THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013–CP–10–2243
Appellate Case No. 2014-001085

Popie Lown Roberts, ... Respondent,

v.

The Health Sciences Foundation of the Medical University of South Carolina and The Franke Home, Inc., d/b/a The Franke Home at Seaside, ... Appellants.

FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

This action to construe the will of Mrs. Caroline Bischoff Lown was commenced with the filing of a summons and complaint dated April 25, 2011 in the Charleston County Probate Court by Mrs. Lown's personal representative, Popie Lown Roberts, the respondent herein. Named as defendants were the appellants herein, The Health Sciences Foundation of the Medical University of South Carolina and The Franke Home, Inc., as well as the heirs at law of the deceased. All but two of the heirs defaulted. The two who answered withdrew their answers before trial. The names of the heirs were then removed from the caption.

The case was tried before the Honorable Tamara C. Curry, Charleston County Probate Judge, on January 31, 2012. Judge Curry entered an order construing the will on June 26, 2012. The appellants' motion to reconsider, alter or amend was heard on October 31, 2012. The motion was granted in part and denied in part by order entered on April 4, 2013.

The appellants appealed to the Court of Common Pleas of Charleston County on April 17, 2013, and filed their grounds of appeal on May 15, 2013. The appeal was heard by the Honorable J.C. Nicholson, Jr., Presiding Judge of the Ninth Judicial Circuit, on December 17, 2013. By order dated April 10, 2014, Judge Nicholson affirmed the orders of the Probate Court, and this appeal followed.

STATEMENT OF FACTS

The testatrix, Caroline Bishoff Lown, died on February 5, 2011. Her closest kin was her niece-by-marriage, Popie Lown Roberts. Mrs. Lown left a will bequeathing to Mrs. Roberts in Article II all her tangible personal property and in Article III one million dollars. In Article IV she bequeathed the residue to Mrs. Roberts and the two appellants. As personal representative, Mrs. Roberts brought this action to construe the will, and in particular the construction of the residuary clause, Article IV.

In the probate court and in circuit court, the appellants urged that Articles II and III function merely to identify Mrs. Roberts as the recipient of specific portions of the residue, namely, Mrs. Lown's tangible personal property and $1,000,000. In other words, the appellants contended that the property apparently devised to Mrs. Roberts in Articles II and III is pulled back into Article IV and then is allocated to Mrs. Roberts as a *portion* of her third of the gross estate. [*See* the appellants' memorandum to the probate court, pp. 7-9, R. 101-03; their accompanying flow chart, R. 238; and their proposed order, ¶¶ 25 & 30, R. 114.] This construction would convert the residuary clause into a provision controlling the disposition of the entire gross estate. The appellants did not contend that the will included any failed devise.[1]

The probate court admitted the testimony of the draftsman of the will, Mr. Joseph Cabaniss, concerning the intention expressed to him by Mrs. Lown. Although the probate court construed the will in accordance with the draftsman's evidence of the testatrix's expressed intention, the probate court stated that it would construe the will in the same manner without that evidence. [Order of June 26, 2012, ¶ (III), p. 12, R. 12; and p. 13, R. 13, final sentence.]

In their appeal to circuit court, the appellants reaffirmed their contention that the effect of the will was to bequeath the gross estate in equal thirds to the three beneficiaries, with the value of the tangible personal property and the one million dollars identified in Article III going toward Mrs. Roberts' equal third. [*See* transcript of appeal hearing of December 17, 2013, pp. 20-21, R. 225-26, and generally.]

The circuit court affirmed the orders of the probate court. Among other things, the

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[1] *See* appellants' proposed order in probate court. [R. 110-17.] The appellants made ambiguous references to Section 62-2-604(b), regarding "failed devises," without affirmatively contending that it applies to anything in this will. *See, e.g.,* appellants' amended answer & counterclaim, ¶¶ 26-30. [R. 83.] The phrase "failed devise" was not mentioned in the appellants' argument of their appeal in circuit court. *See* transcript of hearing of December 17, 2013. [R. 209-37.]

circuit court affirmed the probate court's holding that this will includes no failed devise as that term is used in S.C. Code Ann. § 62-2-604(b). The appellants made no motion under Rule 59, SCRCP, to reconsider, alter or amend.

On appeal, the appellants no longer advocate the construction of the will which they advanced in the courts below. Instead, they contend that the residuary clause includes a failed devise of one million dollars to Mrs. Roberts, which goes equally to the two appellants.[2]

ARGUMENT

I.

