

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

APPELLATE CASE NO. 2016-000332

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JUN 23 2016

SC Court of Appeals

GWENDOLYN LEVERITT Respondent,

VS

LORINE C. PRESSLEY AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF ERVIN CHRISTOPHER PRESSLEY Appellant.

INITIAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

- I. Did the Circuit Court, in its Orders filed December 9, 2015 and January 11, 2016, properly construe the Last Will and Testament of Ervin Christopher Pressley?
- II. Did the Circuit Court properly apply *S.C. Code Ann.* §62-2-802 and *S.C. Code Ann* §62-2-507 in construing and interpreting the Last Will and Testament of Ervin Christopher Pressley?
- III. Did the Circuit Court err in failing to find that the evidence, facts and plain language of the Last Will and Testament of Ervin Christopher Pressley resulted in intestacy?
- IV. Did the Circuit Court err in failing to conclude that the clear intention of Ervin Christopher Pressley as expressed in Item III of the Last Will and Testament, was that the contingent beneficiaries as set forth therein would only take if Erica Pressley did not survive him?
- V. Did the Circuit Court err in failing to find and hold that *S.C. Code Ann.* 62-2-802 only revokes a provision in the Will which affects the putative spouse by in some manner of appointing, empowering or benefitting the ex-spouse?
- VI. Did the Circuit Court err in failing to hold and find that the contingent beneficiary provision contained in Item III of the Last Will and Testament of Ervin Christopher Pressley was a matter of succession that was not affected by either *S.C. Code* 62-2-802 or *S.C. Code* 62-2-507, but was governed by existing *S.C. Law* concerning contingent beneficiaries and wills?

STATEMENT OF THE CASE

This is an action to construe the Last Will and Testament of Ervin Christopher Pressley (Decedent). The initial filing in the Estate for the Decedent in the Williamsburg County Probate Court was on August 5, 2014 by an Application for Informal Probate only by Lorine C. Pressley, Mother of the Decedent (Tr. March 12, 2015, p. 5). Subsequently, Gwendolyn Leveritt, the Appellant, filed a Petition for Formal Testacy on December 20, 2014 and submitted the original will of the Decedent (Tr. March 12, 2015, p. 6).

The Decedent died on January 25, 2014, and, at the time of his death, he was a resident of the County of Williamsburg, State of South Carolina. The Decedent was married to Erica Pressley at the time of the execution of his will on February 5, 2008 (Final Order, April 2, 2015, p. 1; Last Will and Testament of Ervin Christopher Pressley, P. 1). By the time of his death, the Decedent was separated from his wife and a New York Court had approved a Stipulation of Settlement dated November 14, 2012. (Final Order, April 2, 2015, p. 2; Plaintiff's Exhibit #3)

After the Decedent's death, Erica Pressley brought an action in New York to have the Stipulation of Settlement declared null and void. That action was unsuccessful. The Williamsburg County Probate Court found that the New York Court "issued an Order upholding the divorce, upholding the Stipulation of Settlement, and refusing to interfere with the distribution of the (Decedent's) life insurance proceeds." (Final Order, April 2, 2015, p. 3; Plaintiff's Exhibit #2). The Probate Court found that, "In essence, (the

Order) affirmed the Judgment of Divorce.” (Final Order, April 2, 2015, p. 3; Plaintiff’s Exhibit #2)

A hearing was held before the Honorable Betty F. Matthews, Judge of Probate for Williamsburg County on March 12, 2015. On April 2, 2015, an Order was issued by Judge Matthews found that the Decedent died without issue and that his will should be admitted to Probate. (Final Order, April 2, 2015) The Probate Court also found that, under the applicable laws, that the Last Will and Testament of Ervin Christopher Pressley was revoked as to any provision that benefitted, empowered or appointed Erica Pressley. (Final Order, April 2, 2015, p.4) Since the applicable law (*S.C. Code Ann.* §62-2-802 and *S.C. Code Ann.* §62-2-507) limited the revocation to provisions benefitting, empowering or appointing the spouse, the Probate Court did not extend any application beyond the explicit provisions of the law. The Probate Court also held that the condition precedent contained in the Last Will and Testament of the Decedent that the alternate takers under the Will took received the estate only if Erica Pressley did not survive him. (Final Order, April 2, 2015, p. 4 and p. 6) Accordingly, the Probate Court held that there was an intestacy. (Final Order, April 2, 2015, p. 4 and p. 6) The Respondent, Gwendolyn Leveritt, appealed the Order of the Probate Court dated April 2, 2015 to the Circuit Court. The Circuit Court, after a hearing on October 28, 2015, reversed the Final Order of the Probate Court. (Order, December 9, 2015) The Appellant timely filed a Motion for Reconsideration with the Circuit Court on December 30, 2015. The Circuit Court denied the Appellant’s Motion. (Order, January 11, 2016) The Appellant filed her Notice of Appeal on February 18, 2016.

STATEMENT OF FACTS

The Decedent and Erica Pressley were married in the State of New York on July 7, 2007. On February 5, 2008, the Decedent executed his Last Will and Testament while in the State of New York. At the time of the execution of his will, the Decedent was married to Erica Pressley. The Decedent became a resident of the County of Williamsburg, State of South Carolina prior to his death on January 25, 2014.

