

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM WILLIAMSBURG COUNTY
The Honorable R. Lawton McIntosh**

APPELLATE CASE NO. 2016-000332

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SC Court of Appeals

GWENDOLYN LEVERITT Respondent,

VS

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

RECORD ON APPEAL

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INDEX

I. ORDERS

1. Order of Circuit Court Judge R. Lawton McIntosh filed on January 11, 2016 3
2. Order of Circuit Court Judge R. Lawton McIntosh filed on December 9, 2015 6
3. Final Order of Probate Judge Betty F. Matthews, filed on April 2, 2015 15

II. PLEADINGS

1. Petition of Gwendolyn Leveritt filed December 30, 2014 21
2. Answer of the Estate of Ervin Christopher Pressley filed February 26, 2015 27

III. TRANSCRIPT OF PROCEEDINGS

1. Transcript of Hearing of October 28, 2015 30
2. Transcript of Hearing of March 12, 2015 68

IV. EXHIBITS

1. Exhibit Log of Court Reporter
(March 12, 2015) 98
2. Respondent's Exhibit Number 1 - Judgement of Divorce in New York dated October 7, 2014 with Findings of Fact dated September 24, 2014 99
3. Respondent's Exhibit Number 2 - Decision/Order of the New York Court dated June 30, 2014 106
4. Respondent's Exhibit Number 3 - Order to Show Cause dated March 7, 2014 with Supporting Affidavit and Exhibits Thereto Including Stipulation of Settlement dated November 14, 2012 113

V. OTHER

1.	Last Will and Testament of Ervin Christopher Pressley dated February 5, 2008	132
2.	Appellant's Brief to The Circuit Court filed June 22, 2015	135
3.	Respondent's Brief in Circuit Court filed August 14, 2015	147
4.	Motion of Gwendolyn Leveritt to Alter or Amend Judgment filed December 30, 2014	170
5.	Memorandum in Support of Respondent's Motion to Alter or Amend Judgment filed January 4, 2016	176

VI. CERTIFICATE OF COUNSEL 184

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

In the Matter of the Estate of Ervin
Christopher Pressley,

Gwendolyn Leveritt,

Appellant,

vs.

Lorine C. Pressley, as Personal Rep-
resentative of the Estate of Ervin
Christopher Pressley,

Respondent.)

A CERTIFIED TRUE COPY
IN THE COURT OF COMMON PLEAS

SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY

**ORDER DENYING
RESPONDENT'S MOTION TO ALTER
OR AMEND JUDGMENT
PURSUANT TO RULE 59(e) and
RULE 60, SCRPC
[No Hearing Held]**

CA No. 2015-CP-45-00198

THIS MATTER was previously before the undersigned in Williamsburg County. This Court issued an Order reversing the Probate Court and remanding this matter back to the Probate Court for disposition consistent with this Court's Order. The Order was filed December 9, 2015 and received by Respondent's counsel on December 21, 2015. Respondent's present motions were filed and served on December 30, 2015 and are therefore apparently timely. This Court disposes of the present motions without necessity of a formal hearing.

Background

The undisputed facts presented establish that the decedent executed his Last Will and Testament on February 5, 2008 while a resident of New York state. Thereafter, decedent and his wife, Erica Danielle Bledsoe-Pressley, were effectively divorced in New York on or around November 14, 2012. The decedent moved to South Carolina and thereafter died on January 25, 2014.

The decedent's Last Will and Testament admitted to Probate provided, inter alia:

"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 reason ceases to act as an Executor, I hereby appoint Lorine Pressley as Executor of this my Last Will and Testament"

Lorine Pressley (decedent's mother) serves as Personal Representative without objection. Further, the parties stipulate that South Carolina law applies to this matter.

The decedent's will further provides, after payment of debts and funeral expenses, that:

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 DANIELLE 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 LEVERITT and LORINE PRESSLEY, equally, or all to the survivor of them. If there be no survivor between them, then to JAKOYA GRISSETT and JAHEEN PRESSLEY, equally, or all to the survivor between them. If there be no survivor between them, then to those persons to whom and in those proportions in which the same would have been distributable if I had then died the owner thereof, intestate, and a resident of the State of New York."

In her memorandum in support of the present motions, Respondent states that "[n]othing in S.C. Code Ann §62-2-802 or S.C. Code §62-2-507 requires, or in any way states, that the spouse who is divorced or whose rights to property have been eliminated is completely removed from the Will, as if the spouse predeceased the former spouse".

During the hearing and in the present motions, Respondent urges the Court to find that decedent's will created a condition precedent requiring decedent's former spouse predecease decedent before the contingent beneficiaries could take under the subject Last Will and Testament. In doing so, Respondent urges this Court to affirm the Probate Court's ruling that decedent's estate shall be distributed as if decedent died intestate.

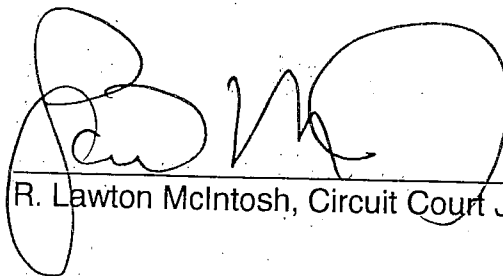
S.C.Code Ann. §62-2-507(e) provides that "[p]rovisions of a governing instrument and nomination in a fiduciary or representative capacity that are revoked by this section are given effect as if the former spouse predeceased the decedent".

(Emphasis added.)

Contrary to Respondent's argument that decedent's ex-wife actually survived decedent thus defeating the condition precedent, S.C.Code Ann. §62-2-507(e) treats decedent's ex-wife as predeceasing him as a matter of law. To hold otherwise would defeat the clear and unambiguous language of S.C.Code §62-2-507(e) and decedent's Last Will and Testament and would lead to absurd results.

Accordingly, Respondent's Motions are denied without a formal hearing; and the matter is remanded to the Probate Court to make distribution of decedent's estate, at the appropriate time, in accordance with decedent's Last Will and Testament and consistent with the South Carolina Code and this Order.

IT IS SO ORDERED This 4th Day of January, 2016.



R. Lawton McIntosh, Circuit Court Judge

Anderson, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

Gwendolyn Leveritt
Appellant,

v.

Lorine C. Pressley as Personal Representative
of the Estate of Ervin Christopher Pressley,

Respondent.

A CERTIFIED TRUE COPY
Sharon W. Staggers
SHARON W. STAGGERS
CLERK OF COURT
WILLIAMSBURG COUNTY
IN THE CIRCUIT COURT OF
THIRD JUDICIAL CIRCUIT
CASE NO.: 2014-ES-45-00179

2015-CV-45-198

ORDER

RECEIVED - 9 FEB 2015

This is an appeal from an order of the Probate Court. The issue on appeal is the validity and interpretation of a decedent's will when the decedent failed to update or change that will following divorce from a spouse. The relevant facts are uncontroverted and the issues presented are simply issues of law. As such, this Court's scope of review is ~~de novo~~ ^(R.M.) for errors of law.¹ Although the Decedent (Ervin Christopher Pressley) was a resident of New York when his will was prepared (February 5, 2008) and at the time of his divorce (effectively in 2012²), he moved to South Carolina and became a resident of this state prior to his death on January 25, 2014. Accordingly, the parties agree that it is South Carolina law that applies to the matter.

¹ "An appellate court's determination of the standard of review for matters originating in the probate court is controlled by whether the cause of action is at law or in equity." *Holcombe-Burdette v. Bank of Am.*, 371 S.C. 648, 654, 640 S.E.2d 480, 483 (Ct. App. 2006). "The construction of a will is an action at law." *Id.* "On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings." *Blackmon v. Weaver*, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005).

² A New York Court had approved a Stipulation of Settlement dated November 14, 2012. After the decedent's death, his former spouse brought a legal action in New York to have the Stipulation of Settlement declared null and void. That action was unsuccessful – and as the Probate Court here found, 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." The Probate Court here found that, "In essence, [the Order] affirmed the Judgment of Divorce."

FACTS AND PROCEDURAL HISTORY

The Decedent's will directed that "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 reason ceases to act as Executor, I hereby appoint LORINE PRESSLEY, as Executor of this my Last Will and Testament." (capitalization in original). Lorine Pressley (the Decedent's mother) presently serves in that capacity without objection.

The Decedent's will further provided, after the payment of debts and funeral expenses, that:

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 DANIELLE 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 LEVERITT and LORINE PRESSLEY, equally, or all to the survivor of them. If there be no survivor between them, then to JAKOYA GRISSETT and JAHEEN PRESSLEY, equally, or all to the survivor between them. If there be no survivor between them, then to those person to whom and in those proportions in which the same would have been distributable if I had then died the owner thereof, intestate, and a resident of the State of New York.

Again, Lorine Pressley is the Decedent's mother and Gwendolyn Leveritt is the Decedent's former mother-in-law.

This matter was originally opened by the Probate Court of Williamsburg County on an application for the informal appointment of the Respondent as the personal representative of her son's estate. Subsequently, on December 20, 2014, the Appellant filed a petition for formal testacy based upon the New York will from February 2008. In response to this petition for formal testacy, the Respondent sought a declaration that the will did not dispose of the

Decedent's property (she also sought to be named as the personal representative pursuant to her alternate designation in the will).

The matter came before the Probate Court for hearing on March 12, 2015. After presentation of agreed facts, relevant exhibits, and counsel argument, the matter was taken under advisement. The Probate Court issued its order dated and filed April 2, 2015 which recognized the Will (not challenged by this appeal), confirmed the appointment of Lorine (also not challenged by this appeal), and held that the Decedent's assets should "pass as if he died intestate" – despite the admission of the valid Will with its specified distributions. In this appeal from the latter Probate Court ruling, the Appellant asserts that the estate distribution *is* controlled by the will, as modified by statute, despite the Decedent's divorce, and that the Decedent's mother and the Appellant are to share equally in the estate.

PROBATE CODE PROVISIONS

Although the parties disagree as to the statute's impact, the applicable Probate Code provision is clear. S.C. Code Ann. § 62-2-802(a) states: "An individual who is divorced from the decedent . . . is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death." In analyzing this section, the Court of Appeals of South Carolina opined: "'Surviving spouse' is defined in the negative as not including one who is divorced from the decedent or whose marriage to the decedent has been annulled." *Lovett v. Lovett*, 329 S.C. 426, 432, 494 S.E.2d 823, 826 (Ct. App. 1997). The Reporter's Comment to subsection (a) further expounds that: "Under Section 62-2-802(a), a valid divorce or a valid annulment deprives the putative spouse of the status of surviving spouse of the decedent and the capacity to take as such in succession to the decedent's estate under this Code." S.C. Code Ann. § 62-2-802(a), comment 2.

Parallel to the provisions of Section 62-2-802(a) are the Probate Code provisions of Section 62-2-507, which provides, in part:

(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,³ 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;

(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.

Evidencing the similarities between § 62-2-507 and § 62-2-802, the Reporter's Comments to § 62-2-802 says:

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. Section 62-2-507 refers to Section 62-2-802 for the definition of divorce and annulment.

S.C. Code Ann. § 62-2-802(a), comment 4. Additionally, upon the codification of the "revocation by divorce" statute, authors of the statute opined:

The [South Carolina Probate Code] includes several sections that revoke a testator's will, in whole or in part, based on assumptions about the testator's intent rather than the expression of an intent to revoke. These situations include a testator who is divorced after the execution of a will (the "revocation-by-divorce" statute). When applicable, the revocation-by-divorce statute, section 62-2-507, revokes a testator's will to the extent necessary to omit an ex-spouse.

³ In this case, the November 14, 2012 court approval of the decedent's property division qualifies as a "Divorce or annulment" under the statute which specifically provides for the inclusion of "a court 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." S.C. Code Ann. § 62-2-507(a)(2).

Catherine H. Kennedy and S. Alan Medlin, *2013 Amendments to the S.C. Probate Code*, 25 S. CAROLINA LAWYER 32, 35 (Ms. Kennedy chaired the South Carolina Bar study committee that drafted and recommended the 2013 amendments; Professor Alan Medlin served as the Code reporter.).

QUESTION PRESENTED

The question presented by this matter is whether the “revocation-by-divorce” statute allows for or requires that the decedent’s entire will be revoked so as to omit not only an ex-spouse but also omit anyone in that spouse’s family – and create a disfavored⁴ intestacy.

ANALYSIS

A Validly Made and Executed Will Admitted To Probate

The Probate Court found that the Decedent’s Will “should be admitted for filing pursuant to Section 62-2-901 of the 1976 Code of Laws of South Carolina, as amended, and finds it to be the Last Will and Testament of the decedent, Ervin Christopher Pressley.”

Will Construction

Where there is a valid and unambiguous will, South Carolina courts have consistently published that: “We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties.” *United States Bank Trust Nat’l Ass’n v. Bell*, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009) (citing *C.A.N. Enterprises, Inc. v.*

⁴ A long-standing principal of South Carolina jurisprudence is that “the court should ‘indulge in every presumption’ to validate a will and thereby avoid intestacy.” *In re Estate of Blankenship v. Grady*, 336 S.C. 103, 109, 518 S.E.2d 615, 618 (Ct. App. 1999); *see also Meier v. Meier*, 208 S.C. 520, 526, 38 S.E.2d 762, 765 (1946) (“The law strongly favors the sustaining of a will as opposed to its invalidation and will indulge in every presumption against intestacy.”); *Abrams v. Templeton*, 320 S.C. 325, 330, 465 S.E.2d 117, 121 (Ct. App. 1995) (“The law abhors intestacy and will indulge every presumption in favor of the validity of the will.”).

South Carolina Health & Human Services Finance Com., 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988)). Furthermore, “A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *Id.*; see also *Thomason v. Hellams*, 233 S.C. 11, 14-15, 103 S.E.2d 324, 325 (1958) (“It was held that the will is plain and unambiguous and there is no room for construction or interpretation of it. The court improperly took into consideration facts, such as the very advanced age of the defendant and her frail health, which were disclosed in argument; but they were not in the complaint and will not be considered by this court.”).

The requirement that a Court first follow the unambiguous language of the Will itself serves to effectual the cardinal rule of will construction “that the testator’s intent should be ascertained and given effect.” *May v. Riley*, 279 S.C. 248, 250, 305 S.E.2d 77, 78 (1983); see also *Fenzel v. Floyd*, 289 S.C. 495, 498, 347 S.E.2d 105, 107 (Ct. App. 1986) (internal citations omitted)(“In construing a will, the purpose of the courts is to discover and give effect to the intent of the testator. The first resort is always to language of the will itself. Where the terms of the will are ambiguous, the court may resort to extrinsic evidence to resolve the ambiguity.”) see also *Shelley v. Shelley*, 244 S.C. 598, 601, 137 S.E.2d 851, 853 (1964) (“In the construction of a will the primary purpose of the court is to arrive at testator’s intention as expressed in his will considered as a whole. His intention must be ascertained from the language he used where it is clear and unambiguous.”).

No Ambiguity Here

In this case, the language of the Will itself was not ambiguous – indeed, it was clear. The decedent devised and bequeathed his residuary estate “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 of them." (The decedent had no issue).

Thus, the surviving spouse was to inherit the entirety of the estate and if there was no surviving spouse, then Gwendolyn Leveritt and Lorine Pressley were to inherit the estate in equal shares if they both were alive. Because there is nothing ambiguous about these provisions, there was no need and no legal authority to consider evidence extinsic to the Will.

An Error of Law

The Probate Court here, however, did consider extinsic evidence stating "the Court has to look at the intent of the Testator, and in this case, the intent of the Testator can be gleaned from the Last Will and Testament *as well as the Judgment of Divorce, Stipulation of Settlement and the other documents filed as evidence.*" (emphasis added). Although the existence of the Divorce did trigger the Probate Code's statutory exclusion of the former spouse, the Judgment of Divorce and Stipulation of Settlement were otherwise extinsic to the intent clearly expressed in the will and should not have been considered in determining the Decedent's intent.

The Probate Court's consideration of this extinsic evidence is reversible error. See *Thomason*, 233 S.C. at 14-15, 103 S.E.2d at 325 (showing an example of reversible error where the court had an unambiguous will but "improperly took into consideration facts, such as the very advanced age of the defendant and her frail health, which were disclosed in argument"). By looking outside of the four corners of the valid Will when determining the intent of the Decedent, the Probate Court committed an error of law.

Unnecessary Speculation

In addition to inappropriate consideration of extrinsic evidence, the Probate Court here also engaged in the speculative and presumptive act of assigning an unexpressed intent to the Decedent. Specifically, the Court presumed that the “Testator would not want to divide his assets in a Stipulation of Settlement which was approved by the Judgment of Divorce.” Based upon this speculative presumption, the Probate Court improperly concluded “this Will does not effectively dispose of the decedent’s property so the decedent’s assets will pass as if he died intestate.” As noted in the arguments to this Court, there is nothing statutorily prohibited or inherently inconsistent/unintended with a gift to a named⁵ former in-law or former step-child. To the contrary, clearly identified individuals are presumed to be the intended devisee absent some statutory bar. The Probate Court’s holdings to the contrary are improper judicial activism; if the Legislature wanted to invalidate or revoke an entire will upon a subsequent divorce, it could have directed that result in the Probate Code (as is apparently the case in some states) – it did not.

CONCLUSION

Contrary to the activism of the Probate Court, this Court concludes that the Probate Code provisions neither require or allow for the posthumous revocation or nullification of a testator’s express intent to include specific named persons other than the statutorily barred ex-spouse. Accordingly, the decision of the Probate Court is reversed and this matter is remanded back to

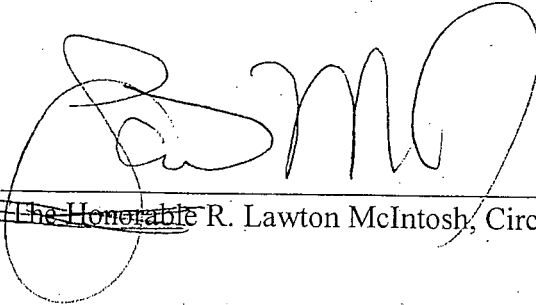
⁵ Notably, some Courts have drawn distinctions between the intent when expressed in terms of a general classification of persons and the more specific intent shown when a devisee is actually identified by name. *See, e.g., Estate of Hermon*, 39 Cal. App. 4th 1525 (1995) (California Court of Appeal found contingent gift to the testator’s children and “my spouses children” was a class gift to a class of persons, not named, and statutorily no longer in existence. Indeed, the appellate court provided that “If different language had been employed in the dispositive portions of the will, we may have reached a contrary result.”).

the Probate Court for distribution of the estate equally between the Appellant and the decedent's mother.

AND IT IS SO ORDERED.

Anderson, South Carolina

December 3, 2015



~~The Honorable~~ R. Lawton McIntosh, Circuit Judge

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG) IN THE PROBATE COURT
CASE NO. 2014-ES-45-00179

Gwendolyn Leveritt,)
Petitioner,)

vs.)

FINAL ORDER

Lorine C. Pressley as Personal)
Representative of the Estate of Ervin)
Christopher Pressley,)
Respondent.)