The appellants have abandoned the construction of the will which they advocated in the lower courts. They advocated a construction giving each of them and Mrs. Roberts an equal third of the gross estate. Now they contend that each of the appellants should receive a half-million dollars more than Mrs. Roberts. The appellants cannot adopt a new theory on appeal. Their new theory is incorrect as a matter of law, in any event.

A. Mrs. Lown's will cannot possibly be construed in the manner urged by the appellants in the courts below. They cannot abandon that position and take a new one on appeal.

Summary of Argument

The question on appeal to the circuit court was not whether there may be a construction of this will which is better than the one made by the probate court. The limited question was whether the construction advocated by the appellants in the probate court was correct as a matter of law.[3] The construction advocated by the appellants in the

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[2] *See, e.g.,* the final paragraph of appellants' brief:

> This case should be remanded to the Probate Court to apply S.C. Code Ann. § 62-2-604(b) so that the Charities receive an equal share of the one million dollars that is withheld from Mrs. Roberts' one-third share.

[3] An action to construe a will is an action at law. *Kemp v. Rawlings,* 358 S.C. 28, 594 S.E.2d 845, 848 (2004). "If a proceeding in the Probate Court is in the nature of an action at law, review by the Circuit Court . . . extends merely to the correction of errors (continued...)

courts below converts the residue into the gross estate and rewrites the will. It depends entirely upon inserting a wrong conjunction into the opening words of Article IV. Whatever else may be said of it, the appellants' construction surely was not right as a matter of law. The appellants cannot now leave that flawed construction behind and urge a new construction — equally flawed — on appeal.

* * * * * *

The appellants have abandoned the position which they consistently took in both courts below and have switched to a novel theory. For the first time, the appellants now contend that one million dollars was excepted from Mrs. Roberts' share of the residue. They now say that this one million dollars is a failed devise, and that the one million dollars goes to the two appellants. Instead of urging a construction of the will by which each of the three beneficiaries would receive an equal share of the gross estate, as they did in the probate court and in the circuit court, they now claim that the two appellants should receive one million dollars more than Mrs. Roberts.

The appellants did not contend in the probate court or in the circuit court that one million dollars of the residuary estate is a failed devise within the meaning of Section 62-2-604(b), as apparently they do now. In the proposed order which the appellants submitted to the probate court, there was no contention that this will contains a failed devise. [Appellants' proposed order, R. 110-17.] On the contrary, the appellants sought a ruling that the gross estate is devised by the will in equal thirds. The probate court specifically found that there is no failed devise. In their motion to reconsider in probate court, the appellants did not contend that any part of the devise to Mrs. Roberts is a failed devise within the meaning of Section 62-2-604(b). Rather, they asked for a sort of theoretical declaration of the meaning of this code section with no claim that it actually applies here,

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[3](...continued)
of law." *Bob Jones Univ. v. Strandell,* 344 S.C. 224, 229, 543 S.E.2d 251, 253 (Ct. App. 2001).

nor could they have done so without abandoning the construction which they advocated. The probate court denied that motion in material part. In their grounds of appeal to circuit court [R. 118-24], the appellants said nothing about the code section and made no claim that the devise to Mrs. Roberts or any part of it is a failed devise within the meaning of Section 62-2-604(b) or that the probate court erred in this regard in any respect. The circuit court repeated the probate court's finding that there was no failed devise and that Section 62-2-604(b) has no application to this case. The appellants did not move the circuit court to reconsider that ruling.

The appellants contended in probate court that the residue consists of the entire gross estate — including the personal property and the one million dollars bequeathed in Articles II and III. Their contention was that the entire gross estate was bequeathed by Article IV to Mrs. Roberts and the two appellants in equal thirds. [Appellants' amended answer & counterclaim, ¶¶ 17-25, R. 81-83.] Their contention was that the value of the personal property bequeathed to Mrs. Roberts in Article II and the one million dollars bequeathed to her in Article III should be counted toward her one-third share of the gross estate. The appellants could only reach this construction of the will by reading the conjunction **"and"** into the first sentence of Article IV. This would cause Article IV to read:

> "I direct that the rest and residue of my estate, **[and]** the payment of the specific bequests . . . be divided . . ."

and distributed in three equal shares, with the value of the personal property and the million dollars being counted toward Mrs. Roberts' one-third share of the gross estate. [*See* tr. of hearing of December 17, 2013, p. 30, R. 235, lines 10-22.] In other words, the bequests of Article II and Article III are put back into the residue, so that the residue consists of the entire gross estate. [Appellants' amended answer & counterclaim, ¶¶ 17-25, R. 81-83.]