The Decedent separated from his wife prior to his death and they executed a Stipulation of Settlement dated November 14, 2012 which was approved by a New York Court. (Final Order, April 2, 2015, p. 2; Plaintiff's Exhibit #3). Ervin Pressley and Erica Pressley were divorced by Judgment of Divorce filed on September 24, 2014, in the New York Supreme Court for Bronx County New York under index 12012-11 (Plaintiff's Exhibit #1). The divorce action was commenced by Ervin Pressley against Erica Pressley by the filing of Summons and verified Complaint on October 18, 2011. A hearing was held in New York on November 14, 2012, at which time the divorce was granted on the record. (Plaintiff's Exhibit #3) The Court in New York also approved the parties' Stipulation of Settlement, after taking testimony from each party. (Plaintiff's Exhibit 3)

On March 10, 2014, an Order to Show Cause was filed in the Office of the Supreme Court of the State of New York for Bronx County, wherein Erica Pressley sought a declaratory judgment seeking to have the divorce abated because the Plaintiff, Ervin Pressley, died before the Judgment of Divorce was actually granted in writing and filed of record. In addition, she sought a declaratory judgment that the Stipulation of Settlement entered into on November 14, 2012 was not null and void, but that it had no force or effect. (Plaintiff's Exhibit #3) She wanted the court to direct the American Journal Life Insurance Company to pay the entire death benefit of life insurance to her

instead of Lorine Pressley.

In a Decision/Order dated June 30, 2014, the same Judge who signed the Judgment of Divorce and approved the Stipulation of Settlement also found that the divorce had been granted on the record and the Stipulation of Settlement concerning the parties' agreement had been confirmed on the record after questioning of both parties by the court in 2012. (Plaintiff's Exhibit #3) The only reason the divorce had not been finalized by filing was because of a clerical error, which was later corrected. The court found it had jurisdiction of the parties and the subject matter. (Plaintiff's Exhibit #3) The New York Court denied Erica Pressley's application for an Order of Abatement of the divorce by death and dismissed the entire action upholding the divorce, the Stipulation of Settlement and denying her other requests. (Plaintiff's Exhibit #3)

The Williamsburg County Probate Court found that, "In essence, (the Order) affirmed the Judgment of Divorce." (Plaintiff's Exhibit #3) Final Order p. 3; (Plaintiff's Exhibit #1)

The only dispositive provision of the Last Will and Testament of Ervin Christopher Pressley is the Third Item which states:

THIRD: All the rest, residue and remainder of the property both real, personal and mixed and wheresoever situate which I may own or be entitled to at the time of my death, I give, devise and bequeath to my spouse, ERICA DANELLE BLEDSOE-PRESSLEY, if my said spouse shall survive me. If my said spouse shall not survive me, then I give, devise and bequeath my residuary estate to my issue, per stirpes, and if there be no surviving issue, then to GWENDOLYN LEVERETT and LORINE PRESSLEY, equally, or all to the survivor between them. If there be no survivor between them, then to JAKOYA GRISSETT and JAHEEN PRESSLEY, equally, or all to the survivor between them.

The language in the Will of the Decedent clearly sets forth a contingent devise that is to be effective only if his spouse shall not survive him. (Third Item, Last Will and

Testament of Ervin Christopher Pressley, p. 1). The Decedent's spouse, at the time the will was prepared, was Erica Pressley. The will contains a mandatory condition precedent that requires that Erica Pressley not survive the Decedent before the contingent devise is effective. Erica Pressley survived the Decedent.

After hearing this matter on March 12, 2015 and receiving Exhibits, Arguments of Counsel and a Stipulation, all as set forth in the Transcript of the hearing on March 12, 2015, the Probate Court for Williamsburg County issued its Order, which held that Erica Pressley was prohibited by law from taking as a surviving spouse under §62-2-802(a); and that she was bound by the marital litigation in the State of New York, in which she released and abandoned any rights to the property of the Decedent and his Estate. (Final Order, April 2, 2015) The Probate Court further found that the Decedent had no issue. The Probate Court found that since Erica Pressley survived the Decedent, the condition precedent in the Decedent's Will did not occur and the contingent devise failed. (Last Will and Testament of Ervin Christopher Pressley, p. 1 and Final Order of April 2, 2015.)

STANDARD OF REVIEW

A Circuit Court should apply the same standard of review when it considers an appeal from the Probate Court as an Appellate Court would apply on appeal. *In re: Howard*, 434 S.E.2d 254, 315 S.E. 356 (1993). Accordingly, the Circuit Court should uphold the findings of the Probate Court if there is any evidence to support them before the Circuit Court on appeal when the matter is an action at law. *Bob Jones University V. Strandell*, 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001) If the action is equitable, the

Circuit Court may make findings in accordance with its own view of the preponderance of the evidence.