Trial Date: March 12, 2015
Trial Judge: Betty F. Matthews, Judge of Probate for Williamsburg County
Petitioner's Attorney: Michael C. Abbott, Esquire
Respondent's Attorney: Gregory B. Askins, Esquire and
William M. O'Bryan, Jr., Esquire
Court Reporter: Erica Norwood

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This matter is before the Court on a Petition for Formal Testacy filed by the Petitioner, Gwendolyn Leveritt, on December 30, 2014. A four page document purporting to be the Last Will and Testament of Ervin Christopher Pressley which was dated February 5, 2008, was filed with this Court. The Court notes that at the time the Will was executed, the Will provides that the Testator resided in Bronx, State of New York. The Will was purportedly signed by Ervin Pressley, the decedent, in front of two witnesses who also signed the document. Both witnesses also signed an Affidavit of Subscribing Witness before a notary public for the State of New York.

The Respondent filed an Answer/Response to the Petition for Formal Testacy requiring proof of the Will and if found to be the Last Will and Testament of the decedent, filing the same as required by statute. In addition, the Respondent, requested a declaratory judgment be issued declaring that the Will does not dispose of the decedent's property and therefore the decedent's assets will pass as if he died intestate. Also, the respondent requests that she be allowed to continue to serve as Personal

Representative of the estate since she has already qualified as the Personal Representative under an informal appointment and she is also named as the substitute Executor/Personal Representative under the purported Last Will and Testament.

At the call of the case, the Petitioner appeared along with her attorney and the Respondent appeared with her attorneys. The Court heard arguments from Mr. Abbott and Mr. Askins concerning the positions of their clients. Each party introduced several documents. The Respondent admitted that she has no evidence which shows that the decedent, who was the son of the Respondent, revoked the Last Will and Testament in question by executing another Will or otherwise. The Respondent contends that the Will is without force because it does not provide for the disposition of the assets of the decedent.

The parties stipulated that Ervin Pressley and Erica Pressley were married to each other in New York on July 7, 2007. No children were born of the marriage and Ervin Pressley had no other children and Ervin Pressley died without issue. Ervin Pressley died on January 25, 2014, at which time he was a resident of Williamsburg County, South Carolina. A Judgment of Divorce was filed in the New York State Supreme Court in Bronx County, New York, on September 24, 2014, granting the decedent, Ervin Pressley, a divorce from his wife, Erica Pressley, who is the daughter of the Petitioner, Gwendolyn Leveritt. In addition, that Judgment of Divorce approved a Stipulation of Settlement dated November 14, 2012, between Ervin Pressley and Erica Pressley. A hearing was held on November 14, 2012, at which time both Ervin Pressley and Erica Pressley appeared and testified and both were represented by separate counsel. The Summons and Complaint had been filed by the Ervin Pressley as Plaintiff on October 18, 2011. A copy of the Judgment of Divorce with the attached Stipulation of Settlement was introduced into evidence.

After the death of Ervin Pressley, Erica Pressley filed an Order To Show Cause in the same Court in New York that previously heard the divorce case and issued the Judgment of Divorce. Erica Pressley sought to have the divorce abated because the Divorce Decree was not filed prior to the time

that Ervin Pressley died. In addition, she wanted the Stipulation of Settlement which resolved the property issues between the parties to be declared null and void. She also sought further relief including requiring an insurance company to pay her the proceeds of a policy which named Lorine Pressley as beneficiary at the time of the death of Ervin Pressley. By Decision/Order with the same caption dated June 30, 2014, the same Court and Judge issued an Order upholding the divorce, upholding the Stipulation of Settlement and refusing to interfere with the distribution of the life insurance policy. In essence it affirmed the Judgment of Divorce. A copy of the Order To Show Cause with attached exhibits was introduced as well as a copy of the Decision/Order.

Both parties agree that Erica Pressley and Ervin Pressley were divorced. Section 62-2-507 of the 1976 Code of Laws of South Carolina, as amended, provides in sub-section (c) that the provisions of wills and nomination in a fiduciary or representative capacity that are revoked by this section are given effect as if the former spouse predeceased the decedent. Section 62-2-802 provides a person who is divorced from the decedent at the time of the decedent's death is not a surviving spouse. The THIRD item of the Will provides that all of the decedent's property be disposed of as follows: All property "... I give, devise and bequeath to my spouse, ERICA DANELLE LEDSOE-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 LEVERITT and LORINE PRESSLEY; equally or all to the survivor between them". Because of their divorce any bequest to Erica Pressley is treated as if she predeceased the decedent and therefore does not inherit. To determine who does inherit, the Court has to look at the intent of the Testator, and in this case, the intent of the Testator can be gleaned from the Last Will and Testament as well as the Judgment of Divorce, Stipulation of Settlement and the other documents filed as evidence.

Both Mr. Askins and Mr. Abbot informed the Court that neither had found any cases on point in South Carolina. However, Mr. Askins cited two cases in his oral argument and further in a written brief, from states that have adopted the Uniform Probate Code and had statutes similar at the time to

the current South Carolina statutes. Both cases held that the statutes treat the divorced spouse as if she had pre-deceased the decedent, but held the statutes did not apply to the rest of the Will. Each Will should have to be analyzed to ascertain the testator's intent and the Will should be strictly construed. The requirement in the Wills for the spouse predeceasing the decedent before providing for other dispositions of assets was present in both cases. Since the divorce was prior to the death of decedent in each of the cases, the statutes treated the bequests to the surviving spouse as if she had predeceased the decedent. However, both courts also found that the requirement that the spouse not survive the decedent for others to inherit had not happened. The Court finds that the Will does not provide for the distribution of the decedent's assets because in fact Erica Pressley did survive the decedent. The obvious intent of the decedent was to provide for his wife in the event the two were married at the time of his death or to both his or her families, if the parties were married at the time of her death prior to or at the same time as his death. The literal wording in the Will provides that the only condition for anyone else receiving any assets under the terms of the Will would be for the spouse, Erica Danelle Bledsoe-Pressley, to not survive the decedent.

Even though our statutes declare that the former spouse is presumed to have predeceased the decedent in the case of a valid divorce which is true in this case, the statutes do not go so far as to say the entire Will would be read as though the former spouse had predeceased the Testator, only the provision for the Testator's former spouse. If the legislature had intended that the provisions of the previously cited statutes specifically require that the entire Will be read as though the former spouse had predeceased the Testator, it would have specifically provided the same. The Court finds no such provision. The Court finds that the decedent's assets pass as if he died intestate.

The Court notes that in the FOURTH paragraph of the Last Will and Testament the decedent provided as follows in the appointment of the Executor of his Last Will and Testament: "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 reason ceases to act as Executor, I hereby appoint Lorine Pressley as

Executor of this my Last Will and Testament." The Will contemplates several possibilities for the spouse not being the Executor including her prior death and "for any reason" if she could not continue to act as Executor. The Court finds that the Testator would not want to divide his assets in a Stipulation of Settlement which was approved by the Judgment of Divorce and after his divorce still leave half of his estate to his mother-in-law or to any other heirs of the former spouse. The broad language concerning the appointment of the Executor and/or successor Executor is absent in the contingent bequest as shown herein.

The Court finds the Will should be admitted for filing pursuant to Section 62-2-901 of the 1976 Code of Laws of South Carolina, as amended, and finds it to be the Last Will and Testament of the decedent, Ervin Christopher Pressley. The Court finds that this Will does not effectively dispose of the decedent's property so the decedent's assets will pass as if he died intestate. The contingencies that the former spouse not survive him having not occurred, the remaining provisions concerning the disposition of the assets of the estate are not relevant.

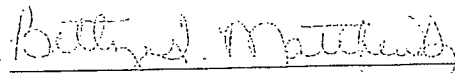
The former spouse is, by statute and by the Stipulation of Settlement, not allowed to serve as the Executor/Personal Representative of the estate of her former husband. Lorine Pressley will continue to act as Personal Representative as she has been appointed by informal probate and she is named in the Will to serve if Erica Pressley does not qualify to serve. The Court notes that the Petitioner requested that the estate be filed by exemplification in Rochester County, New York. The Court finds that the Personal Representative should properly probate the estate to include the filing exemplified copies of relevant estate documents where required. According to the testimony of Erica Pressley, the house in Rochester, New York, is owned by and titled in the name of an LLC which was owned by the decedent and Erica Pressley. If the property is owned by an LLC then there may be no need to file exemplified copies in New York. It is therefore

ORDERED that the Last Will and Testament of Ervin Christopher Pressley dated February 5, 2008, consisting of four typewritten pages with the last page being the Affidavit of Subscribing

Witnesses, is hereby admitted for filing as the Last Will and Testament of Ervin Christopher Pressley. The Court finds that this Will does not dispose of the decedent's property as the contingency that the former spouse not survive him did not occur. Therefore the decedent's assets will pass as if he died intestate. It is

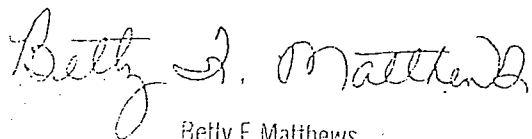
FURTHER ORDERED that Erica Pressley, the former spouse of the decedent, is also statutorily barred and barred by the Stipulation of Settlement between the parties which was incorporated into the Judgment of Divorce in New York, from serving as Executor/Personal Representative of the estate. Lorine Pressley, as the sole intestate heir of the decedent and as the person named in the Will if the former spouse cannot serve shall continue to serve as Personal Representative. Lorine Pressley, having already qualified as Personal Representative of the estate, shall continue to act as the same and shall fully probate the estate of the decedent both in South Carolina and by exemplification elsewhere if deemed to be proper when the actual ownership of the property in Rochester is determined.

AND IT IS SO ORDERED.



Betty F. Matthews
Probate Judge for Williamsburg County

A CERTIFIED TRUE COPY



Betty F. Matthews
Probate Judge
Williamsburg County

Kingstree, South Carolina
April 2, 2015.

2015 APR -2 PM 4:07

STATE OF SOUTH CAROLINA

COUNTY OF WILLIAMSBURG

IN THE MATTER OF: ERVIN CHRISTOPHER PRESSLEY

(Decedent)

IN THE PROBATE COURT

CASE NUMBER: 2014-ES-45-00179

***COMPLETE THIS SECTION ONLY IF FILING PETITION FOR FORMAL TESTACY AND/OR FORMAL APPOINTMENT**

Gwendolyn Leverett,

Petitioner

vs.

Lorine C. Pressley, as Personal Representative of Estate of Ervin Christopher Pressley,

Respondent

APPLICATION FOR INFORMAL

(check any that apply)

☐ PROBATE OF WILL

☐ APPOINTMENT

***PETITION FOR FORMAL**

☒ TESTACY

☐ APPOINTMENT

Applicant/Petitioner: Gwendolyn Leverett

Address: 825 Boynton Avenue, Apt. 3C, Bronx, NY 10473

Telephone: (917) 439-6179

I. ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.

1. If this is a formal filing, please explain on page 3 attach pleadings pursuant to *SC Rules of Civil Procedure*.

***NOTE: IF THIS IS A FORMAL PROCEEDING, IN ADDITION TO THIS FORM PETITION, YOU MUST ALSO FILE A SUMMONS (FORM SCCA 401PC), AND PAY THE STATUTORY FILING FEE OF \$150.00. A HEARING IN THE PROBATE COURT ON THE PETITION MAY BE REQUIRED.**

2. Decedent Information:

Full Legal Name

(including all known names): Ervin Christopher Pressley

Date of Birth: 7-10-68

Date of Death: 1-25-14

Age at date of death: 45

3. Venue for this proceeding is proper in this County because:

- ☒ Decedent was domiciled in this County at date of death:

Address: 1485 Old Georgetown Road, Hemingway, SC 29554, Williamsburg County, State: South Carolina

- ☐ Decedent was not domiciled in South Carolina, but property of Decedent was located in this County at date of death at:

Address: County State: South Carolina

- ☐ Decedent has a right to take legal action in this County because:

If the above address is the address of a nursing home, prison, or other residential facility, please give the last address of the Decedent prior to entering a facility:

FORM #300ES (1/2014)

62-2-504, 62-3-102, 62-3-203, 62-3-301, 62-3-302, 62-3-303, 62-3-308, 62-3-311, 62-3-401, 62-3-402, 62-3-404, 62-3-409, 62-3-414, 62-3-601, 62-3-602, 62-3-704, 62-3-804, 44-23-1090, 44-23-1120

Page 1 of 6

2014 DEC 30 PM 3:00
FILED
CLERK OF PROBATE
WILLIAMSBURG COUNTY

4(a). Names and addresses of beneficiaries (devisees) named in the Will.

Full Legal Name (including all known names)	Year of Birth	Full Address	Relationship to Decedent
Lorine C. Pressley	1946	1485 Old Georgetown Road, Hemingway, SC 29554	mother
Gwendolyn Leverett	9-4-48	825 Boynton Ave., Apt. 3C, Bronx, NY 10473	friend

(use additional sheet if necessary)

4(b). Names and addresses of intestate heirs who are not devisees (persons who inherit if Decedent left no Will).

Full Legal Name (including all known names)	Year of Birth	Full Address	Relationship to Decedent
Lorine C. Pressley	1946	1485 Old Georgetown Road, Hemingway, SC 29554	mother

(use additional sheet if necessary)

4(c) Did all of the above persons survive one hundred and twenty (120) hours since the death of Decedent?

☒ YES ☐ NO If no, please explain on page 3.

5. Did Decedent have any change of marital status or the birth or adoption of any children after execution of this Will, if one exists, or has any child of the Decedent been born since his/her death, or is any birth of a child of the Decedent anticipated? (This includes illegitimate children.)

☐ NO ☒ YES If yes, please explain, on page 3.

6. To the best of your knowledge, was the Decedent a patient in a non-private State of South Carolina mental health facility during his/her lifetime?

☒ NO ☐ YES If yes, please explain, on page 3.

7. Has a Guardian or Conservator ever been appointed by the Court for this person?

☒ NO ☐ YES If yes, please explain on page 3.

8. Has a Personal Representative of the Decedent been appointed prior to this date by a Court in this State or elsewhere?

☒ NO ☐ YES If yes, please state details, including name and address of such Personal Representative on page 3.

9. Have you received or are you aware of any Demands for Notice (FORM 111ES) of any probate or appointment proceeding concerning the Decedent that may have been filed in this state or elsewhere?

☒ NO ☐ YES If yes, please state details, including names and addresses on page 3.

FILED
 2014 DEC 30 PM 3:01
 CLERK OF PROBATE
 WILLIAMSBURG COUNTY, SC

10. Have more than ten (10) years passed since the Decedent's death?
☒ NO ☐ YES If yes, please state circumstances authorizing tardy probate on page 3.
11. The Decedent died with probate personal property having an approximate value of \$TBD and/or probate real estate having an approximate value of \$TBD. (Note: A complete inventory of probate assets with fair market values to be filed after Personal Representative is appointed.)
12. After the exercise of reasonable diligence, are you aware of any unrevoked Will and/or Codicil(s), other than the one(s) attached hereto, relating to property in this State?
☒ NO ☐ YES If yes, please explain on page 3 and then proceed to Section II.

II. IF A WILL EXISTS, PLEASE COMPLETE THIS SECTION.

1. Regarding the Decedent's Will:

- ☐ The original is attached.
☒ The original is in the Court's possession.
☐ An exemplified (authenticated) copy of a Will probated in another jurisdiction is attached.
☐ An exemplified (authenticated) copy of a Will not probated in another jurisdiction is attached.
☐ The Will is lost, destroyed, or otherwise unavailable, however, a description of its contents is attached.

2. The execution date of the Will was: 2-5-08
 Codicil(s): _____

3. Does Decedent's Will refer to a Memorandum (list disposing of tangible personal property)?

☒ NO ☐ YES If yes, attach hereto.

4. To the best of your knowledge, do you believe the Will listed above is the Decedent's validly executed last Will?

☒ YES ☐ NO If no, please explain on page 3.

5. To the best of your knowledge, is any witness to the will an "interested witness" (devisee, spouse of a devisee, or issue of a devisee)?

☒ NO ☐ YES If yes, please explain on page 3.

COMPLETE EXPLANATION(S) FOR QUESTIONS IN SECTIONS I and II HERE.
 (If more space is required, use additional sheets.)

1. The Personal Representative opened this Estate as intestate, however, the Decedent left a Will which was filed on September 17, 2014. Therefore, the Petitioner seeks this Court to declare the Will to be valid and to require the Personal Representative to administer the Estate in accordance with its terms. Also, the Petitioner seeks an accounting and to require the Personal Representative to open an ancillary estate in New York to marshal any assets of the Estate in that venue.

5. The Decedent was granted a divorce from Erica Pressley on November 20, 2012 in the State of New York.

FILED
 2014 DEC 30 PM 3:01
 CLERK OF PROBATE
 WILLIAMSBURG COUNTY, SC

III. IF APPLYING FOR INFORMAL OR FORMAL APPOINTMENT, PLEASE COMPLETE THE FOLLOWING.

1. If the Applicant/Petitioner is not the proposed Personal Representative(s), list name and address of the person you are proposing be appointed as the fiduciary:
Lorine C. Pressley, 1485 Old Georgetown Road, Hemingway, SC 29554
2. Priority for appointment of the proposed Personal Representative (whether applicant or nominee) is:
 - ☒ named as Primary Personal Representative in Will
 - ☐ named as Alternate Personal Representative in Will
 - ☐ nominee of Primary Personal Representative in Will
 - ☐ nominee of Alternate Personal Representative in Will
 - ☐ surviving spouse of Decedent who is devisee of Decedent or nominee of said spouse
 - ☐ other devisee of Decedent (describe): _____ or nominee of said devisee
 - ☐ surviving spouse of Decedent or nominee of said spouse
 - ☐ other heir of Decedent (describe): _____ or nominee of said heir
 - ☐ creditor (forty-five (45) days after death must have passed) or nominee of creditor; written statement of claim, FORM 371ES, is attached
 - ☐ other (describe): _____
3. List below the name(s) of any other person(s), if any, having an equal or higher priority of appointment than the proposed Personal Representative:
N/A

IV. ALL APPLICANTS/PETITIONERS MUST COMPLETE VERIFICATION.

VERIFICATION

The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the undersigned's knowledge, information and belief, and hereby submits to the Court's jurisdiction in this matter.

SWORN to before me this 29th day
of DEC, 20 14

Notary Public for South Carolina
My Commission Expires: 5/4/23

Signature of Applicant/Petitioner: Gwendolyn Leverett
Print Full Name: Gwendolyn Leverett
Address: 825 Boynton Avenue, Apt. 3C
Bronx, NY 10473

Telephone (work): _____
(Home): (917) 439-6179
(Cell): _____
Email: _____
Relationship to Decedent/Estate: Friend

SWORN to before me this 29th day
of January, 20 14

Karen C. Howard
Notary Public for South Carolina
My Commission Expires: 10-20-18

Signature of Co-Applicant/Co-Petitioner: _____
Print Full Name: _____
Address: _____

Telephone (work): _____
(Home): _____
(Cell): _____
Email: _____
Relationship to Decedent/Estate: _____

ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a Will executed _____

be Informally. ☐ GRANTED ☐ DENIED.

Executed this _____ day of _____, 20____

Probate Court Judge

☐ For formal probate of Will, see separate order executed _____.

ORDER OF INFORMAL APPOINTMENT

IT IS HEREBY ORDERED that the above Application for Appointment be granted upon the filing of an appropriate bond, if applicable, and upon the signing of the Qualification and Statement of Acceptance of appointment.

- ☐ Fiduciary Bond in the amount of \$ _____
- ☐ Bond not required for Personal Representative nominated by Will
- ☐ Bond not required as Personal Representative is sole heir or sole devisee
- ☐ Bond not required as Personal Representative is state agency, bank, or trust company
- ☐ Bond waivers filed
- ☐ See order dated _____
- ☐ Other: _____

Notice to Creditors

- ☐ Required
- ☐ Not Required

Executed this _____ day of _____, 20____

Probate Court Judge

☐ For formal appointment of Personal Representative, see separate order executed _____.

