a compromise agreement. Id. at 420, 743 S.E.2d at 751. As part of the compromise agreement, Tommie Rae received a net 23.75% distributional interest in a new trust, described by the Supreme Court as the "Settlement Entity." Id. at 421-22, 743 S.E.2d at 752. The appellants in Wilson, who included two individuals appointed by the circuit court as the personal representatives for Brown's estate and as trustees of the 2000 Irrevocable Trust (the "Trustees"), did not consent to the proposed compromise agreement and challenged the circuit court's approval of such agreement. Id.

On appeal, the Court analyzed whether the compromise agreement arose from a good faith contest or controversy: "The first part of the two-part statutory mandate of section 62–3–1101(3) [for the approval of compromise agreements] requires that the court 'finds that the contest or controversy is in good faith[.]'" Id. at 432, 743 S.E.2d at 758. Among other things, the Court concluded that Tommie Rae's claim under the omitted spouse statute had not been made in good faith, explaining, in pertinent part:

> Beyond this,[3] Brown's testamentary documents state that he was specifically omitting any other beneficiaries or potential beneficiaries, including a future spouse or heirs, based on his desire to leave most of his estate to charity after providing for the education of his grandchildren. *See* S.C. Code Ann. § 62–2–301(a) (2009) (providing an omitted spouse is not entitled to a statutory share

[3] The Court also questioned the validity of Brown's marriage to Tommie Rae because of Tommie Rae's apparent failure to obtain a divorce or annulment from a prior husband before purporting to wed Brown in 2001. Id. at 440, 743 S.E.2d at 762.

> where '(1) it appears from the will that the omission was intentional; or (2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence').

Id. at 441, 743 S.E.2d at 762.

It is clear from a careful reading of Wilson that the Court interpreted section 62-2-301(a) to exclude Tommie Rae from taking as an omitted spouse because the estate planning documents expressed Brown's intent to exclude *any* future spouse. Id. There is no indication in the Wilson decision that the Court even looked at whether Tommie Rae had been specifically mentioned in the estate planning documents, much less whether Tommie Rae received a devise in contemplation of marriage. See generally id.

In the present case, as in Wilson, Stephen's testamentary documents articulated his desire, upon the death of Nancy, to enjoy Nancy's and Stephen's assets during his lifetime, with such assets to be distributed evenly to Nancy's and Stephen's children upon his death. The dissenting opinion applied Stephen's testamentary intent, but the majority opinion overlooked it. Consequently, Appellants respectfully request that this Court grant their petition for rehearing, reverse the decision of the circuit court affirming the probate court, and remand this matter to have Respondent's omitted spouse claim dismissed.

III. Appellants respectfully contend that the majority opinion overlooks Stephen's intention to exclude any future spouse from taking under the Will by focusing on Stephen's subsequent inaction well after the Will had been executed

The majority opinion solely relied on Stephen's failure to comply with Section 4.2 of the Agreement in concluding that evidence supported the probate court's determination that the Will intentionally omitted Mary. With respect to this issue, the dissenting opinion hits the nail on the head: "The significance of the Agreement between Stephen and his third wife, Nancy—and what

it says about Stephen's testamentary intent—is that anyone in the role of subsequent spouse was to be excluded from the estate." **Opinion, p. 51**.

The question of the interpretation and construction of a will is one of law. See Lemmon v. Wilson, 204 S.C. 50, __, 28 S.E.2d 792, 800 (1944) (explaining that, as with a deed, it is the province of the court to construe a will). "It is the cardinal rule of will construction that the testator's intent should be ascertained and followed unless it violates some well-established rule of law." McGirt v. Nelson, 360 S.C. 307, 311, 599 S.E.2d 620, 622 (Ct. App. 2004). "In ascertaining this intent, a court's first reference is always to the will's language itself." In re Est. of Hyman, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004). "Circumstances known to the testator at the execution of his Will are an admissible aid in construing doubtful provisions, but the main recourse must be to the language used." Limehouse v. Limehouse, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971). "We may not redraft the Will, nor may we doctor a crucial part." Id.

In this case, the majority opinion did not need to go beyond the four corners of the Will and Agreement to discern Stephen's intent. See Section 2.3 (emphasizing the mutual plan to provide for the Survivor, while preserving the mutual estate plan) **(R. p. 735)**; Section 2.6 (same) **(R. p. 735)**; Section 3.2 (providing Will irrevocable upon Predecessor's death) **(R. p. 735)**.

Section IV of the Agreement contains mutual promises by Stephen and Nancy to help ensure their plans remain in place—even if the survivor remarries. **(R. pp. 735-36)**. Rather than honoring this clearly-expressed intention, the majority opinion turns this intent on its head by interpreting Stephen's purported inaction after Nancy's death as a repudiation of a mutual agreement intended to protect Nancy and her heirs. See Pruitt v. Moss, 271 S.C. 305, 312, 247 S.E.2d 324, 327 (1978) ("We have no difficulty in concluding that the language employed in, and the terms of, the Tolbert will evidence the fact that the will was the product of a testamentary

compact, which became contractually binding on the husband at the time he received benefits under the wife's will.").

Brett Bluestein, the attorney who prepared the Will and Agreement, unequivocally testified that Stephen intended to omit any subsequent spouse from taking under the Will. **(R. p. 437, lines 2-18)**. This evidence of intent, which goes beyond the four corners of Will and Agreement, is unnecessary, but instructive nonetheless. As the dissenting opinion concludes:

> Stephen's intent to omit a subsequent spouse is clear from his Will that incorporates the Agreement and was designed as a mutual will with Nancy's. Mary as a subsequent spouse was intentionally omitted from the Will and could not receive any assets from Stephen's estate.

Opinion, p. 53.

Conclusion

For the foregoing reasons, Appellants ask this Court to grant their petition, reverse the circuit court's order affirming the probate court, and remand this matter to have Respondent's petition for benefits under the Omitted Spouse Statute dismissed.

Respectfully Submitted,

BURR & FORMAN LLP

s/Daniel S. McQueeney, Jr.
Daniel S. ("Chip") McQueeney, Jr.
(SC Bar No. 6802)
E-mail: cmcqueeney@burr.com
George Morrison (SC Bar No. 71622)
E-mail: gmorrison@burr.com
100 Calhoun Street, Suite 400
Post Office Box 1431
Charleston, South Carolina 29402
Telephone: 843.723.7831
Fax: 843.722.3227
Attorneys for Appellants