An action to construe a will is an action at law *NationsBank of South Carolina v. Greenwood*, 321 S.C. 386, 468 S.E.2d 658 (Ct.App.1996) (holding an action to construe a will is an action at law). If a proceeding in the Probate Court is in the nature of an action at law, review by the Circuit Court and this Court extends merely to the correction of errors of law. See *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976) (stating appellate review of an action at law is limited to correcting errors of law). *Bob Jones University V. Strandell*, 344 S.C. 224, 543 S.E.2d 251 (Ct. App., 2001)

The factual findings of the Probate Court will not be disturbed on appeal unless a review of the record reveals there is no evidence reasonably supporting the court's findings. *Bob Jones University V. Strandell*, 344 S.C. 224, 543 S.E.2d 251 (Ct. App., 2001)

Questions of statutory interpretation are questions of law, which appellate court is free to decide without any deference to the court below. *Grier V. Amisub of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012)

II

STATUTORY CONSTRUCTION

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Grier V. Amisub of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012)

What a legislature says in the text of a statute is considered the best evidence of

the legislative intent or will, and when engaging in statutory construction, courts are bound to give effect to the expressed intent of the legislature; thus the court must follow the plain and unambiguous language in a statute when construing a statute and have no right to impose another meaning. *Grier V. Amisub of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693(2012)

It is only when applying the words of a statute literally leads to a result so patently absurd that the legislature could not have intended it that court looks beyond the statute's plain language when construing a statute. *Grier V. Amisub of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693(2012)

In ascertaining the meaning of language used in a statute, court presumes the legislature is aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the legislature intended to use the term in that sense. *Grier V. Amisub of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693(2012)

Statutes in derogation of the common law are to be strictly construed, and a statute restricting the common law will not be extended beyond the clear intent of the legislature. *Grier V. Amisub of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693(2012)

III

CONSTRUCTION OF WILLS

The cardinal rule of will construction is the determination of the testator's intent. *Matter of Clark*, 308 S.C. 328, 417 S.E. 2d 856 (1992) In construing the language of a will, the reviewing tribunal must give the words contained in the document their

ordinary and plain meaning, unless it is clear the testator intended a different sense or such meaning would lead to an inconsistency with the testator's declared intention. *In re Estate of Fabian*, 326 S.C. 349, 483 S.E.2d 474 (Ct.App.1997) In construing a will, a court's first reference is always to the will's language itself. *Fenzel v. Floyd*, 289 S.C. 495, 347 S.E.2d 105 (Ct.App.1986) Where the will's terms or provisions are ambiguous, the court may resort to extrinsic evidence to resolve the ambiguity. *Id.* *Bob Jones University V. Strandell*, 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001)

Courts cannot make wills, nor can they conjecture as to the intention of the testator. *Cornelson v. Vance*, 220 S.C. 47, 54, 66 S.E.2d 421, 424 (1951), 220 S.C. at 58, 66 S.E.2d at 426. *Bob Jones University V. Strandell*, 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001)

IV

STATUTORY PARTIAL REVOCATION OF WILLS

S.C. CODE §62-2-802 AND S.C. CODE §62-2-507

Our legislature recognizes that certain marital agreements and orders should have the effect of revoking any provision in a will for the benefit, empowerment or appointment of a spouse under specified circumstances. *S.C. Code §62-2-802* states in part:

Effect of divorce, annulment, decree of separate maintenance, or order terminating marital property rights.

(a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separate maintenance that does not terminate the status of

husband and wife is not a divorce for purposes of this section.

(b) For purposes of Parts 1, 2, 3, and 4 of Article 2 [Sections 62-2-101 et seq., 62-2-201 et seq., 62-2-301 et seq., and 62-2-401 et seq.] and of Section 62-3-203, a surviving spouse does not include:

....

(3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between spouses unless they are living together as husband and wife at the time of the decedent's death; or

....

(c) A divorce or annulment is not final until signed by the court and filed in the office of the Clerk of Court. *S.C. Code Ann.* §62-2-802.

Also, *S.C. Code* §62-2-507 relates to provisions for a spouse or former spouse and states, in part:

§62-2-507. Revocation by divorce, annulment, and order terminating marital property rights; no revocation by other changes of circumstances.

(a) In this section:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument

....

(c) Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable:

(i) disposition or appointment of property or beneficiary designation made by a divorced individual to the divorced individual's former spouse in a governing instrument;

(ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse; or

(iii) nomination in a governing instrument, nominating a divorced individual's former spouse to

serve in any fiduciary or representative capacity, including a personal representative, trustee, conservator, agent, attorney in fact or guardian;

The Reporter's Comments to both *S.C. Ann.* §62-2-802 and *S.C. Ann.* §62-2-507 are instructive and enunciate the limited effect of both these code sections have on a will to those provisions that benefit, empower or appoint a former spouse. The application of those sections is to only those matters that directly affect the spouse. The Reporter's Comments for the 1986 Act #539, Section 1, the enactment of *S.C. Code Ann.* §62-2-507, state, in part:

These circumstances work the revocation of only those portions of a will benefitting, empowering or appointing the former spouse, thus treating the former spouse as having predeceased the testator and they work thus only if the will fails to expressly provide otherwise and only as long as the testator and the former spouse remain unmarried to each other. Reporter's comments (original) *S.C. Code Ann.* §62-2-507

Consistent with those foregoing comments is the following of the Reporter's Comments with *S.C. Code Ann.* §62-2-802 which state, in part:

However, under Section 62-2-507, such an order, a divorce or annulment, whether valid or invalid as under Section 62-2-802(b) has the additional effect of revoking, by operation of law, so much of the decedent's will as affects the putative spouse. Further, matters of succession not within the coverage of Sections 62-2-802(b) and 62-2-507 will continue to be governed by the prior South Carolina law, . . . Reporter's comments to *S.C. Code Ann.* §62-2-802

V

INTESTACY

Although the law engages a presumption against intestacy, this presumption may be overcome by the facts and plain language of the testator's will. *Albergotti v. Summers*, 203 S.C. 137, 26 S.E.2d 395 (1943); *In re Estate of Blankenship*, 336 S.C. 103, 518

S.E.2d 615 (Ct.App.1999). *Bob Jones University V. Strandell*, 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001)

Courts cannot make wills, nor can they conjecture as to the intention of the testator. *Cornelson v. Vance*, 220 S.C. 47, 54, 66 S.E.2d 421, 424 (1951) , 220 S.C. at 58, 66 S.E.2d at 426. *Bob Jones University V. Strandell*, 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001)

ARGUMENTS

I. THE CIRCUIT COURT FAILED TO PROPERLY CONSTRUE THE LAST WILL AND TESTAMENT OF CHRISTOPHER ERVIN PRESSLEY. THE CIRCUIT COURT IMPROPERLY APPLIED S.C. CODE ANN. §62-2-802 AND S.C. CODE ANN. §62-2-507 IN CONSTRUING THE LAST WILL AND TESTAMENT OF ERVIN CHRISTOPHER PRESSELY.

In order to properly interpret and construe the Last Will and Testament of the Decedent, the applicable laws that affect the terms of a Will, after a divorce or property settlement, must be examined. Without question, the applicable law revokes any provision that benefited, empowered, or appointed Erica Pressley. (S.C. Code Ann. §62-2-802 and S.C. Code Ann. §62-2-507) (See also Reporter's Comments)

The central question that is presented here is "Do these laws have any affect beyond the application to the spouse?" The original reporter's comments to S.C. Code Ann. §62-2-507, as stated above, limit the application to only to those provisions that benefit, empower, or appoint the spouse. The statutes are silent as to any other application. The Reporter's Comments for S.C. Code Ann. §62-2-507, specifically state that these provisions, "work thus only if the Will fails to expressly provide otherwise..."

The Will of the Decedent specifically provides, and specifically contains a contingent beneficiary statement, i.e., a condition precedent, that is only effective if Erica Pressley does not survive the Decedent. The Decedent specifically expressed this requirement. That was his intention when he signed his will.

The effect of the *South Carolina Probate Code* on the Will of Ervin Christopher Pressley is limited. The effect of the termination of the marital relationship under the South Carolina Probate Code (SCPC) on a Will has been succinctly stated by Professor S. Alan Medlin of the University of South Carolina School of Law, as follows:

“The SCPC provides that, unless a will expressly indicates otherwise, the termination of a marriage subsequent to the execution of the testator’s will partially revokes the will to the extent of devises to the ex-spouse or appointments of the ex-spouse to an office. For these purposes, the Code treats the spouse as having predeceased the testator. Any invalidated devise would pass to other devisees or by partial intestacy, depending on the terms of the will.” Page 3-32, Section 310.2(b), Divorce, S. Alan Medlin, *The Law of Wills and Trusts, Vol. I, Estate Planning in South Carolina* (2002)

Professor Medlin clearly states that the SCPC only revokes a will partially and only for the purposes as stated above. The alternative provision with the condition precedent in the Will of Ervin Christopher Pressley is not revoked by the SCPC. In fact, Professor Medlin recognizes that the partial revocation of a will by a divorce or termination of marital relationship could well result in an intestacy, which is exactly what has occurred in this matter.

The Reporter’s Comments limited application of *S.C. Code Ann. §62-2-802* and that limited application is confirmed by the *S.C. Code Ann. §62-2-802*, which clearly states that the revocation, the operational law, is only to the extent that it “affects the putative spouse”. Additionally, the Reporter’s Comments to *S.C. Code Ann. §62-2-802*

state “further, matters of succession not within the coverage of *S.C. Code Ann.* §62-2-802(b) and *S.C. Code Ann.* §62-2-507 will continue to be governed by prior South Carolina law” (Reporter’s comments to *S.C. Code Ann.* §62-2-802)

Since a statute in derogation of the common law, and in fact, all statutes, must be strictly construed and the plain language of the statute applied, the condition precedent that Ervin Christopher Pressley placed in his will must be given full effect. (Will of Ervin Christopher Pressley, p.1)

The clear intent of the legislature is evidenced by these statutes and the Reporter’s Comments, which clearly enunciate that the revocation is limited to the spouse and only to those provisions that benefit, empower or appoint the spouse. The condition precedent in the Decedent’s Will does not, in any manner, empower, benefit or appoint Erica Pressley. Additionally, the language of the condition precedent in the decedent’s Will uses the mandatory word “shall”. (Will, p. 1) There is no statutory basis for the revocation of the portion provision with the condition precedent.