FILED
2014 DEC 30 PM 3:01
BETTY F. MATTHEWS
JUDGE OF PROBATE
WILLIAMSBURG-COURTLY, SC

QUALIFICATION AND STATEMENT OF ACCEPTANCE

I accept this appointment and agree to perform the duties and discharge the trust of the office of Personal Representative of this estate. I further submit personally to the jurisdiction of the Court in any proceeding relating to the Estate.

Signature: _____
Print Full Name: _____
Address: _____
Telephone (Work): _____
(Home): _____
(Cell): _____
Email: _____

Signature: _____
Print Full Name: _____
Address: _____
Telephone (Work): _____
(Home): _____
(Cell): _____
Email: _____

Attorney: _____
Address: _____
Telephone: _____
Email: _____

FILED
2014 DEC 30 PM 3:01
ESTATE MATTERS
CLERK OF PROBATE
WILLIAMSBURG COUNTY, VA SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

IN THE PROBATE COURT
CASE NO. 2014-ES-45-00179

IN THE MATTER OF THE ESTATE OF)
ERVIN CHRISTOPHER PRESSLEY)

Gwendolyn Leveritt)

Petitioner,)

vs.)

Lorine C. Pressley, as Personal)
Representative of the Estate of)
Ervin Christopher Pressley)

Respondent.)

ANSWER/RESPONSE TO PETITION
FOR FORMAL TESTACY

FILED
2015 FEB 26 PM 2:23
JUDGE J. M. HENKES
CLERK OF PROBATE
WILLIAMSBURG COUNTY, SC

The Respondent, Lorine C. Pressley, responds to the Petition of Formal Testacy as follows:

FOR A FIRST DEFENSE:

1. The Respondent lacks information with which to answer or admit that the purported will of Ervin Christopher Pressley consisting of four (4) pages and being dated February 5, 2008, is the last will of Ervin Christopher Pressley and therefore denies the same and demands strict proof thereof.

FOR A SECOND DEFENSE:

The Respondent reiterates each and every allegation of the first defense fully stated herein.

1. If the will is admitted, the Court should find that the decedent died intestate because the will does not provide for the distribution of the decedent's assets unless Erica Pressley did not survive decedent when in fact she did survive the decedent.

2. The THIRD paragraph of the will, basically gives, devises and bequeaths all the property of the decedent to his then wife, Erica Danelle Bledsoe-Pressley, "if my said spouse shall survive me". In addition, the provision goes on "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 LEVERITT and LORINE PRESSLEY, equally or to the survivor between them". Pursuant to South

Carolina law, Erica Danelle Bledsoe-Pressley is not a surviving spouse of Ervin Christopher Pressley because the two were divorced by Judgment of Divorce rendered in the New York State Supreme Court, Bronx County by Judgment of Divorce under Index 12012-11 in a case captioned Ervin Pressley, Plaintiff vs. Erica Pressley, Defendant and signed by the Honorable La Tia W. Martin, J.S.C., on September 24, 2014. Subsequently, the same Court issued its Decision/Order in essence upholding the divorce, upholding the Stipulation Of Settlement between the parties, as well as failing to grant other relief requested by the Defendant, Erica Pressley, pursuant to an Order to Show Cause.

3. Pursuant to South Carolina law, specifically Sections 62-2-802, Erica Danelle Bledsoe-Pressley would be deemed not to be a surviving spouse of the Decedent in this case. In addition, Section 62-2-507(e) of South Carolina Laws of 1976 Laws of State of South Carolina, as Amended, provides "Provisions of a governing instrument and nomination in a fiduciary or represent a capacity that are revoked by this section are given affect as if the former spouse predeceased the Decedent".

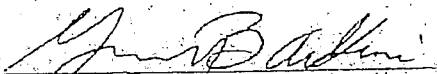
4. The obvious intent of the decedent was to provide for his wife in the event the two were still married at the time of his death. The divorce, however, pursuant to statutes, notwithstanding the Stipulation Of Settlement which also waived any right of the former spouse to inherit from the decedent, clearly prevents the former wife from inheriting under the terms of the will, the same which is not the claim of the Petitioner in this matter. However, the intent of the Testator has to be interpreted from the will itself since there is no other evidence of what the Testator intended. As such, the literal wording in the will provides that the only condition of anyone else receiving any assets under the term of the will would be for the spouse, Erica Danelle Bledsoe-Pressley, to not survive the decedent. In fact, Erica Danelle Bledsoe-Pressley did survive the decedent herein. Even though our statutes declare that the former spouse is presumed to have predeceased the decedent in case of a valid divorce which is true in this case, the statutes do not go so far as to say that the entire will be read as though the former spouse had predeceased the Testator, only the provisions for the Testator's former spouse. If the Legislature had intended that the

provisions of Section 62-2-507 and 62-2-802 specifically require that the entire will be read as though the former spouse had predeceased the Testator it would have specifically provided the same. It did not.

5. The contingency of the will and the clear intent of the decedent's contingent disposition to Gwendolyn Leveritt and Lorine Pressley fails because the contingency required specifically by the decedent was not met. There being no other provision in the will, no extrinsic evidence as well as the provision of the cited statutes, the Court must find that the decedent's assets pass as if he died intestate and thus the Respondent herein, Lorine Pressley, will be the sole surviving heir of the decedent, Ervin Christopher Pressley. Basically, the contingency for the alternate disposition did not occur in that Erica Danelle Bledsoe-Pressley did survive the decedent.

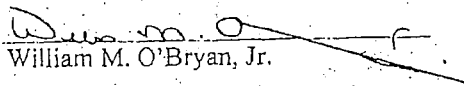
MP
PS
Wherefore, the Respondent requests the Court to dismiss the Petition of Formal Testacy or if the will is filed and/or admitted to declare the will does not dispose of the decedent's property and for all intent and purposes the decedent's assets will pass as if he died intestate. As such the contingency that the former spouse, Erica Danelle Bledsoe-Pressley, survive him having not occurred, though she is barred from inheritance or acting as Personal Representative by statute, the will fails to provide for any other contingency, such as the divorce, and the assets of the decedent should descend to his heirs at law.

ASKINS, CHANDLER & ASKINS, LLP
Attorneys for the Respondent

BY: 

Gregory B. Askins
PO Box 10 - 307 E. Broad Street
Hemingway, SC 29554
Phone: (843) 558-2588
Fax: (843) 558-3234

O'BRYAN AND O'BRYAN
Attorneys for the Respondent

BY: 

William M. O'Bryan, Jr.

1 STATE OF SOUTH CAROLINA

2 COUNTY OF WILLIAMSBURG

CIRCUIT COURT
2015-CP-45-00198

3
4 GWENDOLYN LEVERITT,
Plaintiff,

5 -vs-

TRANSCRIPT OF RECORD

6 LORINE C. PRESSLEY, as personal
7 representative of the Estate of
8 ERVIN CHRISTOPHER PRESSLEY,
Defendant.

9
10 Heard on Wednesday, October 28, 2015

11 Kingstree, South Carolina

12
13 BEFORE:

14 THE HONORABLE R. LAWTON McINTOSH

15
16
17 APPEARANCES:

18 Counsel on Behalf of the Plaintiff:
Jon Rene Josey, Esq.

19
20 Counsel on Behalf of the Defendant:
Larry G. Reddeck, Esq.
Gregory B. Askins, Esq.

21
22
23 Cheri L. Young, RPR
Circuit Court Reporter
24 P O Box 5232
Aiken, SC 29804-5232
25

1 ON OCTOBER 28, 2015 AT 11:56 A.M.:

2 THE COURT: Leveritt versus Pressley.

3 This is an appeal. I haven't read
4 anything. Bear with me.

5 MR. JOSEY: I can give you a short
6 introduction.

7 THE COURT: Okay. Give me background.
8 Tell me what the issues are and we'll go from
9 there.

10 MR. JOSEY: Well, I'm Renee Josey. I
11 represent the Appellant and the Appellant is the
12 mother-in-law of the Decedent. The Respondent is
13 the mother of the Decedent. So, the Decedent
14 dies. The Decedent had a will done in 2012, I
15 believe it was. He dies in 2014.

16 His will is typical of a lot of married
17 folks where it says, leaving stuff to the wife.
18 Well, in the interim between 2012 and 2014 he
19 gets divorced. And that's where it gets
20 interesting.

21 THE COURT: Did he name the wife or just a
22 generic wife?

23 MR. JOSEY: He named the wife and he named
24 the mother-in-law.

25 THE COURT: And he never --

1 MR. JOSEY: Never changed it in the two
2 years of -- after he got --

3 THE COURT: Even after the divorce?

4 MR. JOSEY: Even after the divorce.

5 THE COURT: Isn't there a statute saying
6 there's --

7 MR. JOSEY: That's what we're here about;
8 yes, sir.

9 THE COURT: Okay.

10 MR. JOSEY: It's our position that the will
11 that was admitted to probate is a valid will. It
12 met all the statutory requirements. It was done
13 in New York because this couple resided in New
14 York. And then he came home when he was ill, and
15 his mother took care of him and he died here.

16 THE COURT: So, the law that controls would
17 be South Carolina law.

18 MR. JOSEY: That's -- it's been probated
19 here because he was a resident here at the time.

20 THE COURT: Okay.

21 MR. JOSEY: Now his will, I think, meets
22 the requirements of the Uniform Probate Code --

23 THE COURT: Okay

24 MR. JOSEY: -- in that it had sufficient
25 witnesses.

1 THE COURT: So nobody contested the
2 validity of the will when executed but the effect
3 of it since the divorce?

4 MR. JOSEY: That's right. That's right.

5 THE COURT: All right.

6 MR. JOSEY: It's our position that the will
7 was validly done, validly admitted to probate.
8 And that it met all the statutory requirements.
9 I don't think that's contested.

10 THE COURT: Is that an issue with you as
11 far as an execution?

12 MR. REDDECK: No, sir, Your Honor.

13 THE COURT: So let me ask you this,
14 Mr. Josey. Don't you have to have some
15 affirmative act by the Decedent subsequent to the
16 divorce to reaffirm the will in order for it to
17 be valid?

18 MR. JOSEY: Well, maybe for the wife.

19 THE COURT: I don't know. That's just my
20 memory.

21 MR. JOSEY: We're on -- I think we're in
22 new territory here where there's not a lot of
23 case law in the country, much less South
24 Carolina.

25 THE COURT: Okay. But we have a statute on

1 that?

2 MR. JOSEY: We do have a statute. And I'll
3 give you the reference.

4 THE COURT: Please do.

5 MR. JOSEY: The brief that was done was
6 done by one of my associates. It's almost maybe
7 too thick. It's got too many --

8 THE COURT: More than 10 pages.

9 MR. JOSEY: I'm trying to make it simple
10 here. So we got a will that's valid. Our
11 contention is that it's non-ambiguous. It says
12 clearly: I leave to wife, if wife pre-deceases
13 me, I leave to these two ladies. And it names the
14 two ladies, mama and mother-in-law. By name, not
15 by category but by name.

16 And then the probate judge, what she did
17 was she took the statute that we're going to talk
18 about --

19 THE COURT: Which is what number?

20 MR. JOSEY: Well, the main one is 62-2 --
21 I've got the Probate Code here if you'd like a
22 copy of it.

23 THE COURT: Have you got a copy?

24 MR. REDDECK: I have a copy, both of them.
25 There's two of them, Your Honor.

1 THE COURT: Thank you.

2 MR. JOSEY: What the statute essentially
3 says is that it bars an ex-wife from collecting
4 on a will by making her pre-deceased even if
5 she's still alive. It says: A spouse that's
6 named in a will that gets divorced shall be
7 treated as pre-deceased.

8 What the statute doesn't say is anything
9 about mothers-in-law.

10 THE COURT: So basically --

11 MR. JOSEY: Now --

12 THE COURT: -- the same situation -- and
13 I'm sorry to interrupt you.

14 MR. JOSEY: Go ahead.

15 THE COURT: I keep doing that.

16 If I were disclaimed under a will then I'm
17 treated as being pre-deceased but then my heirs
18 would take into that scenario. In other words,
19 if I were -- my mother would die tomorrow and I
20 say I don't want anything, I revoke -- or what's
21 the term I'm looking for -- I disclaim anything
22 under the will.

23 That doesn't mean my side -- my children
24 would not take.

25 MR. JOSEY: It doesn't invalidate the

1 will.

2 THE COURT: That's right.

3 MR. JOSEY: And what the probate judge did
4 here was invalidate the will. And she basically
5 declared it intestacy because she said the will
6 could no longer possibly represent the intent of
7 the testator.

8 Our position is that if you've got an
9 unambiguous will, you can only look to the four
10 corners of that will to decide what his intent
11 was.

12 Now, here we've got a statute that does bar
13 one thing but it doesn't invalidate the whole
14 will. So we've still got a valid will that you
15 look within the four corners of it to determine
16 what his intent was.

17 And there's plenty of cases out there from
18 other states, not plenty but there's some cases
19 where they say if you name a person as opposed to
20 a category, it's particularly presumed that you
21 know what you're doing because there are a lot of
22 folks who intentionally leave things to
23 stepchildren even after they've divorced the wife
24 or the spouse that's the parent of those
25 stepchildren because they bonded with those

1 stepchildren.

2 And for -- we have to presume that he
3 bonded with his mother-in-law because he named
4 her in this will.

5 THE COURT: So the wife doesn't take but
6 the mother-in-law does --

7 MR. JOSEY: Exactly.

8 THE COURT: -- because she's named in the
9 will.

10 MR. JOSEY: And she doesn't take all of
11 it. She splits it with the mother. It's a
12 50-50.

13 THE COURT: The probate judge says no
14 deal.

15 MR. JOSEY: The probate judge says, I'm
16 declaring that the will is ambiguous because of
17 the effect of that statute.

18 And there are two statutes. One statute
19 says the wife shall be treated as pre-deceased.
20 The other statute -- you've got it in front of
21 you. I'm not going to try to quote it, but it
22 basically says the same thing or has the same
23 impact. Neither one of them say you can't name
24 your ex-mother-in-law in your will.

25 THE COURT: Well, hang on. May I look at

1 this?

2 MR. JOSEY: Sure, sure.

3 (Pause.)

4 THE COURT: Okay.

5 MR. JOSEY: I've got two underlying
6 principles that kind of, I think -- you got the
7 statute. But then one underlying principle is
8 you got an unambiguous statutory-compliant will
9 that is admitted by the probate court that you
10 need to look within the four corners of it. And
11 we don't think the law will allow the probate
12 judge or you, Your Honor, to declare it ambiguous
13 when it's not ambiguous.

14 And the other underlying principle is
15 there's a long line of South Carolina cases that
16 say we disfavor intestacy. That if a will is
17 valid or can be valid or should be valid, it
18 needs to be given effect. And here we've got a
19 testator who names specific people, had plenty of
20 time to change his mind and rewrite his will if
21 he wanted to and he didn't.

22 We can't presume -- you know, maybe the
23 probate judge assumed he forgot about it. Maybe
24 he didn't forget about it, but that's not in the
25 record and you can't -- I think you'd have to

1 presume the guy wrote what he intended and that
2 what he intended is in the four corners of that
3 document. And it names two specific people, one
4 of whom happens to be a mother-in-law,
5 ex-mother-in-law.

6 That's our position, Your Honor.

7 THE COURT: Why is that not a valid
8 argument? I mean, although we're all sitting
9 here, you try to look behind what's going on and,
10 pop, you got to look after business. But at the
11 same time, how does the State statute in any form
12 or fashion affect mother-in-law? I understand
13 wife but the mother-in-law is a totally
14 independent person.

15 MR. REDDECK: Your Honor, my name is Larry
16 Reddeck. I represent the Respondent along with
17 Gregory B. Askins.

18 If I could in explaining this just step
19 back and take a look at the actual document --

20 THE COURT: Okay, sir.

21 MR. REDDECK: -- the will itself.

22 MR. JOSEY: And you should have this
23 notebook -- excuse me, Larry.

24 THE COURT: Is that it?

25 MR. JOSEY: Yeah, the record on appeal and

1 it's got the will if he's going to talk about it.

2 THE COURT: Just one second, Mr. Reddeck.

3 MR. REDDECK: Yes, sir.

4 MR. JOSEY: I'm sorry, Larry.

5 MR. REDDECK: No, that's no problem.

6 (Pause.)

7 THE COURT: I've got it.

8 MR. REDDECK: Your Honor, I think there's
9 two things that I -- well, first let me say when
10 I first looked at this, you know, I get the same,
11 same flush. You know, the wife's divorced, the
12 wife signed the property settlement. She's out.

13 But, our statute does not do that. And if
14 I could get -- explain that she's not totally --
15 I mean, it's -- her name is not totally out of
16 the will. She's totally prevented from
17 inheriting. And there's some comments that I
18 want to get to, to the reporter's comments and
19 that sort of thing.

20 THE COURT: You're looking at 62-2-802,
21 right?

22 MR. REDDECK: 802 and 507. But when you
23 look at the will, and that's where I think we
24 have to start, it does not say if my wife
25 pre-deceases me or if my wife does not inherit.

1 It says my -- "If my said spouse shall not
2 survive me."

3 Now he's referenced his spouse. And he's
4 made a condition precedent in this will. In
5 other words, he's made a condition that these
6 people, his issue and his mother-in-law and his
7 mother inherit or get this devise under this will
8 if that contingency happens.

9 And the statutes and the reporter's
10 comments do not continue on and say you treat
11 them completely as far as dispositive provisions
12 are concerned as if the wife pre-deceased. That
13 is not in the statute.

14 I want to also note before I forget it,
15 Judge, our legislature redid this Probate Code a
16 ton in 2013. I thought I used to know it pretty
17 well, but I have to go back and dig every time I
18 get something because I'm scared of something
19 they changed.

20 They changed some major things and some
21 simple things. They made some changes with these
22 statutes. All of this, the 2013 amendments apply
23 to this gentleman because he died, I believe it
24 was February 25, 2014. These went into effect
25 the first of '14.

1 THE COURT: Okay.

2 MR. REDDECK: But when you look at that,
3 that's a condition precedent. In other words,
4 that's not anything giving her property. It's
5 not taking any property away from her. This part
6 does not apply, it is not applied by those
7 statutes.

8 The probate judge looked at this will and
9 if you look at the order it says she looked at
10 this and one of their contentions, one of the
11 Appellant's contentions is that she considered
12 things she shouldn't and she lists what's she
13 considered was all these domestic orders,
14 property settlement, divorce, and rule to show
15 cause that were heard in New York.

16 Well, the statute, our statute 62-2-802,
17 and 2-507 require, require a Court to consider
18 those matters if they affect the marital
19 situation. And that's what she considered. So
20 she didn't look outside the will. She just
21 didn't look outside the will. She considered
22 those things which she was statutorily required
23 to consider. And this condition precedent is
24 important when you look at 62-2-802.

25 THE COURT: May I stop you right quick?

1 MR. REDDECK: Sir?

2 THE COURT: Specifically you're looking at
3 the third paragraph under the will?

4 MR. REDDECK: Yes, sir.

5 THE COURT: Okay.

6 MR. REDDECK: Yes, sir. I mean, and
7 that's -- I mean, that's the only dispositive
8 provision. And all of that is contingent upon
9 Erika Danielle Bledsoe Pressley not surviving the
10 Decedent. And it's clear in the record that she
11 survived him.