It is true that the scrivener omitted a needed conjunction after the comma which punctuates the end of the first clause of Article IV, but the missing conjunction can only be

"after", not **"and"**, as the courts below found. In this way, Article IV means:

> "I direct that the rest and residue of my estate, **[after]** the payment of the specific bequests, . . . be divided . . ."

As the circuit court observed:

> The South Carolina Probate Code does not define "residue" or "residuary devise." Generally speaking, a residuary clause of a will is that clause which disposes of property, usually not specifically described, which has not been disposed of by the other provisions of the will. 96 C.J.S. *Wills* § 796, p. 215. A residuary clause commonly refers to the "rest, residue or remainder," or uses language of similar import. *Id.* at p. 217. A residuary clause is "[a] testamentary clause that disposes of any estate property remaining **after** the satisfaction of specific bequests and devises." BLACK'S LAW DICTIONARY 1311 (7th ed. 1999). "Residue" means "[s]omething that is left over **after** a part is removed or disposed of; a remainder." *Id.* Article IV of Mrs. Lown's will is plainly a residuary clause. It was not intended effectively to nullify the specific bequests of the preceding two articles, as the construction proposed by the appellants would do. The residue consists of what is left **after** the specific bequests are made and **after** the expenses of the estate are paid.

Order, pp. 4-5, R. 27-28 (emphasis added).

Taking back the bequests clearly made in Articles II and III and placing that property in the residue would run afoul of a settled rule in the construction of wills.

> "When a gift is made in one clause of a will in clear and unequivocal terms, the quantity or quality of the estate given should not be cut down or qualified by words of doubtful import found in a subsequent clause. To have that effect, the subsequent words should be at least as clear in expressing that intention as the words in which the interest is given."

Schroder v. Antipas, 215 S.C. 552, 56 S.E.2d 354, 355 (1949), *quoting Walker v. Alverson,* 87 S.C. 55, 68 S.E. 966, 968 (1910). In accord are the many cases cited in *Schroder* and, more recently, *Limehouse v. Limehouse,* 256 S.C. 255, 259, 182 S.E.2d 58, 60 (1971), where Justice Brailsford observed for the Court:

> "[W]here an estate is once given by words of clear and ascertained legal significance, it will neither be enlarged nor cut down by superadded words in the same or subsequent clauses of the will, unless they raise an irresistible inference that such was the intention of the testator * * *." *Lawrence v. Burnett,* 109 S.C. 416, 422, 96 S.E. 144, 146 (1918).

The construction of Article IV urged by the appellants in the courts below would effectively

nullify the earlier bequests of Articles II and III, requiring Mrs. Roberts to earn those bequests over again by debiting her one-third of the residue by the value of the earlier specific bequests.

The appellants cannot now abandon the position consistently taken in their pleading and at every stage in the courts below.

> We consider the pleadings in this case in the light of the general rule, that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action.

Elrod v. All, 243 S.C. 425, 435, 134 S.E.2d 410, 416 (1964).

B. Even if one million dollars were to be withheld from Mrs. Roberts' share of the residue, that money would not go to the appellants. It would go to Mrs. Lown's heirs, none of whom appeared in this action to advocate such a construction of the will.

The probate court ruled that Mrs. Lown's will contains no failed devise. The appellants did not challenge that finding in their grounds of appeal to the circuit court. On appeal, the circuit court reiterated the finding of no failed devise and explained the basis for it, in detail. The appellants did not move the circuit court under Rule 59, SCRCP, to reconsider this or any other portion of the order affirming the probate court. It is the law of the case that Mrs. Lown's will contains no failed devise. Hence, Section 62-2-604(b) of the Probate Code, dealing with failed devises, has no application to this case. It was the consistent position of the appellants that the gross estate is validly devised in equal thirds to Mrs. Roberts and the two appellants.

Because the appellants cannot switch theories at this final stage of the case, this Court of Appeals has no issue to decide concerning "failed devises." But even if such an issue were before the Court, it is plain that there is no failed devise. As the circuit court pointed out, a failed devise is most commonly one to a beneficiary who predeceases the

testator, or a devise which is void for illegality. There is no such thing as a "partial failed devise". The devise to Mrs. Roberts is valid. The only question pertains to the amount.