The Probate Court correctly used the cardinal rule of will construction to determine the testator’s intent. There is nothing in the Will that contradicts the requirement for the contingent provision to be effective, Erica Pressley must not survive the testator. To hold otherwise would be a conjecture as to the intent of the Decedent and an inappropriate act of judicial activism. *Cornelson v. Vance*, 220 S.C. 47, 54, 66 S.E.2d 421, 424 (1951) , 220 S.C. at 58, 66 S.E.2d at 426. *Bob Jones University V. Strandell*, 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001)

There are no cases directly on point in South Carolina. However, there are cases

in other jurisdictions which construe similar statutes.

In a case similar to the case at bar, *Re Will of Lampshire*, (1968) 57 Misc 2d 332, 292 NYS2d 578, the will devised all of the residue of the testator's estate to his wife, provided that if his wife should predecease him, such residue should be equally divided among the wife's children. After the will had been executed, the testator and his wife were divorced, and subsequently a statute was enacted providing, in part, that if after executing a will, a testator was divorced, such divorce revoked any disposition or appointment of property made by the will to the former spouse unless the will expressly provided otherwise. The Court pointed out that such statute did not, in word or intent, have any reference to deeming a divorced spouse civilly dead. Furthermore, the gift over provided for in the instant will in the event the wife should predecease the testator was predicated solely upon and limited to that particular condition. The New York Court said that since such contingency had not occurred, the result was intestacy. (*Re Will of Lampshire*, (1968) 57 Misc 2d 332, 292 NYS2d 578)

The New York Court held the fact that an event might have happened prior to or after the making of a will, which, as the will might indicate, was unknown to, or unforeseen by and/or not provided to a testator, could not affect the meaning of the words employed by him in a will, declared the court, nor could such language be perverted or disregarded in order to give effect to an intention which the testator might possibly have had, but which was not revealed in his words. (*Re Will of Lampshire*, (1968) 57 Misc 2d 332, 292 NYS2d 578)

After the *Lampshire* case, the legislature of the State of New York changed the law to add the following: "and the provisions, dispositions and appointments made in such will shall take effect as if such former spouse had died immediately before such testator." Estates, Powers and Trusts Laws § 5-1.4 The Legislature of the State of South Carolina

has not made any such addition or change to extend the revocation based upon divorce or separation. Accordingly, the limitation of the revocation of provision of a Will, by law based upon a divorce or other action by order of actions by the parties, is limited solely to those provisions that benefit, empower, or nominate the putative spouse.

The case of *Hermon vs. Urteago*, 46 Cal.Rptr.2d 577, 39 Cal.App.4th 1525 (1995) dealt with this issue. In that case, the decedent's will, which was executed during a marriage which had been dissolved prior to the decedent's death by divorce, contained a certain bequest in the event his spouse predeceased him to his children and spouse's children and his issue and his spouse's issue. In *Hermon*, the Court held that the bequest failed as to his spouse's children and his spouse's issue, absent an expression of intent by the testator that the bequest was to survive a dissolution of the marriage. The effect of the California statute, which is similar to the South Carolina statute in that upon divorce, the testator's spouse is treated as having predeceased the decedent for the purposes of implementing the provisions of the will in favor of the former spouse. The court, in *Hermon*, also held that, if the legislative intent was for this statute to cause all provisions of the will to be read as if the spouse predeceased the decedent, it would have specified exactly the same in the applicable statute and not limited its application. Similarly, the South Carolina legislature did not specify that the former spouse was to be treated as deceased for all provisions, but only dealt with the right of the former spouse to claim under the will written during the marriage, but probated after the divorce. However, as to the remaining provisions of the will of the Decedent, there was no specific showing of the testator's intentions in the will as to what would take place, if the spouse did survive, but could not inherit for whatever reason other than her prior death. See also *Jones v. Peddy*, 122 CAL. App. 4th 326 (2004) citing *Hermon v. Urteago, Id.*

In a Texas case with similar facts, *In Re Estate of Marvin Nash*, 164 S.W.3d 856

(TX, 2005), the testator bequeathed his estate to his wife, if she survived him by 30 days and named his wife's daughter as the alternative beneficiary. There were other provisions in the will that provided in the event that the decedent and his wife died at the same time or in the event that she does not survive him by 30 days or in the event that she should predecease him. After executing the will, the testator divorced his wife who survived him. The Texas probate code provided that, if after making a will, the testator is divorced or if the testator's marriage is annulled, all provisions in the will in favor of the testator's former spouse, or appointing such spouse to any fiduciary capacity under the will or with respect to the estate or person of the testator's children, must be read as if the former spouse failed to survive the testator, and the will provision for the former spouse shall be null and void and of no effect unless the will expressly provides otherwise. However, the Texas statute, like the applicable South Carolina statutes, did not extend the revocation of the Decedent's Will to specific contingencies in the will for provisions that do not benefit the former spouse. In essence, that court found that the bequest to the wife failed because the contingency required, i.e., the death of the spouse, which did not occur. Therefore, the decedent's estate descended to his heirs-at-law.