12 And to go into look and see, well, you
13 know, he may have -- his mother-in-law, and
14 wanted to look after his mother-in-law, his
15 mother. That's conjecture, Your Honor.

16 To properly construe this will as the law
17 says you look at the four corners.

18 THE COURT: Do they have any children?

19 MR. REDDECK: No, sir. No issue. That's
20 in the record, too. There's no issue.

21 The facts are basically as he stated them.
22 The only thing we -- I take real issue with is
23 the will didn't say, if my wife pre-deceases me
24 or if I don't have a surviving spouse. It uses as
25 mandatory "shall not survive me".

1 And what was the reason for that? I can
2 conjecture that maybe if both of them were gone
3 he wanted to take care of them.

4 THE COURT: Well, what about the fact that
5 he says "My wife", doesn't that pretty much
6 clarify it?

7 MR. REDDECK: Excuse me. No, he said "If
8 my said spouse".

9 THE COURT: Okay. Spouse, wife; whatever.

10 MR. REDDECK: But he's referenced spouse
11 and that's just a lazy lawyer thing to do instead
12 of saying Erika again, he said "my said spouse".
13 So it references that particular person.

14 THE COURT: Well, if you're gathering
15 intent as you're arguing from the document,
16 you're just saying no intent, look at the statute
17 only.

18 MR. REDDECK: I'm saying that what this --
19 the plain words say "said spouse". He referred
20 to the spouse, and if that spouse, that person
21 did not survive him. That's the document.

22 And when you look at 802 --

23 THE COURT: Okay.

24 MR. REDDECK: -- the comments -- the -- and
25 as you look at these things it talks about the

1 surviving spouse and it talks about how it
2 affects that person.

3 And then when you look at 62-2-507 and,
4 Your Honor, I'll be glad to hand it up. I went
5 back and looked at the original reporter's
6 comments to 62-2-507. The 2013 amendments don't
7 say in the reporter's comments, they don't say
8 anything about what we had was wrong or we're
9 saying something different.

10 When I looked at the original comments and
11 this is in our brief, and these original comments
12 say that 62-2-507 specifies only the
13 circumstances affecting the revocation of the
14 will, parts thereof, by operation of law after
15 the enactment of this code, divorce and other
16 matters there, which do not terminate the husband
17 and wife.

18 These circumstances work the revocation of
19 only those portions of the will benefiting,
20 empowering or appointing the former spouse thus
21 treating the former spouse as having pre-deceased
22 the testator. They work only if the will fails
23 to expressly provide otherwise and only as long
24 as testator and the former spouse remain
25 unmarried.

1 And when you look at the 507 which now
2 they, the legislature, I think, recognized the
3 fact that a lot of people have survivorship
4 deeds, bank accounts, investment accounts. So
5 they went back to include everything. And when
6 you look at the 507 comments at the very end --if
7 I can pull them out here, Judge.

8 THE COURT: Does it expand and cover life
9 insurance?

10 MR. REDDECK: Yes, correct, Judge. That's
11 right. They just wanted to cover everything.

12 When you look at the very last thing, this
13 section effectuates the Decedent's presumed
14 intent. Without contrary indication by the
15 Decedent a former spouse will not receive any
16 probate transfer as a result of the Decedent's
17 death. She won't receive it.

18 It didn't -- they had the opportunity to
19 expand that to say she's treated completely as
20 dead for the whole will. But they didn't do it.
21 And it's interesting to note in E of that code
22 section --

23 THE COURT: 507?

24 MR. REDDECK: Yes, sir. It's on the second
25 page, I think.

1 E says: Provision of the governing
2 instrument and nomination in a fiduciary or
3 representative capacity that are revoked by this
4 section or give an effect as if the former spouse
5 pre-deceased the Decedent. They used the words
6 pre-deceased there. They didn't use it anywhere
7 else in this statute.

8 It's a distinction. That's a difference.
9 It is a distinction and it's important.

10 THE COURT: Let me stop you so I can
11 understand what your argument is.

12 I was understanding from Mr. Josey that
13 what we're really fighting over is mother-in-law
14 taking any portion under this will, not the
15 wife. It's conceded she doesn't take but the
16 mother-in-law does take, according to him and you
17 say doesn't take; or, is that right?

18 MR. REDDECK: Yes, the wife -- there was a
19 separate order on the wife. And she tried to say
20 that these documents didn't preclude her but that
21 was a separate order. And that's not under this
22 appeal.

23 THE COURT: Okay.

24 MR. REDDECK: And what the probate judge
25 did is when she looked at it and she saw that

1 contingency, that condition precedent was not
2 fulfilled, then -- and when it's not fulfilled
3 then nobody takes. And I understand there's an
4 idea that you don't want an intestacy. And I
5 understand that. But there are cases. I got a
6 Nelson Versus Vance case. And, you know, we've
7 cited other cases that say, you know, if that's
8 what happens, that's what happens.

9 THE COURT: Right.

10 MR. REDDECK: And, to -- and what I was
11 getting at before was that I could come up with
12 conjectures that he wanted Ms. Erika, his wife at
13 the time, when she designates who it is I think
14 in this will. If she didn't survive these two
15 people needed help but they don't need help now
16 because she's still living. There's all kind of
17 conjecture. And I think to go to what the
18 Appellant wants to do is conjecture.

19 THE COURT: What I understood him to say is
20 we got a clear unambiguous will naming mother-in-
21 law that's not been changed and even though
22 there's a divorce where wife doesn't take, she's
23 still named.

24 MR. REDDECK: She's named but she's only
25 entitled under our probate law, under or our

1 common law to take if it's contingency.

2 THE COURT: Well, common law -- now in code
3 or code codified you have to look at the statute,
4 right?

5 MR. REDDECK: Yes, sir, you do. But this
6 statute does not address anybody other than the
7 spouse. If you look at these two statutes, they
8 talk only about the spouse. The comments in
9 the -- in this matter and there's another comment
10 I'd like to --

11 THE COURT: Sure.

12 MR. REDDECK: -- get for you. And it's to
13 802, and part of that. And when you look at that
14 it says that the -- anything under the common law
15 as descent distribution remains unchanged.

16 THE COURT: Okay.

17 MR. REDDECK: And statutorily, and we've
18 cited cases, you construe the statute strictly.
19 In other words, if the statute does not say that
20 the wife is presumed civilly dead for all
21 purposes then we say you can't go beyond that
22 statute.

23 The legislature had a great opportunity in
24 2013 to do something different than that.
25 There's a case Lancier -- In Re: Lancier, a New

1 York case. And I've got a copy of that I'd like
2 to hand up. And it's really the same facts. And
3 they said that just because the spouse was
4 determined to be -- could not take under these
5 statutes, they had no right to declare her
6 civilly dead for all purposes under the will.
7 And we think that case is just on point.

8 THE COURT: What is their New York statute
9 as compared to the statutes we have involved in
10 this case?

11 MR. REDDECK: It was close to the same
12 thing, Your Honor. But what they did in that,
13 after that -- and this is in our brief. What
14 they did after that was they passed a statute
15 that basically declared that the person would be
16 civilly dead. And it's -- it has the same effect
17 as provision E. 507-2(E) that says for all
18 purposes it's pre-deceased. That language is not
19 used in this, in either one of these statutes --

20 I picked up the wrong brief. I'm sorry,
21 Judge.

22 And in the -- like I say, and there are
23 other cases. And I think the reason that,
24 obviously, we don't have all these cases coming
25 about this is because what the statute said. It

1 only deals with what the spouse is entitled to.
2 In the Lancier case the statute that was changed
3 said any provisions, dispositions and
4 appointments made in such will shall take effect
5 as if the former spouse had died immediately
6 before the testator. They went in and put the
7 clear language.

8 And to put that kind of language in this
9 case goes beyond these statutes. These statutes
10 only pertain to what the spouse is to receive,
11 not what somebody else is to receive.

12 THE COURT: I'm still trying to get my arms
13 around it. Let me ask you this: What did the
14 probate court order in this case, in this
15 particular --

16 MR. REDDECK: What the court ordered in
17 this case was that the will was admitted to
18 probate as properly executed.

19 THE COURT: Okay.

20 MR. REDDECK: The -- and I think a big
21 distinction --

22 THE COURT: No, just give me, just
23 generally that and then --

24 MR. REDDECK: Okay. And then it appointed
25 the Respondent as the personal representative.

1 And it ordered that the -- he did not
2 effectively dispose of his property because the
3 condition precedent, that Erika didn't, did
4 not --

5 THE COURT: Pre-deceased.

6 MR. REDDECK: Pre-decedent -- if she did
7 not -- she survived him. So that condition did
8 not come about. In other words, she survived so
9 that condition that was in his will clearly
10 stated. It doesn't say: If Erika is my, is my
11 spouse or not or she's not surviving or if we
12 divorce or anything else.

13 Now, when you look at the fourth provision
14 of his will about the appointment, it says "If my
15 said spouse". He appoints her to be executor.
16 "In the event my said spouse shall pre-decease
17 me, fail to qualify or having qualified otherwise
18 dies, resigned, is removed from office, or for
19 any reason ceases to act as executor."

20 In other words, they went into some detail
21 there but this provision as to disposition is
22 absolutely clear as to the -- as to what they --
23 as to what he wanted.

24 When you look at these cases and let me
25 just, I don't want to beat this to death, but,

1 the legislature, the cases say, we cited Greer
2 versus Amy Sugg of South Carolina for a number of
3 these things about statutes. When the statute is
4 there the legislature is presumed to know what
5 the common law is. And the common law is if
6 there's a condition precedent and that's not
7 fulfilled then that can result in intestacy.
8 Like it did in this case. And when you look --

9 THE COURT: Let me -- I'm going to stop you
10 there. What effect does 802 have under your
11 construction at all on the scenario in this
12 case? Nothing.

13 MR. REDDECK: 802, Your Honor, both of
14 these statutes have an affect as to what they
15 don't say because you look at what they say and
16 it only applies to the spouse. It's what they
17 don't say that has an affect. And maybe I didn't
18 make that clear but I think that's -- I think
19 that's the real crux of this is what they don't
20 say. I mean, the reporter's comments say some
21 things but they all refer to what the -- what it
22 does to the spouse.

23 They don't refer to what it -- anything
24 about other situations with a will, like the New
25 York statute did. And they went back and they

1 said, okay, we want to do that. We don't want --
2 we want to take the wife's name out completely.
3 And they did that with that statute. Our statute
4 does not do that.

5 And I'm saying that when you strictly
6 construe the statute and you look at just what it
7 says, it doesn't say take her name out and that
8 provision about surviving, the requirement of
9 surviving. It does not say that. And when it
10 doesn't say it then you -- I don't think you go
11 forward and try to expand that because when you
12 do then you're presuming some intent. And the
13 only presumed intent that can be taken from these
14 statutes is the presumed intent that they didn't
15 want his spouse to take.

16 That's the only -- and the comments were
17 clear with that. That's the only presumption
18 that you get out of this statute. Not that you
19 knock her name out of everything or a spouse's
20 name out of everything.

21 And -- have I answered your question with
22 that, Judge?

23 THE COURT: Yeah. Let me just tell both of
24 you, I need to sit down and read this, read the
25 statutes. I think I understand the arguments and

1 I say I think because I'm not positive that I do,
2 but --

3 MR. REDDECK: Could I mention one other
4 thing?

5 THE COURT: Yeah. It's very interesting
6 but, yeah, you can say what you want.

7 MR. REDDECK: I've got it in the brief in
8 part of the comments and under Section
9 62-2-802(B) says: Matters of succession not
10 within the coverage of these two sections are not
11 affected, will continue to be governed by prior
12 South Carolina law.

13 So what we're saying is this is a matter of
14 succession that's governed by South Carolina
15 law. If there's a condition precedent, that
16 condition has to be fulfilled before they can
17 take.

18 THE COURT: Gotcha.

19 MR. REDDECK: And that's the -- I guess
20 that's kind of the crux of where we are. But
21 we've -- and I don't know if there's any other
22 cases I've got here that -- I'll be glad to hand
23 any of these up, if you want these other cases we
24 cited.

25 THE COURT: I'll read everything you give

1 me. I'm down here without a whole lot to do, so
2 I'll be glad to look at it.

3 MR. JOSEY: I have a few comments in reply
4 when you're ready.

5 THE COURT: I see you jumping.

6 MR. REDDECK: (Documents handed to the
7 Judge.)

8 THE COURT: Thank you, sir.

9 MR. REDDECK: Maybe I cannot have to get
10 back up if we could, Judge. We think it's a big
11 difference in pre-deceased and shall not
12 survive. We think that's the mandatory language.

13 THE COURT: I see. Thank you,
14 Mr. Reddeck.

15 Mr. Josey?

16 MR. JOSEY: Judge, just a couple things.
17 And I sort of apologize that I didn't do a reply
18 brief because it is a very interesting issue of
19 law that doesn't have a lot of clarity, I guess.

20 But I had some budgetary restraints in this
21 case that kept me from doing another reply
22 brief. In fact, Mr. Askins and I talked, we're
23 not exactly sure what we're fighting over yet.
24 We're trying to figure that out.

25 THE COURT: What kind of estate did he

1 leave? Just as a matter of -- I'm just asking.

2 MR. ASKINS: Your Honor, he was, it's
3 interesting because they had a stipulation of
4 settlement in the divorce case. She got a house
5 in New York, Bronx. He got a house in Rochester,
6 an LLC that never was transferred. Her house was
7 transferred. His wasn't because, we think
8 because of his illness.

9 Other than that the only asset is a 9-11
10 claim in New York. He was killed or he died as a
11 result of a lung injury he suffered in 9-11. He
12 worked as a parking attendant at a garage right
13 at ground zero.

14 THE COURT: Really?

15 MR. ASKINS: And he was trapped in the
16 basement of that for a good while.

17 THE COURT: So you assume that the house
18 and the LLC undistributed, and the 9-11 claim,
19 what kind of money? Not that it's relevant to my
20 analysis. I'm just curious.

21 MR. ASKINS: That's another good point.
22 There also may be a Workman's Compensation claim
23 that I know was filed. Now, I think the wife has
24 withdrawn from that. We're proceeding with
25 that. And that's a \$50,000 limit.

1 So that's, that's -- there are claims
2 against the estate for probably 30 or 40,000.
3 So, you know, my client paid the funeral bills,
4 such-and-such.

5 The 9-11 claim. The statute that set that
6 up says that what happens, you've got until July
7 of 2016 to file a claim. So the claim statute is
8 still open. Literally thousands, you can
9 imagine, of people have filed for this. When you
10 file your claim it goes before a commission to
11 see whether or not you have a valid claim.

12 THE COURT: Like a screening committee.

13 MR. ASKINS: A screening committee. And
14 we've done that. And I say we, it was -- the
15 other side of this is a firm that our guy hired
16 before he died. It turned from a survival claim
17 to a death claim.

18 THE COURT: Okay.

19 MR. ASKINS: That was the big firm in New
20 York. It's in the paper. Rene and I laugh about
21 it because they had all kind of inner --

22 MR. JOSEY: They have fallen apart

23 MR. ASKINS: -- affairs. They split up.
24 We still got our lawyer, a guy name Lapollo.

25 THE COURT: Lapollo.

1 MR. ASKINS: Chris Lapollo. Chris says,
2 don't worry, we have a valid claim. I said, okay,
3 what does that mean? Well, that means that
4 we've passed that stage and now the next
5 committee has to look at it to see what we think
6 your claim is worth. They haven't done that yet.

7 They will tell us what the claim is worth,
8 and we will tell them whether or not we accept
9 that claim. If we accept that claim they will
10 pay 10 percent of that claim to us now, and then
11 the other rest of the money would be due after
12 July of 2017. That gives us the July 16 claim
13 period time to expire, the appeals to be handled
14 and then they'll have the final disbursements.

15 Interestingly enough, the whole thing that
16 sets this up says attorney's fees are limited to
17 10 percent. So I'm asking Lapollo, does that
18 mean if they do fund this and they do do a
19 partial pay out of 10 percent, that's your fee
20 and you're out of it. Is that what it means. He
21 says, we don't know yet. Well, I can tell you
22 something. It's not going to happen like that.
23 We're not going to agree to that.

24 Now the other question you have and I don't
25 mean to be too long on this but it could be, he

1 tells me he estimates the claims could be 150- to
2 200,000. It could be 250,000. He doesn't know.
3 He doesn't have a handle on it. Now, here's the
4 great part of it. This is what Rene and I are
5 talking about. We don't know whether there's
6 enough money to pay anybody up there.

7 MR. JOSEY: They haven't fully funded the
8 recovery fund.

9 MR. ASKINS: They already ran out of
10 money. And so you got all kind of politicians up
11 there and movie stars and talk show hosts, all of
12 them saying we need to get some more money in
13 this thing.

14 MR. JOSEY: Senator Gillibrand is a big
15 advocate for re-funding or supplemental funding.
16 John Stewart was big a proponent of funding.

17 MR. ASKINS: Yeah, but in that regards you
18 don't have to have -- you don't have to be an
19 employee of the state or the country or anything.
20 You just have to be affected and have to prove
21 that you were at ground zero between 9-11 and I
22 think it's 60 days thereafter.

23 THE COURT: All right.

24 MR. ASKINS: And you have a medical.

25 THE COURT: I have all of that. How about

1 the house?

2 MR. ASKINS: The house is worth, we think,
3 30,000.

4 THE COURT: Thirty in the Bronx?

5 MR. ASKINS: In Rochester. No, the Bronx
6 house, the lady already got. It was worth half a
7 million.

8 THE COURT: I gotcha.

9 MR. ASKINS: This is a rental house out in
10 the middle of nowhere. My client was the
11 personal representative. By the way, she
12 qualifies as personal representative without a
13 will. It's an intestate thing. And then she was
14 named in the will, so it was re -- it was
15 affirmed.

16 MR. JOSEY: That wasn't opposed.

17 MR. ASKINS: That was not opposed. We have
18 tried our best to figure out how we can get that
19 house into the personal representative's name
20 where we can, you know, agree to sell it or do
21 something because we're losing a lot of money
22 trying to rent it. We get a tenant in there for
23 two months and then they tear it up and they're
24 gone. We have to repair it. It's just awful.

25 Even the claims that have been filed, the

1 money that the mother has put into this estate so
2 far, you know, paying those bills and doing other
3 things from her money, far outweighs the value,
4 we think, that's going to be.

5 We may not have anything but paperwork but
6 we're moving -- I'm pushing as hard as I can.

7 THE COURT: I gotcha.

8 MR. ASKINS: It's interesting from that
9 standpoint.

10 THE COURT: Sure.

11 MR. ASKINS: The law firm in New York that
12 handles the 9-11 claim handled, I'm thinking the
13 guy told me over, they had over 10,000 people try
14 to go through them. And then they -- there's
15 already been files and claims in New York about
16 them, they're able to collect 10 percent plus
17 their out-of-pocket costs. And when I found out
18 about it and read the article I don't know
19 whether Rene sent it to me or not, but it was
20 complaints that they're, like, saying we have
21 \$30,000 in costs, you know. They're going to get
22 25,000 attorney's fee, 10 percent at 250, then
23 they want 30 more and these people are losing
24 money.

25 So I talked to Lapollo, I said, how much

1 out-of-pocket do you have on us. I sent him
2 everything. He hasn't done a thing. He said, I
3 have to look into that. He looked into it. He
4 said, we don't really have anything out-of-pocket
5 on you guys. Well, put that in writing.