If Mrs. Lown's will were to be construed so as to withhold one million dollars from Mrs. Roberts' one-third share of the residue, the withheld million would not constitute a "failed devise" under any possible concept of that term. It would constitute property withheld from the residuary gift. It would pass by intestacy since Section 62-2-604(b) deals only with failed devises. The common law of this State remains intact where the will does not dispose of all the testator's property. *See Padgett v. Black,* 229 S.C. 142, 92 S.E.2d 153 (1956) (generally a lapsed legacy falls into residuum, but where a lapsed legacy is part of residuum itself, it is distributed as intestate property) (unless the later-enacted "failed devise" provision of § 62-2-604(b) applies). The common law rule is altered by Section 62-2-604 only with respect to "failed devises." If the testatrix intended to subtract a million dollars from her residuary gift to Mrs. Roberts, the million dollars would not be a "failed devise" but simply a portion of the estate not disposed of by will, passing by intestacy.[4]

* * * * * *

The question before the circuit court on appeal was not whether there may be a construction of this will which is better than the one made by the probate court. The question was whether the construction advocated by the appellants in the probate court was correct as a matter of law. The construction proposed by the appellants in both courts below converts the residue into the gross estate and rewrites the will. It depends entirely upon inserting a wrong conjunction into the opening words of Article IV. Whatever else

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[4] Although Mrs. Roberts' obituary stated that she died without heirs, she had a number of distant relations. [*See* pp. 71-78, R. 175-82, transcript of probate court hearing of 1/31/12.] All were made parties to this action and all defaulted or withdrew their answers. No party contended in the courts below that the "less, however" language of Article IV meant that a million dollars should be withheld from Mrs. Roberts' share of the residue and should pass by intestate succession. Construing the will as a whole, the probate court construed the residuary bequest to Mrs. Roberts to constitute one-third of the residuum, **not including** the specific bequest of Article II.

may be said of it, the appellants' proposed construction surely was not right as a matter of law, nor is the new one advanced in this Court of Appeals.

Even if the appellants were permitted against the rules to jettison their position in the courts below and to adopt the new one, it would do them no good. If the will were construed to withhold one million dollars from Mrs. Roberts' share of the residue, that sum would not pass to the appellants as a failed devise. It would go to the heirs by intestate succession. None of Mrs. Roberts' distant relations appeared in this action to make such a claim.

II.

The admission of the draftsman's evidence was harmless error.

Mr. Cabaniss, the draftsman of the will, testified that Mrs. Lown's intention was to devise to Mrs. Roberts her personal property, and one million dollars, and one-third of the residue. The probate court accepted that evidence but stated that it reached the same construction of the will without regard to this testimony. [Order of June 26, 2012, ¶ (III), p. 12, R. 12; and p. 13, R. 13, final sentence.] On appeal, the circuit court held that the admission of this evidence was harmless error since both the probate court and the circuit court construed the will in that way, without regard to this evidence.

Where the trial judge admits incompetent evidence in a bench trial, the error is harmless unless the judge "either affirmatively relied on the incompetent evidence, or could not have reached the same result without relying on the incompetent evidence." *Brown v. Allstate Ins. Co.,* 344 S.C. 21, 542 S.E.2d 723 (2001). Unlike the case at bar, in the *Brown* case the trial judge did not state that the outcome would have been the same without the evidence later found inadmissible. The Supreme Court nonetheless found the error harmless. In the case at bar, the circuit court on appeal did not consider the incompetent evidence but reached the same construction of the will as did the probate court.

The appellants contend, in effect, that the admission of incompetent evidence in a

bench trial is reversible error *per se*. This is not the case, however. The admission of Mr. Cabaniss's testimony was harmless error.

CONCLUSION

Neither the construction of Mrs. Lown's will urged by the appellants in the courts below, nor the construction urged in this Court of Appeals, is correct as a matter of law. Hence, their appeal must fail.

The respondent therefore asks the Court to affirm the judgment.

Respectfully submitted,

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November 21, 2014.

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CERTIFICATE OF SERVICE

I certify that I served a copy of respondent's final tial brief by first class mail, postage prepaid, addressed to appellants' attorneys at their address of record, namely:

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CERTIFICATE OF COUNSEL

I certify that respondent's final brief complies with Rule 211(b), SCACR.

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