The will of Ervin Christopher Pressley requires a holding that the death of the spouse was a sole condition precedent to the effectuation of the gift over to the contingent takers. Since there is a lack of any specific provision in the will with respect to a divorce, and since there is the express language and terminology employed in the will of the Decedent in conditioning the gift over upon the death of the spouse, the Probate Court for Williamsburg County properly understood its function. It is a court's function merely to construe and interpret the actual terms and provisions of the will, and not to make a new will for the testator or to supply or build up a scheme for the purpose of carrying out what might be thought to be in accordance with a Testator's wishes.

Stated otherwise, the express language and terminology employed by a testator, where such language is clear and unambiguous, must be given full force and effect. It may not be cut down, or added to, under the guise of construction. (S.C. Code Ann. §62-2-601) Stated otherwise, courts should adhere to the principal that they ought not, in the name of construction, make a new will for a testator, or by mere conjecture as to his probable intention, read something into his will not actually expressed therein, but which might seem to be in accordance with his wishes, or would effectuate an equitable distribution of his property.

The specific requirement or contingency which triggers an alternative provision must be strictly construed. In this case, if the will is the last will of the decedent, then it must be strictly construed. The bequest in Ervin Christopher Pressley's will is clear in that the provision for the spouse only is effective if she survived the testator. The Probate Code (S.C. Code Ann. 62-2-507(e)) requires that the provision in a will for a former spouse to be treated as if the former spouse predeceased the testator. The contingent bequest to the issue (there are none in our case), if any, and then to Gwendolyn Leverett and Lorine Pressley fails because the contingency, i.e. the death of Erica Bledsoe-Pressley, did not occur.

The Third item of the decedent's will provides clear and complete evidence of the intent of Ervin Christopher Pressley by the language used. The testator did not use the contingent language such as "if my wife does not survive me or if for any other reason any spouse cannot take under the will. However, when the entire will of the decedent is examined, what the third item does not state further confirms his intent. (*Shelley v. Shelley*, 244 S.C. 598, 137 S.C. 2d 851 (1964))

While there are no other contingencies except Erica's survival for the contingent beneficiaries to inherit in the third item, the appointment of a personal representative

contains several:

“In the event my said spouse shall predecease me, fail to qualify, or having qualified thereafter dies, resigns, is removed from office or for any other reason ceases to act as Executor, I hereby appoint LORINE PRESSLEY, as Executor of this my Last Will and Testament”. (Last Will and Testament of Ervin Christopher Pressley dated February 5, 2008, p. 1)

The decedent did not provide for the disposition of his property to the contingent beneficiaries if Erica failed to survive him or is prevented for any reason from inheriting from him. The language of appointment in the will is a great example of the thought process concerning a provision in a will in favor of a former spouse. In his appointment as executor, he listed several contingencies, but stated only one in connection with the condition precedent in the third item of his will. Not only is the intent clear and unequivocal by the decedent's requirement that others inherit only in the event that Erica Pressley did not survive him, it is confirmed by the language used in the appointment of an executor.

Since the contingency in the bequest to the surviving spouse did not occur, the contingent bequests fail and the estate should pass as if the decedent died intestate. Since there is no other expression of testatorial intention in the Third item, other than his spouse must not survive him, then the property should pass by intestate succession. The entire bequest occurs in a residuary clause and there is no other provision for anyone to inherit, except in the case the spouse does not survive.

II. AFTER THE CONSIDERATION OF THE EVIDENCE, FACTS, PLAIN LANGUAGE OF THE LAST WILL AND TESTAMENT OF ERVIN CHRISTOPHER PRESSLEY AND THE APPLICABLE LAW THE CIRCUIT COURT ERRED IN ITS REVERSAL THE PROBATE BECAUSE THE PROBATE COURT PROPERLY FOUND THAT THE DISPOSITIVE PROVISION, AS SET FORTH IN THE LAST WILL AND

TESTAMENT OF THE DECEDENT, RESULTED IN AN INTESTACY.

Erica Pressley survived the Decedent. With the statutory revocation of the provision benefitting Erica Pressley eliminated and only that provision eliminated, the express terms of the Will of the Decedent must be given effect. *Fenzel v. Floyd*, 289 S.C. 495, 347 S.E.2d 105 (Ct.App.1986) The mandatory statement providing for the condition precedent only if Erica Pressley did not survive the Decedent clearly must be given their ordinary and plain meaning without some other intention expressed by the testator. To do otherwise would create an inconsistency with the testator's declared intention. *In re Estate of Fabian*, 326 S.C. 349, 483 S.E.2d 474 (Ct.App.1997)

The Appellant acknowledges that while there is a presumption against intestacy, our law is clear that that presumption may be overcome by the facts and the plain language in the testator's Will. *Albergotti v. Summers*, 203 S.C. 137, 26 S.E.2d 395 (1943); *In re Estate of Blankenship*, 336 S.C. 103, 518 S.E.2d 615 (Ct.App.1999). *Bob Jones University v. Strandell*, 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001)

The Probate Court for Williamsburg County properly refused to speculate or engage in conjecture as to the intent of the testator realizing that the Court cannot make Wills and to do so would be improper. *Cornelson v. Vance*, 220 S.C. 47, 54, 66 S.E.2d 421, 424 (1951), 220 S.C. at 58, 66 S.E.2d at 426. *Bob Jones University v. Strandell*, 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001)

Unlike the Probate Court, the Circuit Court improperly extended revocation mandated by S.C. Code Ann. §62-2-802(b) and S.C. Code Ann. §62-2-507 to provisions that empower benefit or appoint a former spouse, and held that Erica Pressley is civilly dead as to all provisions in a Will. This holding is an error of law.