6 THE COURT: Put that in writing.

7 MR. ASKINS: But that's where it is.

8 THE COURT: Okay. Guys, I'm going --

9 Mr. Josey?

10 MR. JOSEY: Just a couple things, judge.

11 The Lancier case is what I haven't replied
12 to and they did raise it. It is interesting. If
13 you look in Lancier it said that there's a split
14 among the states as to how they've done the
15 statute. One of the options it says, I think
16 it's 14 states, have specifically -- the
17 legislature has specifically said if the spouse
18 dies the whole will is out.

19 Well our legislature has not done that. So
20 I don't think you should do it or the probate
21 judge should do it. The argument that this is a
22 pre-condition as opposed to something else. I
23 mean, it is a pre -- I guess if you want to call
24 it a pre-condition, it's a pre-condition but the
25 intent of that pre-condition is if my wife does

1 survive me I want her to get the whole estate.

2 I mean, that's the intent of saying only if
3 she's dead does it go to these contingent
4 beneficiaries. My position is that the statute
5 satisfies that contingency. Whether she's really
6 alive or not, I think the statute satisfies that
7 contingency as defining her as dead. If the
8 legislature wanted it to be more than that they
9 could say the whole will is thrown out if the
10 wife is mentioned at all. They didn't do that.

11 The only other response is Mr. Reddeck
12 suggested it's conjecture to think that the
13 testator wanted to give something to his mother-
14 in-law. I'm not asking you to conjecture that.
15 I think you have to presume that because he named
16 her by name.

17 MR. REDDECK: Just real briefly, Your
18 Honor.

19 THE COURT: Go ahead.

20 MR. REDDECK: I don't think the New York
21 legislature threw the whole will out.

22 MR. JOSEY: No, they didn't.

23 MR. REDDECK: I'm sorry. I think what
24 the -- what he said was that as to the spouse,
25 anything as far as the spouse, you look at it as

1 totally pre-deceased. I will say that our
2 legislature, again, had the -- looked at any
3 appointment of the spouse and threw it out
4 completely.

5 They've redid this in 2013. And I looked
6 at that. There must be 300 pages to that bill
7 that they amended. They had an ample opportunity
8 to expand this if they wanted to. But when you
9 look at the reporter's comments it just says,
10 we're taking the spouse out as to what the spouse
11 receives. Nothing else.

12 I think that's our position; that you
13 construe the will exactly what it says. Don't
14 read anything into. It says "said spouse".
15 Erika shall not survive me it goes here. Since
16 she didn't survive, it doesn't go.

17 Thank you.

18 THE COURT: Thank you, guys.

19 MR. JOSEY: No, I don't want --

20 THE COURT: No.

21 MR. JOSEY: I don't want you to think I
22 misrepresented this case. New York may do that
23 but they mention in here that Oregon and Georgia
24 say you throw out the will.

25 THE COURT: I gotcha. I'm going to read

1 everything y'all gave me.

2 MR. REDDECK: Thank you, Judge. I
3 appreciate it.

4 THE COURT: This is an interesting fact
5 scenario. It may be a little while before I give
6 you a decision. I've got some other stuff I need
7 to do. Thank you.

8 MR. REDDECK: Thank you, Judge.

9 THE COURT: Appreciate it.

10 END OF CASE: 12:38 p.m.

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, Cheri L. Young, Registered Professional Reporter and Official Court Reporter for the State of South Carolina, Second Circuit-At Large, do hereby certify that the foregoing proceedings were written stenographically by me using computer-aided translation; further, that the foregoing is a true, accurate and complete record, to the best of my skill and ability, of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Williamsburg County, on the 28th day of October, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

I have hereunder set my hand this 22nd day of April, 2016.

Cheri L. Young, RPR
Official Court Reporter

State of South Carolina
In the Probate Court
County of Williamsburg

Gwendolyn Leveritt,
petitioner,

V.

2014-ES-45-00179

Lorine C. Pressley, as personal
representative of the estate of
Ervin Christopher Pressley,
respondents.

 COPY

The Probate Hearing Held Before
The Honorable Betty F. Matthews

The probate hearing was taken before Erica
Norwood, Court Reporter and Notary Public for the
State of South Carolina, at the Williamsburg
County Probate Courtroom, Florence, South
Carolina, on Thursday, March 12, 2015, pursuant to
notice and/or agreement, in the above-entitled
cause pending in the above-named court.

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E X H I B I T S

Respondent's Pg/Ln	Ex.	Description
Premarked	1	Judgement of Divorce
Premarked	2	Decision/Order
Premarked	3	Order to Show Cause

** Uh-huh = Affirmative
Huh-uh = Negative

1 THE COURT: Good morning. This
2 hearing comes before the Williamsburg County
3 Probate Court on this 13th day -- 12th day of
4 March, 2015. The hearing is taking place at the
5 Williamsburg County Alex Chapman Judicial Complex
6 at approximately 10:15 a.m. The hearing is in the
7 matter of the Estate of Ervin Christopher
8 Pressley, case number 2014-ES-45-00179.

9 Petitioner and personal representative listed on
10 the Estate is Lorine Pressley. And the matter is
11 being brought forth by Attorney --

12 MR. ABBOTT: Michael Abbott.

13 THE COURT: -- Michael Abbott.

14 MR. ABBOTT: Michael Abbott, Your
15 Honor. Thank you.

16 THE COURT: At this time we'll allow
17 Attorney Abbott to present his case.

18 MR. ABBOTT: Your Honor, I think in
19 the -- in chambers we agreed that we would address
20 the matter of Gwendolyn Leveritt first. There's
21 actually two separate petitions. Ms. Leveritt's
22 petition is to -- for formal testacy to probate a
23 will. Previously, Your Honor, we had filed the
24 original Will, which is contained within the
25 Court's file. And I think Mr. Askins was going to

1 state some facts that I think we both agree on.

2 If we don't, I'll let you know.

3 THE COURT: Okay.

4 MR. ASKINS: May it please the Court?

5 THE COURT: Yes.

6 MR. ASKINS: Your Honor, I'd like for
7 the record to reflect that my name is Gregory
8 D. Askins. I represent Lorine Pressley along with
9 William M. O'Bryan also known as Monty O'Bryan.
10 Your Honor, Ervin Pressley is the decedent and he
11 and Erica Pressley who was the petitioner in the
12 second case we have were married to each other in
13 New York on July 7th of 2007. No children were
14 born of the marriage and Ervin Pressley had no
15 other children outside of the marriage. Ervin
16 Pressley died as a resident of Williamsburg
17 County, South Carolina on January 25th of 2014.
18 The death certificate is filed along with the
19 other probate records. The -- Erica Pressley and
20 Ervin Pressley were divorced by Judgment of
21 Divorce filed in New York with Eri--- Er--- Ervin
22 Pressley as the plaintiff and Erica as the
23 defendant. During that divorce each was
24 represented by counsel. The original hearing was
25 on November 11th -- November 14th of 2012. The

1 Judgment of Divorce also included a Stipulation of
2 Settlement, which was a written agreement that the
3 parties entered into. The Summons and Complaint
4 was filed by Ervin Pressley on October the 18th of
5 2011. The petitioner in the second case,
6 Ms. Erica Pressley, filed an Order to Show Cause
7 in New York. We have that listed as Respondent's
8 Exhibit 3 and we'll be -- we'll use those exhibits
9 and of--- in both cases. We have certified copies
10 of the Judgment of Divorce that has the
11 Stipulation of Settlement attached to it by the
12 Court. A certified copy has -- is -- is
13 Respondent's Exhibit 1. The Order to Show Cause
14 filed by Ms. Pressley in New York will be
15 Respondent's Exhibit 3. And as a result of that
16 hearing in New York, there was a decision slash
17 order in the same caption that was -- that was
18 dated 6--- June the 30th of 2014 indexed in the
19 case number 12012/2011, which was a same case
20 number as the Judgment of Divorce. That decision
21 of or--- slash order is Respondent's Exhibit 3.
22 The petitioner -- the petitioner was -- well,
23 after the death of her son, Ms. Lorine Pressley
24 filed a petition with the court for informal
25 appointment. She -- at that time she had no will.

1 Since there were no other issues, she would have
2 been the only heir -- intestate heir of Ervin
3 Pressley. When she filed the claim -- I mean,
4 when she filed the Notice to Creditors and so
5 forth, Miss -- Ms. Erica Pressley filed a claim.
6 There was a disallowance filed or sent back by
7 Ms. Lorine Pressley and Ms. Erica Pressley has
8 filed for allowance of the claim and that's what
9 the second hearing's about. The first hearing
10 there is a will that was sent into the court and
11 filed by Mr. Abbott purporting to be a Last Will
12 and Testament of Ervin Christopher Pressley. It
13 consists -- it -- it looks like it consists of
14 four pages dated February 5th of 2008. The -- the
15 -- it's a former petition by Ms. Gwendolyn
16 Leveritt to have this Will probated in formal
17 fashion. The position of the Petitioner,
18 Ms. Leveritt, is obviously this is the Last Will
19 and Testament of the decedent. Quite honestly,
20 Your Honor, we -- we just ask that it -- it be
21 proved under the formal probate procedures because
22 we have no indication since this will is
23 obviously -- if it was the Last Will and Testament
24 of Ervin Christopher Pressley it was executed
25 during the time these parties were married.

1 Certainly, after they were married and before they
2 were divorced. So we don't know whether he tried
3 to -- we don't have any evidence to show that he
4 revoked it. He certainly didn't tear up the
5 original. He didn't have it. Mrs. Erica Pressley
6 is a resident of the state of New York and so is
7 Ms. Gwendolyn Leveritt, to my knowledge. Lorine
8 Pressley, the mother and the sole intestate heir
9 of Ervin Christopher Pressley resides in
10 Williamsburg County, which is the place he resided
11 when he died. I think that's the -- that's
12 basically the facts as they -- they stand right
13 now. Then -- then the issue, I guess, going in to
14 the will first with Mr. Abbott's position.

15 THE COURT: Yes.

16 MR. ABBOTT: Thank you, Your Honor.
17 And the issue with regard to the Will, Your Honor,
18 if you'll look in the third paragraph. First of
19 all, Your Honor, I don't think there's any -- and
20 -- and I may be corrected, but it -- but it -- I
21 don't think there's any evidence -- there will be
22 any evidence before the Court that Mr. Er--- Ervin
23 Christopher Pressley took any steps to revoke this
24 Will. He didn't tear it up. Obviously, it's in
25 your file. We -- no one has found a subsequent

1 will. I -- I think on its face, it's valid. It's
2 attested to by two witnesses, notarized. So I
3 don't think there's any question as to its
4 validity. I think what you have to decide today
5 is whether despite the will being valid on its
6 face, whether it can be enforced given the divorce
7 between the decedent and Ms. Erica Pressley. And
8 that gets back to the third paragraph that I just
9 directed you to. As you'll see, Your Honor, the
10 third paragraph of the Will states, all the rest,
11 residue and remainder of the property, both real
12 and personal, and mixed and wheresoever situate,
13 which I may own or be entitled to at the time of
14 my death, I give, devise and bequeath to my
15 spouse, Erica Danielle Bledsoe Pressley if my said
16 spouse shall survive me. If my said spouse shall
17 not survive me, then I give, devise, bequeath my
18 residuary estate to my issue per stirpes. And if
19 there be no surviving issue, then to Gwendolyn
20 Leveritt who's seated here and Lorine Pressley,
21 his mother seated there. So, Your Honor, the --
22 there were no -- as counsel indicated in the
23 Stipulation of Facts, there were no surviving
24 children. The decedent did not have any children.
25 So the issue becomes if you -- if you enforce the

1 terms of the will who is -- who is a taker of the
2 estate. Your Honor, the South Carolina Code
3 addresses this issue in Section 62-2-507 and
4 62-2-803 wherein the law states that provisions of
5 a will that give estate property to a spouse are
6 deemed invalid if there's a subsequent divorce.
7 If there's a divorce after the will was executed
8 and the parties haven't remarried. In this case,
9 the parties didn't remarry. They were divorced.
10 They were married at the time the will was
11 executed and they were divorced at the time the
12 decedent passed. Section C of 62-2-507 states,
13 provisions of a governing instrument, which is the
14 Will, and nomination in a fiduciary or
15 representative capacity that are revoked by this
16 section -- meaning if they're divorced -- this
17 section says, you can't take under the Will are
18 given effect as if -- as if the former spouse
19 predeceased the decedent. In other words, the
20 divorced spouse is -- is declared not a surviving
21 spouse. Your Honor, I'll then point to Section
22 62-2-601 of the Probate Court, which is the Rules
23 of Construction and Intention for Reforming a
24 Will. The intention of a testator as expressed in
25 the testator's Will controls the legal effect of

1 the testator's dispositions. Basically, you look
2 to the Will to determine the intent of the
3 decedent. And here, Your Honor, we have the
4 decedent's intent in paragraph three. And that is
5 that if -- if he and his spouse aren't together,
6 then it defaults to his kids. He didn't have
7 kids. So then it defaults to Ms. Leveritt and
8 Ms. Pressley. Your Honor, the -- the law in South
9 Carolina -- case law in South Carolina is the
10 Court should indulge in every presumption to
11 validate a Will and thereby avoid intestacy. What
12 -- what Ms. Pressley's would have you do is
13 invalidate the Will, not grant the wishes of
14 Mr. Pressley and have it be intestate, which
15 again, the law in South Carolina says you should
16 try to avoid that at all costs. I think the Will
17 -- the Will is clear in its face. The South
18 Carolina statutory law is clear in its face that
19 Ms. Erica Pressley is deemed not a surviving
20 spouse. And therefore, there's no ambiguity or
21 inconsistency within the Will. I think it's a
22 valid Will. It should be enforced and the state
23 should -- the estate should be divided between
24 Ms. Leveritt and Ms. Pressley as per the
25 decedent's wishes. Thank you.

1 THE COURT: Thank you.

2 MR. ASKINS: If it please the Court.

3 Your Honor, we do not have evidence that Mr. Ervin
4 Christopher Pressley revoked this will. We do

5 know that Mr. Ervin Christopher Pressley sustained

6 -- he was in--- he was injured in the 9/11

7 incident in New York and he developed some

8 physical problems that -- that led to his demise.

9 The -- during that time, and as I stated earlier

10 and I think we stipulated to these facts, in 2012,

11 these parties had a hearing in New York. The --

12 I'll go into this more in the next hearing -- but

13 the parties were divorced on the record as such,

14 is what the decision order says and the -- and the

15 divorce was upheld. After that time, Mr. Pressley

16 moved to South Carolina and he was ill. The --

17 the Will itself if it is valid on its face or if

18 it is the Last Will and Testament, we cannot

19 contest or we don't contest that it -- it should

20 be admitted because it is a Will and our statute

21 provides that all Will -- Last Will and Testaments

22 be filed. However, our statute does not require

23 all Wills to be probated. The -- and there is a

24 distinction there. But when you look at the Will

25 itself, it is -- it does have some distinctions

1 and it requires some judicial -- some legal
2 interpretation. What happens in the third
3 paragraph of the Will and I -- I -- I'm not going
4 to make it a record in this -- in this case, Your
5 Honor, unless you think I should -- but because it
6 is on file with the Court in the record. But it
7 says in the third paragraph -- and I quote -- all
8 the rest, comma, residue and remainder of the
9 property both real, personal and mixed and
10 wheresoever situate, which I may own and be
11 entitled to at the time of my death, I give,
12 devise and bequeath to my spouse, Erica Danielle
13 Bledsoe Pressley if my said spouse shall survive
14 me. That's a condition of Erica Danielle Bledsoe
15 Pressley surviving inheriting from him if she
16 survive. That second sentence is a -- is what is
17 known as a contingent bequest. It says, if my
18 said spouse shall not survive me, then I give,
19 devise and bequeath my residuary estate to my
20 issue per stirpes. And if there be no issues
21 surviving -- if there be no issues surviving
22 issue, then to Gwendolyn Leveritt and Lorine
23 Pressley equally or to the survivor between them.
24 It -- it goes on, but we can stop there because we
25 both have Gwendolyn Leveritt and Lorine Pressley

1 living. But here's the -- here's the key to the
2 Will. The statutes that Mr. Abbott quoted are
3 exactly right. Our statutes say that any bequest
4 to a former spouse by a decedent who wrote the
5 Will during the marriage, but subsequently
6 divorced and did not reconcile, it is -- you treat
7 the -- the provision to the former spouse as if
8 she predeceased the decedent. The statute also
9 says that she wouldn't serve as a personal
10 representative or any other fiduciary capacity.
11 And this Will they refer to as executors. The
12 condition precedent here is that Erica Danielle
13 Bledsoe survived -- not survived Mr. Ervin
14 Pressley. She's sitting right over there
15 breathing. So she survived. The South Carolina
16 divorce -- the Probate Court is the same as it is
17 in New York. It's a Uniform Probate Code, as you
18 well know. And what it says is that Wills should
19 be construed as they exist. So you have to look
20 at the face of the will to determine what the
21 testator did. His obvious intent when he wrote
22 this Will was to provide for his wife. Assumingly
23 they had a good relationship at that time. And he
24 says, if my wife -- I am -- if I was married and
25 my wife -- as my wife she died as my wife before I

1 did and I -- and we have children, I want my
2 children -- our children to have what we have.
3 Because presumably he would have had what they
4 had, both parties. And if we don't have children,
5 then I want her mother to take her half and my
6 mama to take my half and that was his idea. The
7 statute presumes that anything left of the
8 surviving spouse that is divorced and not
9 reconciled is treated as if the former spouse
10 predecease the decedent. Okay. But the statute
11 doesn't cover anything else in the Will. You have
12 to liberally -- you have to literally construe the
13 Will. And it says, what is his intent. Well, his
14 intent obviously would not be after death to
15 provide for her family. She got her part in the
16 divorce. When you look at -- at Respondent's
17 Exhibits 1 with the Judgment of Divorce with the
18 Stipulation of Settlement that divided all assets
19 and debts, it clearly shows that she got her part
20 of the estate. And that's the reason you have a
21 Probate Co--- Code that -- that has that provision
22 for a former spouse. We have -- the only way to
23 get to Gwendolyn Leveritt and Lorine Pressley is
24 if Erica Pressley didn't survive. Now, you have
25 to look at the intent and the intent is obviously

1 there. To make that point even clearer, if you go
2 down to paragraph fourth in the Will, this is the
3 part where he appoints his fiduciary. At the time
4 he executed this Will in New York, the executor
5 was still in play, so he named as executor his
6 wife -- his spouse. And then this is the
7 important clause. In the event my spouse shall
8 predecease me -- the same clause as he has up --
9 up -- up top in paragraph three. But then he goes
10 on and says, fails to qualify or having qualified
11 thereafter dies, resides, is removed from office
12 -- and this is the key wording -- or for any
13 reason ceases to act as executor, I hereby appoint
14 Lorine Pressley as executor of this my Last Will
15 and Testament. Now, South Carolina Law, I
16 represent to the Court that I've exhaustively
17 tried to find cases on point in South Carolina, so
18 have my co-counsel Mr. Monty O'Bryan, and we have
19 also consulted Professor Allen Medlin of -- of
20 South Carolina Law School -- University of South
21 Carolina Law School, who also tells us that --
22 that the interpretation goes into the will on what
23 the intent of the testator is. And, Your Honor,
24 he has cited two cases to us. I have prepared a
25 Brief to -- for the Court, which contains the two

1 cases. And basically the cases are on point. If
2 I might, Your Honor, I'll approach and hand this
3 Brief. The Brief is obviously not -- I'll hand it
4 around to her -- the Brief is obviously not
5 evidence or testimony. It's just the argument
6 part of it. But it does contain two cases. The
7 first case I cite is the case of John R. Herman
8 versus Urteago. That is a case out of California in
9 1995. And basically what happened in that case,
10 the Court was called to construe the Will of John
11 Herman who was married at the time he executed the
12 Will, but whose marriage was dissolved prior to
13 his death by divorce. Their Probate Code, which
14 is the Uniform Probate Code provides the same as
15 we did at that point in time. His Will said the
16 question before the Court involves the status of
17 the testative request to my spouse's children and
18 my spouse's issue. The natural child or the
19 natural heir of Mr. Herman was Curtis Herman and
20 he was the appellant here and the lower court was
21 -- was overturned. In this regard -- in this case
22 -- let me see if I can find -- the trial court
23 rendered among other things that the Will was not
24 ambiguous. That -- that the Appellate court
25 overturned that and found that the -- the Will --

1 the conclusions we arrive at -- they say in the
2 conclusion, which is the last page or the order --
3 we arrive at an outcome consistent with deceased's
4 likely intent giving the language of his Will of
5 construction favor--- favoring the nature objects
6 of his bounty, which would be his family. If
7 different language had been employed in the
8 dispositive portions of the will, we may have
9 reached a contrary result. This is a
10 unsatisfactory and costly way to resolve these
11 disputes. This case graphically demonstrates the
12 necessity to change the statute. The same thing
13 in our state. The statute would provide for
14 certainty. What they are basically saying here is
15 that the Will construed -- goes back and says
16 because of the language if she shall survive me
17 and even though the statute says she doesn't
18 survive and for statutory purposes for her
19 inheritance, it doesn't say that she -- that she
20 is presumed dead for the rest of it, the
21 contingent beneficiaries. The second case cited
22 is a Texas case. The case of Estate of Nash, it's
23 even more on point. The Uniform Probate Code is
24 in Texas also. And it has those provisions. If
25 you'll look at the bottom of page one under

1 Section 69 of the Probate Code for Texas, it tells
2 you it -- it reads pretty much like ours does.
3 And the gist of this case -- and I'll leave it to
4 your -- to your reading -- but it's like this. It
5 says, if -- if the decedent, the testator -- well,
6 let me go to the -- the page four of that thing.
7 At the top left it says the legislature could have
8 revised the Probate Court to require that the
9 entire Will be read as though the former spouse
10 had predeceased the testator, but it didn't do so.
11 It's just talking about the spouse itself. And
12 that includes testate or intestate. Whether he
13 died with a Will or without Will. It also says in
14 this case, the interesting part -- and that's the
15 part I was just making before. If the Will says
16 -- if -- if the Will -- decedent says if my wife
17 or spouse shall survive me. Okay. And then it
18 goes on to say if she shall not survive me. The
19 contingency for her inheriting is that she
20 survive. The contingency for the other part of
21 the Will is that she doesn't survive. But she did
22 survive. And she -- and they were divorced. And
23 the only reason she's presumed to be predeceased
24 is because they were divorced. Not because she's
25 actually dead. If the testator had said in

1 paragraph -- the third paragraph of his Will when
2 it says -- when it goes down to the -- the -- the
3 second sentence and it says, if my said spouse
4 shall not survive me, then I give, devise and
5 bequeath. If it had said if my spouse shall not
6 survive me or for any other reason cannot inherit
7 from me, then his intent would have been obvious
8 and clear that he wanted these provisions to -- to
9 uphold -- to be upheld. He didn't say that. He
10 did say it in Item Fourth about the executor part,
11 the personal representative. Obviously, for
12 Mrs. Erica Pressley's standpoint, the Stipulation
13 of Settlement, there is an agreement -- they --
14 they agree not to inherit from each other. And
15 there's also in that same paragraph a clause that
16 says they agree not to act as a fiduciary for each
17 other. So she's out of the picture for two
18 reasons. One is the Stipulation of Settlement,
19 which was approved by the Judgment of -- of
20 Divorce and I might add upheld again after her
21 Order to Show Cause, and she's barred by both
22 statutes that basically say she's treated as if
23 predeceased for purposes of inheritance and for
24 purposes of serving as a fiduciary. The statute
25 does not say that all other provisions will be

1 interpreted as if she predeceased. You have to
2 look at the Will for the intent. The obvious
3 intent of Ervin Christopher Pressley when he
4 divorces, divides his estate out satisfactory to
5 both parties. This wasn't a judgment rule. This
6 was a stipulation of the settlement. It was not
7 only approved by the court, but then subsequently
8 reaffirmed by the court when she tried to have it
9 set aside after he -- after he passed away. And
10 for that reason, the -- if the Will is admitted
11 and -- and we have no reason to say it shouldn't
12 be -- then the effect of it is, it does not
13 provide for the disposition of assets. The reason
14 it doesn't is because Erica Pressley literally
15 survived Ervin Pressley. She can't take because
16 Ervin Pressley and she were divorced and never
17 remarried. But the next provision, the contingent
18 request, don't come into play because the
19 contingency didn't happen. She didn't predecease.
20 The second part of it is under the Uniform Probate
21 Code, the Uniform Probate Code -- Code doesn't say
22 you have to go and -- and treat all the other
23 provisions as if she predeceased because that
24 would be contrary to his intent -- the clear
25 intent of what he was trying to do in the Will.

1 The -- the divorce ends anything with Erica and
2 her family basically unless he -- unless he
3 qualifiedly -- unless he directly -- unless he
4 emphatically says if my spouse shall not survive
5 me or like he did in the fourth paragraph when he
6 says or unless she cannot -- it says in here
7 clearly -- or for any reason ceases to act as
8 executor. He could have very easily put that in
9 the third paragraph and said if my spouse shall
10 not survive me or for any reason cannot inherit
11 from me including divorce or whatever. That's not
12 in there. So it was contemplated and his clear
13 intent would be that his family would -- would --
14 would benefit from -- from what he's worked for
15 and the things he's done. So we feel that the --
16 the Lorine Presslley no matter whether the Will is
17 probated or not, she still the personal
18 representative, executor in New York, personal
19 representative here, and the assets should pass
20 just as it began intestate. I think -- I think
21 that's the correct law. And I think -- I refer
22 you to our Brief and those cases and I think -- I
23 think that clears up the -- the legal argument in
24 that respect. Thank you.

25 THE COURT: Thank you.

1 MR. ABBOTT: If I may respond, Your
2 Honor.

3 THE COURT: Yes.

4 MR. ABBOTT: Counsel is correct. I
5 did my own exhaustive research and there is no
6 case on point in South Carolina. And this is not
7 California and this is not Texas. And in South
8 Carolina as indicated earlier, that the Courts
9 should indulge in every presumption to validate a
10 Will and thereby avoid intestacy. And there must
11 be clear and convincing evidence to avoid the
12 Will. A couple of things, Your Honor. And these
13 are in -- actually in exhibits that were submitted
14 by opposing counsel in the Order to Show Cause.
15 In paragraph 10, at issue -- thank you -- at issue
16 in the -- I'll let you get to it -- in the
17 Affidavit in Support, Your Honor --

18 THE COURT: Okay.

19 MR. ABBOTT: -- in paragraph 10. I
20 think at issue in that was A whether the divorce
21 was valid or not because Mr. Pressley passed
22 before the final order was entered. And one of
23 the issues was a life insurance policy. When --
24 when Mr. Pressley and Erica Pressley had been
25 married, he appointed his wife -- then wife, Erica

1 Pressley, as the beneficiary of this life
2 insurance policy. Well, as you'll see in
3 counsel's exhibit that in December or January of
4 201--- December of 2012 or January of 2013, one
5 month after the Stipulation of Divorce Settlement,
6 the decedent changed his life insurance
7 beneficiary to his mother. Took it away from
8 Erica Pressley and put his mother on the insurance
9 policy. So -- so what -- so what does that tell
10 us? Well, that tells us that Mr. Pressley at that
11 time was aware of the Settlement Agreement and
12 aware that he needed to -- and the -- and the
13 effect of the Settlement Agreement -- and that he
14 needed to make some changes because there's
15 nothing in the Settlement Agreement that addresses
16 this life insurance policy. But the Settlement
17 Agreement, which is also an exhibit, in Article
18 Five, the Mutual Release and Discharge of the
19 Claims, Mr. Pressley was aware in November of 2012
20 that his wife couldn't take from his estate. So
21 there was no reason for him to change his Will
22 because he knew that based upon the law that's
23 existed and this Settlement Agreement that she
24 couldn't take and he knew that his Will because he
25 wrote it and signed it and executed it, the

1 default provisions would take place. And that
2 would be Gwendolyn Leveritt and his mother, 50/50.
3 It's important to remember he didn't divorce his
4 mother-in-law. He divorced his wife. It says
5 nothing about his relationship to his
6 mother-in-law. And contrary to popular belief,
7 they're not necessarily all bad. And in this one
8 was good.

9 MR. ASKINS: Your Honor, we -- I --
10 that's an argument that's not even -- it's not
11 factual about what their relationship was.
12 There's no testimony about that and we certainly
13 object --

14 MR. ABBOTT: And there isn't, but
15 there's also no testimony that his assets should
16 have gone to his family and his family only.

17 THE COURT: Objection sustained.

18 MR. ABBOTT: So, in short, Your Honor,
19 you can discern his intent from his actions
20 immediately upon the signing of the Settlement
21 Agreement and which clearly by this contract and
22 this enforceable contract by law in New York, his
23 wife couldn't take from him and he knew that. And
24 he knew he had a Will. And then he also -- and we
25 know that because he went ahead a month later and

1 took his wife off of the insurance policy and put
2 his mother on the insurance policy. If his intent
3 was to give his mother his entire estate, he could
4 have just as easily changed his Will at the same
5 time.

6 MR. ASKINS: Your Honor, if I might.
7 The -- the -- the reference to the insurance
8 policy is interesting for a couple of reasons.
9 The main reason is it's not a fiduciary document.
10 The other reason is, you can't change an insurance
11 policy as you well know by a Will. It's a
12 contractual ordeal and you have to do that with
13 the insurance company. So most all people are
14 aware of that. When it comes time to pay the
15 premiums and you look at that and say, oh, I
16 better change this beneficiary. It doesn't go
17 under the Will. It doesn't go under the intestate
18 distribution as -- as Your Honor well knows. It
19 has nothing to do with the fiduciary part of this
20 man's estate. You get back into the construction
21 of the Will. And you can't get around it. She
22 didn't -- she survived him. The contingent
23 bequest therefore does not come into play. If he
24 intended for it to survive a divorce, he would
25 have put it in the -- in the Will. If he had said

1 in the Will if she does not survive me or if for
2 any other reason she does not inherit from me.
3 Any other reason being such as we got divorced,
4 then the Will is clear. His intent is clear. But
5 the -- the intent of him now when you look at the
6 natural objects of his affection, which would be
7 his wife --

8 MR. ABBOTT: Objection, Your Honor.

9 MR. ASKINS: Especially --

10 MR. ABBOTT: Objection, Your Honor.

11 He's -- he's getting in the exact same area that I
12 couldn't get into in talking about the
13 relationship between Ms. Leveritt -- the decedent
14 and Ms. Leveritt and the decedent and his mother.

15 THE COURT: Objection sustained.

16 MR. ASKINS: Obviously, Your Honor,
17 the common sense would tell anybody that once you
18 have a divorce and you divide your assets, you
19 don't want to read about them again. And in that
20 regard, you have to look literally at what the
21 Will says. And the Will says I don't want anybody
22 to get anything unless my wife doesn't survive me.
23 It doesn't say if the statute says my wife
24 automatically predeceases me. I would -- I would
25 recommend or -- or represent to the Court that

1 most all people don't understand the effect
2 divorces have on Wills. However, because of that,
3 you still have to abide by the law and you have to
4 literally enforce the provisions of the Will. I
5 think when you read the two cases cited you'll see
6 that those Probate Court -- Court -- the Probate
7 Courts in California and Texas were right on point
8 with ours. We're just behind. And I think you'll
9 see there that it's clear. When you're looking at
10 the intent, you have to literally say what he did.
11 So we re--- we -- we represent to the Court that
12 the Will should be admitted for information
13 purposes, but it has no effect because it doesn't
14 dispose of the assets and it won't change the
15 personal representative. Thank you.

16 THE COURT: Anything further, Attorney
17 Abbott?

18 MR. ABBOTT: Your Honor, I -- I -- I
19 do think this is a -- this is a legal issue rather
20 than a factual issue. Ms. Leveritt's here. She
21 can testify. If you think it appropriate, she can
22 testify about her relationship with the decedent.
23 I -- I don't know that, that adds anything to
24 midst, counsel.

25 MR. ASKINS: I -- I would object to

1 that testimony because it has nothing to do with
2 the validity of the Will and I have nobody here to
3 say -- he's certainly not here to say -- that's
4 his mother-in-law. But it wouldn't do anything
5 but prejudice the respondent's case, Your Honor.

6 THE COURT: I don't think we need to
7 have her testimony.

8 MR. ABBOTT: Well, and the only -- and
9 thank you, Your Honor.

10 THE COURT: In this matter.

11 MR. ABBOTT: Thank you, Your Honor.

12 And then the only thing that I would add as a
13 final thought is, it seems that they're wanting to
14 have their cake and eat it, too. On the one hand,
15 the statute says she's not a surviving spouse.
16 We've got to treat her as not a surviving spouse.
17 Therefore, the Will is invalid -- she can't take
18 under the will. But, oh, wait, she did survive,
19 so the rest of the Will's invalid. And --

20 MR. ASKINS: But Your Honor, she can't
21 take under the Will or the Stipulation of
22 Agreement. I mean, she can't take under the Will
23 because of the Stipulation of Settlement and
24 because of the statutes. So he thought that part
25 -- that the -- the Will itself is what we have to

1 interpret here. Not what the statutes interpret;
2 what the Will says. And obviously, he would not
3 intend for his wife or his wife's family to have
4 anything.

5 MR. ABBOTT: Objection, Your Honor.
6 There is no -- that is not what it reads and it's not
7 on the record. And, again, that's the same
8 objection you sustained earlier.

9 THE COURT: Objection sustained. I
10 think we have enough evidence here to make a
11 decision on whether the Will be admitted to the
12 Court.

13 MR. ABBOTT: Thank you, Your Honor.

14 THE COURT: As it is in the statute,
15 any Will that is brought before the Court, if
16 there no proof that it's invalid or any other Will
17 is presented, we can admit the Will. So, it's
18 hereby ordered that the Will be admitted to the
19 Court and admitted to the records. However, as
20 stipulated in the Will, that the wife -- if the
21 wife predecease him, then Ms. Gwendolyn and
22 Ms. Lorine would inherit. However, we all can
23 clearly say that, you know, she did survive him.
24 Therefore, the Will is admitted, but the
25 distribution of the Will is not admitted. And we

1 will sustain Ms. Lorine Pressley as personal
2 representative. Thank you. The next case.
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A P P E A R A N C E S

For the Petitioner:
 Abbott, Mckissick & Hopewell, L.L.C.
 470 West Evans Street
 Florence, SC 29501
 By: Michael C. Abbott, Esq.

For the Respondent:
 Gregory B. Askins, Esq.
 307 East Broad Street
 Post Office Box 10
 Hemingway, SC 29554

For the Respondent:
 O'Bryan & O'Bryan
 1 Court House Square
 Kingstree, SC 29556
 By: William M. O'Bryan, Esq.

E X H I B I T S

Respondent's		
Pg/Ln	Ex.	Description
Premarked	1	Judgement of Divorce
Premarked	2	Decision/Order
Premarked	3	Order to Show Cause

** Uh-huh = Affirmative
 Huh-uh = Negative

At the Matrimonial/TAS Part 29
Of New York State Supreme Court at
the Courthouse, BRONX,
County, on 9/24/14

Present: **LA TIA W. MARTIN**
Hon. Justice/Referee

ERVIN PRESSLEY

Plaintiff,

-against-

ERICA PRESSLEY

Defendant.

Index No.: 12012-11
Calendar No.:

JUDGMENT OF DIVORCE

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CLERK OF THE COURT
JUDGE OF THE COURT
WILLIAMSBURG COUNTY, N.Y.

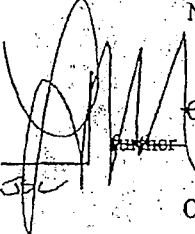
The Plaintiff has brought this action for judgment of absolute divorce by reason of Irretrievable Breakdown In Relationship pursuant to DRL 170 (7), and the Summons and Verified Complaint has been duly served personally upon the Defendant within the State of New York; and the Defendant has appeared by counsel, ZELENITZ, SHAPIRO AND D'AROSTINO, PC and waived the 20 or 30 day waiting period provided by law to respond to the Summons or answer the Complaint and has waived the 40 day waiting period to place this matter on the calendar and has consented to this action being placed on the uncontested divorce calendar immediately, AND A JUDGMENT OF DIVORCE WAS GRANTED ON THE RECORD BY THIS COURT ON NOVEMBER 14, 2012.
The court accepted written proof of non-military status.

The Plaintiff's address is at 1495 Old Georgetown Road, Hemingway, S.C 29554 and social security number is 074-68-1510.

**RESPONDENT'S
EXHIBIT**

The Defendant's address is 9 Dune Court, Apt. 1, Bronx, New York 10473 and social security number is 065-60-2992.

Now on motion of Leonard D'Angelica, the attorney for Plaintiff, it is:

 ~~ORDERED, ADJUDGED~~ that the referee's report if any, is hereby confirmed, and it is

~~further~~
ORDERED, ADJUDGED AND DECREED that the marriage between ERVIN PRESSLEY, Plaintiff, and ERICA PRESSLEY, Defendant, is hereby dissolved by reason of Irretrievable Breakdown In Relationship pursuant to DRL 170 (7); and it is further

ORDERED, ADJUDGED that the Settlement Agreement entered into between the parties on the 14th day of November, 2012 an original and a transcript of which is on file with this Court and incorporated herein by reference, shall survive and shall not be merged into this judgment, and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in their entirety herein, and this Court retains jurisdiction of this matter concurrently with the Family Court for the purposes of specifically enforcing such of the provisions of said Agreement as are capable of specific to the extent permitted by law with regard to maintenance, child support, custody and/or visitation, and for making such further judgment as it finds appropriate under the circumstances existing at the time application for that purpose is made to it, or both; and it is further

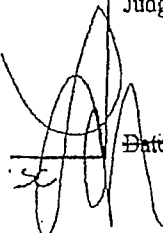
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WILLIAMSBURG COUNTY, SC

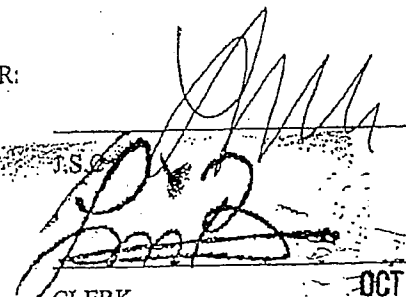
^{DEFENDANT}
ORDERED AND ADJUDGED that the Plaintiff is authorized to resume the use of her
surname: BLEDSTOE; and it is further

ORDERED AND ADJUDGED that both parties are authorized to resume the use of any
surname.

ORDERED AND ADJUDGED That Defendant shall be served with a copy of this
^{THE ATTORNEY FOR THE}
Judgment with Notice of Entry by Plaintiff within 30 days of such entry.