III. ONCE THE WILL OF THE DECEDENT, ERVIN CHRISTOPHER PRESSLEY, DATED FEBRUARY 5, 2008, WAS ADMITTED TO PROBATE, THE PROBATE COURT DETERMINED THE INTENT OF THE DECEDENT BY PROPERLY CONSIDERING THE MARITAL LITIGATION AND STIPULATION OF THE DECEDENT AND ERICA PRESSLEY, AND THEREAFTER PROPERLY APPLYING THE LIMITED AND SPECIFIC REVOCATION, AS REQUIRED BY S.C. CODE ANN. §62-2-802(B) AND S.C. CODE ANN. §62-2-507, TO THE DECEDENT'S WILL. THE CIRCUIT COURT REVERSAL OF THE PROBATE COURT WAS ERROR.

The Probate Court of Williamsburg County was required by law to consider the Divorce Decree and the stipulation concerning property settlement by the applicable South Carolina statutes. (S.C. Code Ann. §62-2-802(b) and S.C. Code Ann. §62-2-507) Since this was a requirement of the applicable law, the Probate Court was bound to consider those documents and statutes affecting the testator's intention (S.C. Code Ann. §62-2-802 and S.C. Code Ann. §62-2-507). The basis for the enactment of the foregoing statute is the "assumed intent" of the testator that he would not provide for a divorced spouse or under specific circumstances where there has been a property settlement.

The Probate Court properly construed the Decedent's will and held that since the Decedent's spouse survived him, his clear intention of that required mandatory condition precedent, did not occur and the result was an intestacy.

It would have been an error of law not to consider and give effect to the marital litigation and stipulation under the applicable law of this State.

IV. THE PROBATE COURT PROPERLY HELD THAT DECEDENT'S WILL DID NOT PROVIDE FOR THE DISTRIBUTION OF HIS ASSETS SINCE THE CONDITION PRECEDENT THAT ERICA PRESSLEY SHALL SURVIVE THE

DECEDENT, DID NOT OCCUR WAS NOT AFFECTED BY S.C. CODE ANN. §62-2-507, BUT WAS GOVERNED BY EXISTING LAW GOVERNING CONTINGENT BENEFICIARIES AND WILLS. THE CIRCUIT COURT ERRED IN ITS REVERSAL OF THE PROBATE COURT.

The Probate Court followed South Carolina Probate Court statutory directives in directing that only the divorced spouse should be treated as predeceasing the Decedent, based upon the expressed intent and mandatory language of the Last Will and Testament of the Decedent. As previously stated, the Probate Court properly applied the applicable code sections to the Decedent's Will. The applicable law limits the statutory revocation to the provisions that benefit, empower or appoint the putative spouse. The applicable law was not intended to override the testator's intent as expressed in his Will. "Matters of succession not within the coverage of Section 62-2-802(b) and 62-2-507 will continue to be governed by prior South Carolina law." Reporter's comments to *S.C. Code* 62-2-802.

The clear mandatory condition precedent that Gwendolyn Leveritt and Lorine C. Pressley were devised property, only upon the failure of Erica Pressley to survive the Decedent, must be, and is, governed by South Carolina law other than *S.C. Code Ann.* §62-2-802(b) and *S.C. Code Ann.* §62-2-507. If a condition precedent is not fulfilled, the devise is not effective.

The contingency in Item III of Ervin Christopher Pressley's Will (that Erica Pressley not survive him) never occurred. Since the contingency did not occur, the contingent takers could not take, and the result was an intestacy.

Since Erica was eliminated as a devisee by the applicable laws, the alternative devise to issue, then to Gwendolyn Leveritt and Lorine Pressley must be examined.

"Alternative devise means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form." 80 Am. Jur. 2d Wills § 1417

"A condition precedent is a condition on a devise which must occur before the interest can vest, while a condition subsequent defeats an interest that has already vested." 97 C.J.S. Wills § 1577

The precedent condition in the Will of Ervin Christopher Pressley is that Erica Pressley not survive the Decedent. If the language of the particular clause or of the whole will shows an intent of the testator that the act on which the estate depends must be performed before the estate can vest, the condition is a condition precedent. 97 C.J.S. Wills § 1577

The clear condition precedent in the alternative gift is that Erica Pressley not survive Ervin Pressley. The intent of Ervin Pressley is clear and unequivocal. Since Erica survived, the condition did not occur and the alternative gift failed. Nothing in *S.C. Code Ann.* §62-2-802 or *S.C. Code Ann.* §62-2-507 requires, or in any way states, that the spouse who is divorced or whose rights to property have been eliminated through property settlement and other marital litigation, is completely removed from the Will, as if the spouse predeceased the former spouse. To the contrary, this limited application is confirmed not only because of the strict construction required under our law of all statutes, but also by the Reporter's Comments to *S.C. Code Ann.* 62-2-802, which state in part:

However, under Section 62-2-507, such an order, a divorce or annulment, whether valid or invalid as under Section 62-2-802(b) has the additional effect of revoking, by operation of law, so much of the decedent's will as

affects the putative spouse. Further, matters of succession not within the coverage of Sections 62-2-802(b) and 62-2-507 will continue to be governed by the prior South Carolina law,. . . Reporter's comments to S.C. Code Ann. §62-2-802

The provision in Item III of the Last Will and Testament of Ervin Christopher Pressley, which provides that the contingent beneficiaries will take only if Erica Pressley does not survive Ervin Pressley, is not a provision that affects the putative spouse. The Reporter's Comments also clearly state that "further, matters of succession not within the coverage of §62-2-802(b) and §62-2-507 will continue to be governed by prior S.C. law." Reporters comments to S.C. Code Ann. §62-2-802.