Dated:

ENTER:


CLERK

OCT 7 2014

STATE OF NEW YORK, COUNTY OF BRONX,
CLERK OF THE COUNTY CLERK AND
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COUNTY, NEW YORK

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SUPERIOR COURT, BRONX COUNTY
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COUNTY, NEW YORK

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ERVIN PRESSLEY

Plaintiff,

-against-

ERICA PRESSLEY

Defendant.

Index No. 12012-11

FINDINGS OF FACT &
CONCLUSION OF LAW

The issue of this action having been submitted to me as one of the Justices /
^{FOR REQUEST}

Referees, of this court at Part 1A28 hereof, held in and for the County of Bronx on

Nov. 14, 2012, and having considered the allegations and proofs of the respective parties,

and due deliberation having been had thereon, AND A JUDGMENT OF DIVORCE HAVING BEEN GRANTED ON THE RECORD ON NOVEMBER 14, 2012;

NOW, after reading and considering the papers submitted and hearing the testimony I do hereby make the following findings of essential facts which I deem established by the evidence and reach the following conclusions of law.

FINDINGS OF FACT

1. Plaintiff and Defendant were both eighteen (18) years of age over when this action commenced.
2. The Defendant has resided in New York State for a continuous period in excess of one year immediately preceding the commencement of the action and the parties were married in New York State.
3. The Plaintiff and the Defendant were married July 7, 2007 in the City of New York County of New York and State of New York in a religious ceremony.

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JUDGE OF PROBATE
WILLIAMSBURG COUNTY, SC

4. That no decree, judgment or order of divorce, annulment or dissolution of marriage has been granted to either party against the other in any Court of competent jurisdiction of this state or any other state, territory or country, and that there is no other action pending for divorce by either party against the other in any court.

5. That this action was commenced by filing the Summons and Verified Complaint with the County Clerk on October 18, 2011. Defendant was served personally with the above stated pleadings and the Notice of Automatic Orders. Defendant appeared and waived her right to answer and has consented that this matter proceed to Judgment.

6. Defendant is not in the military service of the United States of America, the State of New York, or any other state.

7. There are no children of the marriage.

8. The grounds for divorce that are alleged in the Verified Complaint were proved as follows:

Irretrievable Breakdown In Relationship DRL 170 for at least six months (7)

That the relationship with the Defendant has irretrievably broken down for a period of at least than six months as stated ^{by} in the Plaintiff's Affidavit. ON THE RECORD IN OPEN COURT.

9. A sworn statement pursuant to DRL § 253 states that Plaintiff has taken all steps within his power to remove all barriers to Defendant's remarriage, following the divorce, was served on the Defendant.

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CLERK OF THE COURT
JULIA J. HARRIS
CLERK OF THE COURT

10. Equitable distribution and ancillary issues shall be in accordance with the Settlement Agreement.

11. The Plaintiff's address is 1495 Old Georgetown Road, Hemingway, South Carolina 29554 and social security number is 074-68-1510. The Defendant's address is 9 Dunc Court, Apt. 1, Bronx, New York 10461 and social security number is 065-60-2992.

12. There are no unemancipated children of the marriage.

13. Defendant may resume use of the prior surname: BLEDESTOE

14. Compliance with requirements of DRL § 255 (1) and (2) has been satisfied as follows:

A. The parties have entered into a Stipulation dated November 14, 2012 and the Stipulation of Settlement complies with the requirements of DRL § 255 (2).

B. Each party has been provided notice as required by DRL Sec. 255 (1).

15. All ancillary issues including payment of counsel and expert fees, of any, were settled by written settlement agreement.

CONCLUSIONS OF LAW

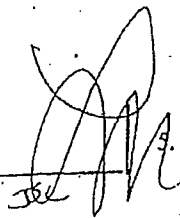
1. Residence as required by DRL §230 has been satisfied.

2. The requirements of DRL § 255 have been satisfied.

3. The requirements of DRL § 240 1(a) including Recording Checking Requirements in DRL § 240 1 (a-1) have been satisfied. ARE NOT APPLICABLE

4. The requirements of DRL § 236 (B) (2) (b) have been satisfied.

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JULIA M. BROWN
JUDGE OF THE COURT
WILLIAMSON COUNTY, TN

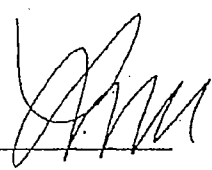


5. ~~DRL~~ §170 subd. (7) is the ground alleged, then All economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the minor children of the marriage have been resolved by the parties or determined by the court and incorporated into the Judgment of divorce.

6. Plaintiff is entitled to a judgment of divorce on the grounds of DRL § 170(7) and granting the incidental relief awarded.

Dated: 9-24-14

J.S.C.


LATIA W. MARTIN

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JULIA M. HARRIS
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 28

ERVIN PRESSLEY,

Plaintiff,

-against-

ERICA PRESSLEY,

Defendant.

Decision/ Order
Index No.: 12012/2011

Recitation, as required by CPLR §2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause and Affidavit in Support	1-2
Affirmation in Opposition	7
Affirmation in Reply	16
Exhibits	3-6;8-15;17

MARTIN, L.

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The defendant moves by Order to Show Cause for the following relief: 1) A Declaratory Judgment as to whether the within action for divorce has abated because the Plaintiff, Ervin Pressley died before a Judgment of Divorce was granted and/or entered; and/or whether this action must be dismissed pursuant C.P.L.R.3216 and/or this action must be deemed abandoned and dismissed pursuant to C.P.L.R. § 3404; 2) A Declaratory Judgment that the Stipulation of Settlement dated November 14, 2012 is null and void and of no force and effect, and/or setting aside said Stipulation of Settlement; 3) Directing and compelling American General Life Insurance Company

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JUDGE OF PROBATE
WILLIAMSBURG COUNTY, SC

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to pay the entire death benefit of life insurance policy #WHO0020640 to the Defendant, Erica Pressley; and 4) For such other and further relief as to this Court may seem just and proper.

Plaintiff's counsel submitted opposition papers. The Court hereby decides the defendant's applications as follows:

Background

The parties were married on July 7, 2007. The parties entered into a Stipulation of Settlement on November 14, 2012. An inquest was held on November 20, 2012.

Abatement by Death/Abandoned

The defendant asserts that this matrimonial action should be abated by death because the plaintiff died on January 25, 2014 and/or had been abandoned by the Plaintiffs failure to submit the Proposed Judgment of Divorce and requisite documents to obtain a Judgment of Divorce in a timely manner. She further argues that not all issues were resolved. She asserts that the Stipulation of Settlement that the parties entered into was silent as to 1) the disposition of the American Life Insurance policy #WH00020840; 2) as to which party was to obtain the judgment of divorce; 3) as to the specific equitable distribution of the marital property, with the exception of two(2) parcels of real property. She avers that under these circumstances the signing of the Judgment of Divorce would be more than a ministerial act. In addition, the defendant requests that the divorce action should be deemed abandoned and dismissed pursuant to C.P.L.R. 3216 as the last Court action occurred on November 14, 2012.

In opposition, the deceased plaintiff's former counsel argues that this matrimonial action should not be abated by death. Counsel asserts that after discovery was completed, the parties entered

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WILLIAMSBURG COUNTY, SC

into a full stipulation of settlement and an inquest was held on November 14, 2012. He indicates that the parties were allocuted on the record and the defendant testified that she understood the terms of the stipulation of settlement. Counsel further asserts that the Court granted the judgment to the plaintiff based upon the grounds of D.R.L. 170(7). Counsel states that on February 12, 2013 he served defendant's counsel with the notice that the proposed Findings of Fact and Conclusions of Law and Divorce Judgment of Divorce would be presented to this Court on March 6, 2013. He acknowledges that he received an Insufficient Papers Notice from the Matrimonial department on June 10, 2013 and on March 5, 2014 the minor insufficiencies regarding the social security number and venue were corrected by his affirmation. Counsel argues that the signing of the divorce was a ministerial act since all issues were completely resolved pursuant to the parties stipulation of settlement dated November 14, 2012 and an inquest on grounds for the divorce was held.

In reply, the defendant's counsel asserts that this Court should disregard the deceased plaintiff's attorney's affirmation as he lacks standing to appear on behalf of the deceased plaintiff. Counsel indicates that only a duly appointed representative of the Estate of Ervin Pressley can appear on the deceased plaintiff's behalf. Counsel also argues that the Judgment of Divorce must be dismissed as abandoned since the submission of the proposed Judgment of Divorce and Findings of Fact and Conclusions of Law was untimely. It was filed one month after the sixty(60) day period required in the Court Order and the purported corrections to the insufficient papers notice twenty months after receipt. The defendant's counsel further argues that the plaintiff's former counsel cannot correct the jurisdictional deficiency by the submission of an affirmation. Counsel asserts that the matter should be dismissed because the Court lacks jurisdiction as the plaintiff's verified complaint indicates that he resided in South Carolina. The Insufficient Papers Notice required an affidavit from

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the now deceased plaintiff that the defendant resided in New York for a continuous period in excess of one year immediately preceding the commencement of this action and that the parties were married in New York.

It is well settled that "a suit for divorce abates at the death of either party, because the marriage relation sought to be dissolved no longer exists" (Cornell v Cornell, 7 NY2d 164, 169, 164 NE2d 395, 196 NYS2d 98 [1959]. However, it has been held that the entrance of the judgment was a mere "ministerial act" the divorce action did not abate upon the death of the husband. Brown v Brown, 208 A.D.2d 485, 617 N.Y.S.2d 48 (1994). The exception to the general rule is that the action did not abate for purposes of entering a judgment of divorce nunc pro tunc, where a final adjudication was made during the parties' lifetime and a judgment could have been entered. Cornell v Cornell, 7 NY2d 164, 169 [1959]. The Court of Appeals determined that "all that remained was the mere ministerial act of entering the final judgment to conform to the adjudication of the substantive rights of the parties which had already been made and was expressed in the decision of the court and the interlocutory judgment that were already on the record." Cornell, 7 NY2d 164. Pursuant to D.R.L. § 230 :

An action to annul a marriage, or to declare the nullity of a void marriage, or for divorce or separation may be maintained only when:

1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or
2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or
3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the

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JUDGE OF PROBATE
WILLIAMSBURG COUNTY, SC

action, or

4. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or
5. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action.

In the instant matter, the Court takes note that it is unclear whether deceased plaintiff's counsel lacks standing to submit responsive papers to the defendant's Order to Show Cause. Wisdom v Wisdom, 111 A.D.2d 113 (1st Dept. 1985). However, the Court shall address the legal issues related to the relief requested by the defendant. The Court as the finder of fact rules that the minor errors listed in the deficiency notice prepared by the clerk of the Court have been corrected. The Court finds that it was provided with sufficient evidence that the plaintiff properly commenced an action for divorce in New York in compliance with D.R.L. § 230. The basis of the venue of this matrimonial action as set forth in the verified complaint was the New York state residence of the defendant and not the plaintiff. The plaintiff's testimony proffered at the inquest regarding his residency at the time immediately preceding the filing of the action for divorce is inconsistent with his statement in the sworn to complaint. The Court takes note that the deceased plaintiff's attorney made an application at the Court at the time of the inquest to confirm the pleadings to the proof. In addition, the defendant testified that she was a resident of Bronx, New York and it is undisputed on this record that the defendant has been a resident of the state of New York. In addition, the Court takes note that the plaintiff's attorney filed an Affidavit signed by the defendant on February 19, 2013, which sets forth the correct social security number.

Moreover, the Court finds the plaintiff's action should not be dismissed or deemed as

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 WILLIAMSBURG COUNTY, SC

abandoned. The Court finds that based upon the facts and circumstances of this case, the delay in the entry of the signing of the Judgment of Divorce was not willfully done by plaintiff and there was a reasonable explanation for said delay. Court takes note that the court file contains an affirmation of lateness dated May 6, 2013 which indicates because the deceased plaintiff resided in South Carolina documents had to be mailed to him or he had to travel to counsel's office to execute the documents. The affirmation further indicated that the now deceased plaintiff went to counsel's office on February 19, 2013.

The Court takes note that the parties' Stipulation of Settlement addressed all issues as it indicates in pertinent part "Except as otherwise herein specifically provided to the contrary, each party waives all rights and interests which may exist in marital property, as the term is defined by statute...". In addition, the parties were fully allocuted by the Court regarding the terms of the parties' written stipulation of settlement and inquest was held. Based upon the facts and circumstances of the case, the Court finds that action did not abate for purposes of entering a judgment of divorce nunc pro tunc, where as here, the final adjudication was made during the parties' lifetime and a judgment could have been entered. Cornell, 7 NY2d 164. Accordingly, the Court hereby denies the defendant's application for an Order of abatement by Death, dismissal of the action, or an Order deeming the action abandoned, and setting aside the parties' Stipulation of Settlement dated November 14, 2012 null and void.

Life Insurance Proceeds

In light of the foregoing, the Court hereby denies the defendant's application to directing and compelling American General Life Insurance Company to pay the entire death benefit of life

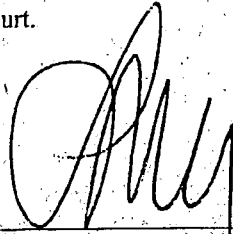
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insurance policy #WHO0020640 to the Defendant.

This shall constitute the decision and order of the Court.

Dated: Bronx, New York
June 30, 2014

So Ordered:



Hon. La Tia W. Martin, J.S.C.

STATE OF NEW YORK, COUNTY OF BRONX,
SS: LUIS M. DIAZ, COUNTY CLERK AND
CLERK OF THE SUPREME COURT, BRONX
COUNTY, DO HEREBY CERTIFY ON

2015 FEB 13 P 1: 56

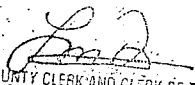
THAT I HAVE COMPARED THIS COPY
WITH THE ORIGINAL FILED IN MY OFFICE ON

7-4-14

AND THAT THE SAME IS A CORRECT

TRANSCRIPT THEREFROM AND OF THE
WHOLE OF SUCH ORIGINAL, IN WITNESS
WHEREOF, I HAVE HEREUNTO SET MY
HAND AND AFFIXED MY OFFICIAL SEAL.

026899


COUNTY CLERK AND CLERK OF THE
SUPREME COURT, BRONX COUNTY
FACSIMILE SIGNATURE USED PURSUANT
TO SECTION 17(2)(b) OF THE JUDICIAL
BRANCH OFF-PAY

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BETTY E. MATTHEWS
JUDGE OF PROBATE
WILLIAMSBURG COUNTY, SC

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FAY-516-466-6344

At a IAS Part 28, of the Supreme Court
of the State of New York held in and for the
County of Bronx, at the Courthouse located
at 851 Grand Concourse, Bronx, New York
on this 7 day of March, 2014.

PRESENT:

HON: La Tia H. Warren
Justice of the Supreme Court

-----X
ERVIN PRESSLEY,

Plaintiff,

ORDER TO SHOW CAUSE

-against-

Index # 12012/2011

ERICA PRESSLEY,

Defendant.
-----X

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Defendant Erica
Pressley, duly sworn to on the 4th day of March, 2014 and exhibits annexed
thereto, the undersigned will move this Court at an I.A.S. Part 28 thereof, to be held
in and for the County of Bronx, at the Courthouse of the Supreme Court, 851 Grand
Concourse, Bronx, New York, Room 621 on the 2nd day of April, 2014 at
9:30 o'clock of forenoon of that day, or as soon thereafter as counsel can be heard, why
an Order should not be made and entered, granting the following relief to the Defendant:

1. A Declaratory Judgment as to whether the within action for divorce has
abated because the Plaintiff, Ervin Pressley died before a Judgment of Divorce was
granted and/or entered; and/or whether this action must be dismissed pursuant
C.P.L.R. §3216 and/or this action must be deemed abandoned and dismissed pursuant to
C.P.L.R. §3404.

RESPONDENT'S
EXHIBIT

3

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WILLIAMSBURG COUNTY, SC

2. A Declaratory Judgment that the Stipulation of Settlement dated November 14, 2012 is null and void and of no force and effect, and/or setting aside said Stipulation of Settlement, and,

3. Directing and compelling American General Life Insurance Company to pay the entire death benefit of life insurance policy #WH00020640 to the Defendant, Erica Pressley; and,

4. For such other and further relief as to this Court may seem just and proper.

SUFFICIENT cause being alleged therefore, it is further ORDERED, pending the hearing of the within application, the American General Life Insurance Company be stayed and enjoined from the payment of death benefits to any named beneficiary with respect to life insurance policy # WH00020640; and,

SUFFICIENT cause being alleged therefore, it is further Ordered pending the hearing of the within application, the Clerk of the Court be stayed and enjoined from the entry of a Judgment of Divorce; and

SUFFICIENT cause being alleged therefore, let service of copy of this Order to Show Cause and the papers upon which it based, by ^{FAX}certified and first class mail upon American General Life Insurance Company, 1050 North Western Street, Amarillo, TX 79106; D'Angelica & Bilsk, PLLC Attorneys for the Plaintiff, 2705 Eastchester Road, Bronx, New York 10469 and Lorine Pressley, 1485 Old Georgetown Road, Hemingway, South Carolina, 29554 on or before the 10th day of March, 2014, be deemed good and sufficient service.

Opposition on or before MARCH 24, 2014.

Reply on or before April 2, 2014 in Court.

ENTER:

J. S. C.

[Signature]
L. H. H. Martin

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JUDGE OF PROBATE
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A

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C

D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
ERVIN PRESSLEY,

Plaintiff,

-against-

ERICA PRESSLEY,

Defendant.

-----X
STATE OF NEW YORK

COUNTY OF BRONX

}
} s.s.:
}

**AFFIDAVIT IN SUPPORT
OF ORDER TO SHOW CAUSE**

Index # 12012/2011

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WILLIAMSBURG COUNTY, SC

ERICA PRESSLEY, being duly sworn, deposes and says:

1. I am the Defendant in the above captioned action for divorce.
2. That I make this affidavit in support of the within Order to Show Cause

which seeks the following relief:

- A. A Declaratory Judgment as to whether the within action for divorce has abated because the Plaintiff, Ervin Pressley died before a Judgment of Divorce was granted and/or entered; and/or whether this action must be dismissed pursuant to C.P.L.R. §3216 and/or this action must be deemed abandoned and dismissed pursuant to C.P.L.R. §3404.
- B. A Declaratory Judgment that the Stipulation of Settlement dated November 14, 2012 is null and void and of no force and effect, and/or setting aside said Stipulation of Settlement, and,
- C. Directing and compelling American General Life Insurance Company to pay the entire death benefit of life insurance policy #WH00020640 to the Defendant, Erica Pressley; and,

D. For such other and further relief as to this Court may seem just and proper.

3. That I have retained the law firm of Agulnick & Gogel, LLC for the sole purpose of filing this Order to Show Cause to establish my rights with respects to the death proceeds of American General Life Insurance policy # WH00020640.

4. The Plaintiff Ervin Pressley and I married in New York County on July 7, 2007.

5. That in 2011, my husband, Ervin Pressley was residing in Hemingway, South Carolina and I residing in Bronx County on October 18, 2011; on October 18, 2011 my husband commenced this action for divorce.

6. My husband, the Plaintiff, Ervin Pressley took out life insurance policy #WH00020640 with American General Life Insurance Company prior to our marriage and thereafter designated me as beneficiary after our marriage.

7. On November 14, 2012, the Defendant and I entered into a Stipulation of Settlement of the action for divorce. That Stipulation was silent as to the disposition of American Life Insurance policy #WH00020840. See Stipulation of Settlement - Exhibit "A".