The prior and current South Carolina law as to Wills clearly states that, if there is a condition precedent, i.e. a requirement that an event happen prior to a bequest or devise being effective, then that requirement must be fulfilled prior to the bequest or devise being effective. "All the authorities agree that conditions precedent must be strictly construed, and that nothing vests until the thing happens, whether it be possible or impossible, legal or illegal, or in conformity to public policy or against it." *Magee v. O'Neill*, 19 S.C. 170, 1883 WL 4874, 45 Am.Rep. 765

The extension S.C. Code Ann. §62-2-802 or §62-2-507, so as to eliminate the requirement that Erica Pressley not survive Ervin Christopher Pressley for the contingent beneficiaries to take under his Will, would be a judicial revision, as well as expansion and extension of those code sections beyond what the legislature clearly stated should be the boundaries of those provisions. Additionally, the clear intent of Ervin Christopher Pressley, as set forth in his Will, would not be followed by such an interpretation.

Based upon the expressed intent and mandatory language of the Last Will and

Testament of the Decedent, the Probate Court for Williamsburg County strictly followed those laws by directing that the divorced spouse should be treated as not surviving the Decedent only as to the provisions of the Will that benefitted, empowered or appointed the spouse. The Probate Court properly applied the applicable code sections to the Decedent's Will. The applicable law limits the statutory revocation to the provisions that benefit, empower or appoint the putative spouse and the applicable law was not intended to override the testator's intent as expressed in his Will. "Matters of succession not within the coverage of Section 62-2-802(b) and 62-2-507 will continue to be governed by prior South Carolina law." Reporter's comments to *S.C. Code Ann.* 62-2-802.

The clear mandatory condition precedent, that Gwendolyn Leveritt and Lorine C. Pressley were devised property only upon the failure of Erica Pressley to survive the Decedent, must be, and is, governed by South Carolina law other than *S.C. Code Ann.* §62-2-802(b) and *S.C. Code Ann.* §62-2-507. If a condition precedent is not fulfilled, the devise is not effective.

V. SUMMARY

The effect of the South Carolina Probate Code on the Will of Ervin Christopher Pressley is limited. The effect of the termination of the marital relationship under the *South Carolina Probate Code* (SCPC) on a Will has been succinctly stated by Professor S. Alan Medlin of the University of South Carolina School of Law, as follows:

The SCPC provides that, unless a will expressly indicates otherwise, the termination of a marriage subsequent to the execution of the testator's will partially revokes the will to the extent of devises to the ex-spouse or appointments of the ex-spouse to an office. For these purposes, the Code treats the spouse as having predeceased the testator. Any invalidated devise would pass to other devisees or by partial intestacy, depending on the terms of the will." Page 3-32, Section 310.2(b), *Divorce*, S. Alan Medlin, *The Law of Wills and Trusts*, Vol. I, Estate Planning in South Carolina (2002)

Professor Medlin clearly states that the SCPC only revokes a will partially and only for the purposes as stated above. The alternative provision with the condition precedent in the Will of Ervin Christopher Pressley is not revoked by the SCPC. In fact, Professor Medlin recognizes that the partial revocation of a will by a divorce or termination of marital relationship could well result in an intestacy which is exactly what has occurred in this matter.

CONCLUSION

For the reasons stated, Appellant requests that the Decision of the Circuit Court be reversed and the decision of the Probate Court be affirmed.

Respectfully submitted,


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June 22, 2016
Lake City, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

JUN 23 2016

SC Court of Appeals

APPELLATE CASE NO. 2016-000332

GWENDOLYN LEVERITT Respondent,

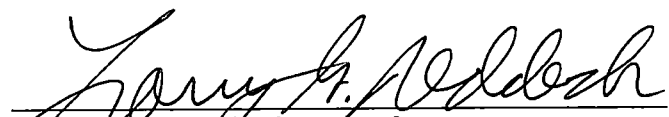
vs

LORINE C. PRESSLEY AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF ERVIN CHRISTOPHER PRESSLEY Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Initial Brief of Appellant complies with Supreme Court Order 2007-08-13-02 Regarding Personal Data Identifiers and other sensitive information.

June 22, 2016
Lake City, SC


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R. Lawton McIntosh, Circuit Court Judge

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GWENDOLYN LEVERITT Respondent,

VS

LORINE C. PRESSLEY AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF ERVIN CHRISTOPHER PRESSLEY Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief of Appellant complies with Rule
211(b), SCACR.

June 22, 2016
Lake City, SC



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