8. The Stipulation of Settlement was also silent as to which party was to obtain the Judgment of Divorce; was silent as to specific Equitable Distribution of the marital property, with the exception of two (2) parcels of real property. Therefore, not all aspects of the divorce action were adjudicated and resolved before the Plaintiff died. Under these circumstances, the entry of the Judgment of Divorce would not be merely a ministerial act.

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9. That as of today's date, no Judgment of Divorce has been granted nor entered. The last Court action on this matter occurred on November 14, 2012. Therefore this action must be deemed abandoned and dismissed pursuant to C.P.L.R. § 3216.

10. That upon information and belief, in December 2012 or January 2013, the Plaintiff removed me as the designated beneficiary of American General Life Insurance policy #WH00020840. He changed the beneficiary to his mother, Lorine Pressley, residing at 1485 Old Georgetown Road, Hemingway, South Carolina 29554.

11. That I have been advised that the automatic restraints provided for in the Domestic Relations Law (D.R.L.) § 236B were violated by that change of beneficiary of the life insurance policy, as I never consented to said change, or no order of this Court allowed said change, and no Judgment of Divorce has been entered.

12. That on January 25, 2014, the Plaintiff Ervin Pressley died. See Certificate of Death - Exhibit "B".

13. Said Certificate of Death improperly recites the Plaintiff marital status as "Divorced (and not remarried)". See Exhibit "B".

14. That I have been advised the Plaintiff's death abated this action, but notwithstanding, the life insurance change of beneficiary improperly occurred while the automatic restraints of D.R.L. § 236(B) were in effect.

15. The general rule is that when a party to a divorce action dies before a decree is granted terminating the marriage, the action abates and the Defendant in the matrimonial action is entitled to consideration as the surviving spouse. See Obadiah v. Shaw, 266AD2d 521, 699NYS2d 124; Matter of Forgione, 237AD2d 438, 655NYS2d 552.

16. In Sperber v. Schwartz, 139AD2d 640, 527NYS2d 279, the Court held that the death of a spouse ordinary abates the action for a divorce and the proceedings to

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obtain Equitable Distribution. Until a divorce is granted, there are no vested rights in Equitable Distribution.

17. Equitable Distribution is available only as an ancillary relief in a matrimonial action following the granting of a Judgment which terminates the marriage. See Sperber, Ibid; Leibowitz v. Leiboewitz, 93AD2d 535, 462NYS2d 469; Scharm v. Union National Bank, 116 Misc.2d 255, 455NYS2d 532.

18. In Briggs v. Briggs, 692NYS2d 924, the Court held that the death of the husband prior to the trial Court's review of the proposed divorce Judgment deprived the Court of any authority to pass upon any of the ancillary issues raised by parties concerning separation and the Settlement Agreement. Here in this case, after more than one year, the proposed Judgment of Divorce was not signed. Obviously, there were more defects or omissions. Therefore signing of the Judgment of Divorce is more than just a ministerial act.

19. In Topol v. Polokoff, 88 So.3d 341 (Fla. 4th DCA 2012) the Court ruled that the husband's redesignation of his wife as the beneficiary of his Individual Retirement Account (IRA) pursuant to an Interlocutory Order in a dissolution of a marriage action requiring him to do so, was rendered null and void by the abatement of the action due to his death, and that the Interlocutory Order in a dissolution of a marriage action requiring him to do so, was rendered null and void by the abatement of the action due to his death, and that the Interlocutory Order was rendered null and void.

20. In a like manner, the aforementioned Stipulation of Settlement should be deemed null and void and the change of the life insurance beneficiary should be deemed a violation of the automatic restraint provisions of the Domestic Relations Law.

21. That the Plaintiff's Last Will and Testament provided that I was the beneficiary of Plaintiff Ervin Pressley's Estate. See Last Will and Testament. - Exhibit "C". I should be considered as the surviving spouse for all circumstances and reasons.

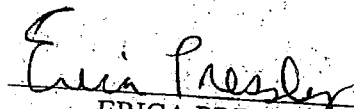
22. That on February 3, 2014, I filed an affidavit with this Court to deem the action for divorce to have been abated. See Affidavit - Exhibit "D".

23. That I have been advised that on March 10, 2014 the American General Life Insurance Company will pay out the proceeds of life insurance policy #WH00020640 in the sum of \$295,000.00 to the new named beneficiary Lorine Pressley, and not to me, unless there is a Court Order staying that payment.

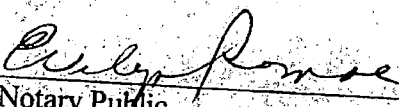
24. That in Order in prevent irreparable harm my pecuniary interests, pending the hearing of his motion, it is respectfully requested that this Honorable Court stay and enjoin American General Life Insurance Company from the payment of any death benefits with respect to life insurance policy #WH00020640 and that the clerk of the Court be stayed and enjoined from the granting or entry of the Judgment of Divorce.

25. That no prior application for the relief sought herein has been made.

WHEREFORE, it is respected requested that the relief sought in the annexed Order to Show Cause be in all respects granted.


ERICA PRESSLEY

Sworn to before me on
this 4 day of March, 2014


Notary Public

EVELYN ROMAN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN BRONX COUNTY
REG. #01R06246594
MY COMM. EXP. AUG. 31, 2015

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WILLIAMSBURG COUNTY, SC

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

-----X
ERVIN PRESSLEY

Plaintiff,

Index No. 12012-11

-against-

**STIPULATION OF
SETTLEMENT**

ERICA PRESSLEY

Defendant.
-----X

THIS AGREEMENT, made on 4 day of NOV, 2012 by and between ERICA PRESSLEY, SS# 065-60-2992 residing at 9 Dune Court, #1, Bronx, New York 10473, ("Wife"), and , ERVIN PRESSLEY SS# 074-68-1510, residing at 1495 Old Georgetown Road, Hemingway , South Carolina, 29554 ("Husband").

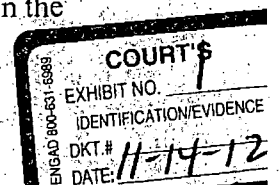
WHEREAS, the parties were married to each other in the City of New York County of New York and State of New York on July 7, 2007 and,

WHEREAS, there are no children of the marriage and there are no expected children of the marriage and,

WHEREAS, a divorce action is now pending between parties in the Supreme Court of the State of New York, County of Bronx, and,

WHEREAS, the parties desire to adjust and settle by agreement their affairs and to fix their respective financial and property rights, support rights and all other privileges and obligations and matters with respect to each other rising out of the marital relationship and otherwise and,

WHEREAS, the Wife has been represented by counsel in the preparation of this agreement and has been fully advised of her rights, and the Husband has represented in the



preparation of the agreement and has been fully informed of his rights, each party considers the terms of this agreement to be fair and reasonable and,

NOW, THEREFORE, in consideration of promises and covenants contained herein, the parties mutually agree as follows:

ARTICLE I
SEPARATE RESIDENCE

It is, and shall be, lawful for the parties at all times to live separate and apart from each other and to reside from time to time at such places as each may see fit and to contract, carry on and engage in any employment, business or trade, which either may see fit and to contract, carry on and engage in any employment, business or trade, which either may deem fit, free from control, restraint, or interference, direct or indirect, by the other in all respects as if unmarried.

ARTICLE II
NO MOLESTATION

Neither party shall in any way molest, disturb, trouble or interfere with the peace and comfort of the other or compel or seek to compel the other to associate, cohabit or dwell with him or her by any action or proceeding or by any means whatsoever for restoration of conjugal rights. Neither party shall directly or indirectly make statements to each other or any persons, which are derogatory to the other party.

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ARTICLE III
SEPARATE OWNERSHIP

Except as otherwise expressly set forth herein, each party shall own his or her separate property, free from any claim or right to the other, all of the items of the property, real personal and mixed, of any kind nature of description and whatsoever situate, which are now in his or her name, control or possession, with full power to dispose of the same as fully and effectually in all respect and for all purposes as if unmarried.

ARTICLE IV
RESPONSIBILITY FOR DEBTS

The Wife represents, and agrees that she had not heretofore, nor will she hereafter incur or contract any debt, charge obligation or liability whatsoever for which the Husband is or may become liable. The Wife agrees to indemnify and hold the Husband harmless of all loss, expenses (including reasonable attorney's fees) and damages in connection with or arising out of breach by the Wife of her foregoing representation and agreement.

Except as otherwise expressly set forth herein, the Husband represents and agrees that she has not heretofore, nor will hereafter incur or contract any debt, charge, obligation, or liability whatsoever for which the Wife is or may become liable. The husband agrees to indemnify and hold the Wife harmless of all loss, expenses (including reasonable attorney's fees) and damages in connection with or arising out of breach by the Husband of his foregoing representation and agreement.

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ARTICLE V
MUTUAL RELEASE AND DISCHARGE OF CLAIMS IN ESTATES**

Except as otherwise herein expressly set forth, each party hereby irrevocably releases, waives and relinquishes all present and future rights under the present or future laws of any jurisdiction or under any will or testamentary writing now or hereafter in existence to share in and to act as executor or administrator or trustee or, without limitation, in any capacity or for any reason whatsoever with respect to the other party's estate by reason of any right which may now or hereafter exist, except as contained in a writing made subsequent to the date hereof and expressly naming the other party. This provision shall constitute a mutual waiver by each party to take under any existing will or testamentary writings of the other and to take against each other's will or testamentary writings, now or hereafter in force, under the present or future laws of any jurisdiction, and without limiting the foregoing, to relinquish any and all rights in and to each other's estate including but not limited to all rights of dower and curtesy. However, the foregoing shall not bar a claim on the part of either party for any cause arising out of a breach of this agreement during the lifetime of the deceased party against whose estate such a claim may be made, in addition to any other remedies which may be available.

ARTICLE VI
SUPPORT AND MAINTENANCE

Taking into consideration all relevant facts and circumstances, including but not limited to financial employment and employment potential, and in reliance upon the distribution of marital property herein neither party seeks nor requires any maintenance or support from the

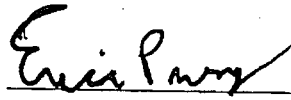
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other, now or in the future. Therefore no provisions for the support of either party is made herein.

ARTICLE VII
MEDICAL SUPPORT

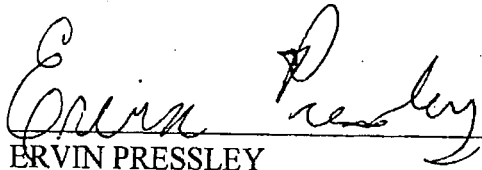
I, ERICA PRESSLEY, fully understand that upon the entrance of this divorce agreement, I shall no longer be allowed to receive health coverage under my former spouse's health insurance plan. I may be entitled to purchase health insurance on my own through a COBRA option, if available, otherwise I will be required to secure my own health insurance.

Dated: 11/14/12


ERICA PRESSLEY

I, ERVIN PRESSLEY, fully understand that upon entrance of this divorce agreement, I shall no longer be allowed to receive health coverage under my former spouse's health insurance plan. I may be entitled to purchase health insurance on my through a COBRA option, if available, otherwise I will be required to secure my own health insurance.

Dated: 11/14/12


ERVIN PRESSLEY

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ARTICLE VIII
DIVISION OF PROPERTY

Except as otherwise herein specifically provided to the contrary, each party waives all

Rights and interests which may exist in marital property, as that term is defined by statute,

Domestic Relations Law § 36, Part B, and Judicially interpreted.

Both parties acknowledge

that if there are any liens, judgments or encumbrances in their names or on which they are responsible on either of the below real properties the party responsible shall be solely responsible for same shall hold the other party harmless in same and shall pay any and all expenses or costs associated with same

The parties currently own as tenants in the entirety premises located at 686 Seward

Avenue, Rochester, New York 14611. Within 30 days of signing this agreement the Wife shall

execute a deed transferring all her rights and interest in said property. The Husband shall pay for

all necessary closing costs. Upon the signing of this agreement all rental payments shall be

sent to the Husband.

Wife has right of 1st refusal,

if wife does not purchase, she waives her entitlement to the real

The Husband is sole owner of ~~non marital~~ property located at 9 Dune Court, #1, Bronx,

New York 10473. Within 30 days of signing this agreement the husband shall execute a deed

transferring title of said property to the Wife. The Wife shall obtain a mortgage and satisfy the

existing mortgage under the Husband's name. In the event the Wife cannot obtain a mortgage,

the Wife shall execute a document holding the Husband harmless for the existing mortgage. The

Wife shall pay for all necessary closing and transfer costs.

Husband waives

his entitlement to any interest in connection w/ said real property, and further agrees to cooperate w/ any sale or transfer.

ARTICLE IX
LEGAL REPRESENTATION

The parties represent to each other that the wife has been represented by Zelenitz,

Shapiro & D'Agostino, P.C. and the Husband has been represented by D'Angelica & Bilski,

WILLIAMSBURG COUNTY, SC
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PLLC as their respective attorneys. Each party agrees to bear his or her own legal expenses in connection with this matter. Each party represents and warrants that he or she has dealt with no other attorney for which services the other party is or may become liable and will indemnify and hold the other party harmless of all loss, expenses (including reasonable attorneys' fees) and damages in the event of a breach of said representation and warranty. However, if either party should default in any of his or her obligation hereunder, or should challenge the validity of this agreement or its interpretation, then said party shall be liable for all damages (including those caused by delayed payments), costs and expenses of the other party as a result thereof, including but not limited to reasonable attorneys' fees.

The parties acknowledge that they have each been separately advised by their respective attorneys that there may be certain tax consequences pertaining to this agreement, that each party has been directed and advised to obtain independent tax advice from qualified tax accountants or tax counsel prior to signing this agreement and has had the opportunity to do so.

ARTICLE X
FULL DISCLOSURE

Each party has had the opportunity to make full and independent inquiry into the complete financial circumstances of the other and acknowledges that they know the nature, extent and value of the other party's property and business interests. The parties have been advised of their right to compel discovery and inspection of the other's book and records, business and personal and their right to have accountants, appraisers or other's business and

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property. Each party has waived their rights and intend not to take any further steps, themselves or through others, in connection with discovery, inspection, investigation, appraisal or evaluation of other's business or property.

Each party acknowledges that they have had full opportunity to read and review this agreement prior to this execution and acknowledge that the agreement has not been the result of any fraud, duress or undue influence. Neither party has been or is under the influence of any drug, alcohol or any other substances which could affect or impair the exercise of proper agreement prior to this execution and acknowledge that the agreement has not been the result of any fraud, duress or undue influence. Neither party has been or is under the influence of any drug, alcohol or any other substances which could affect or impair the exercises of proper judgment during the negotiations and execution of this agreement.

ARTICLE XI
POSSIBLE INVALIDITY

In the event any provision of this agreement should be held to be contrary to or invalid under the law of any country, state or other jurisdiction, said illegality or invalidity shall not in any way affect any other provision which is held to be illegal or invalid in a particular country, state or other jurisdiction in which said provision is legal and valid.

ARTICLE XII
MODIFICATION AND WAIVER

Neither this agreement or any provision herein shall be amended or modified except by written agreement duly executed and acknowledged with the same formality as this agreement

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Any waiver by either party of any provision of this agreement or any right hereunder shall not be deemed a continuing waiver and shall not prevent or stop such party from thereafter enforcing such right or provision. The failure of either party to insist in any one or more instances upon the strict performance of any provision of this agreement shall not be constructed as a waiver or relinquishment of such provision and shall continue in full force and effect.

ARTICLE XIII
INCORPORATION OF STIPULATION

The parties agree that the Stipulation of Settlement be incorporated and not merged into the Judgment of Divorce.

ARTICLE XIV
LEGAL INTERPRETATION

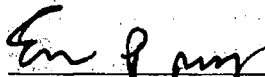
This agreement and all of the rights and obligations of the parties herein shall be governed according to the laws of New York State.

ARTICLE XV
ENTIRE UNDERSTANDING

This agreement contains the entire understanding of the parties who acknowledge that there are no representations, warranties, covenants or undertakings other than those expressly set forth herein.

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IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals the day and year first above written.

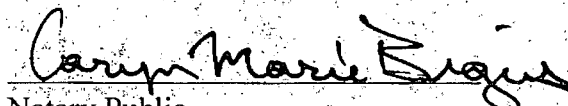

ERICA PRESSLEY


ERVIN PRESSLEY

STATE OF NEW YORK)
COUNTY OF BRONX) ss.:

On the 14th day of Nov, 2012, before me, the undersigned personally appeared ERICA PRESSLEY, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument acknowledgment to me that she/he executed the same in his/her individual capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of whom the individual acted, executed the instrument.

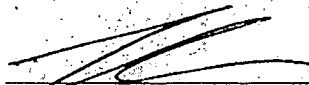
STATE OF NEW YORK)
COUNTY OF BRONX) ss.:


Notary Public
CARYN MARIE BIGUS
Notary Public, State of New York
No. 02B16194791
Qualified in Bronx County
Commission Expires 2016

CARYN MARIE BIGUS
Notary Public, State of New York
No. 02B16194791
Qualified in Bronx County
Commission Expires October 14, 20 16

On the 14 day of NOVEMBER, 2012, before me, the undersigned personally appeared ERVIN PRESSLEY, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledgment to me that he executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of whom this individual acted, executed the instrument.

LEONARD D'ANGELICA
Notary Public, State of New York
No. 02DA3040455
Qualified in Bronx County
Commission Expires 2/28/12


Notary Public

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BETTYE MATTHEWS
JUDGE OF PROBATE
WILLIAMSBURG COUNTY, SC

Index No. 12012

Year 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ERVIN PRESSLEY

Plaintiff,

-against-

ERICA PRESSLEY

Defendant.

FINDINGS OF FACT & CONCLUSION OF LAW

D'ANGELICA & BILSKI, PLLC

Attorneys for Plaintiff
2705 Eastchester Road
Bronx, New York 10469
(718) 515-0300
(718) 515-4366 (Fax)

To:
Attorney(s) for

Service of a copy of the within
Dated:

is hereby admitted.

Attorney(s) for

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Settlement to the Hon. one of the judges of the within named court,
at
on 20 , at .m.
Dated:

To:

D'ANGELICA & BILSKI, PLLC,
LEONARD D'ANGELICA, ESQ.
Attorneys for Plaintiff
2705 Eastchester Road
Bronx, New York 10469

FILED
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JESSIE F. HARTWIGS
JUDGE OF PROBATE
WILLIAMSBURG COUNTY, SC

Index No. 12012

Year 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ERVIN PRESSLEY

Plaintiff,

-against-

ERICA PRESSLEY

Defendant.

JUDGMENT OF DIVORCE

D'ANGELICA & BILSKI, PLLC

2705 Eastchester Road
Bronx, New York 10469
(718) 512-1111
(718) 512-1111 (fax)

To:
Attorney(s) for

Service of a copy of the within
Dated:

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To:

D'ANGELICA & BILSKI, PLLC,
LEONARD D'ANGELICA, ESQ.

Attorneys for Plaintiff
2705 Eastchester Road
Bronx, New York 10469

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BRONX COUNTY

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Judgment entered by
A.I. on OCT 7 2014

WILLIAMSBURG COUNTY, SC
JUDGE OF PROBATE
BETTY F. PATTERSON

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LAST WILL AND TESTAMENT

of

ERVIN CHRISTOPHER PRESSLEY

I, ERVIN CHRISTOPHER PRESSLEY residing in Bronx, State of New York, which I hereby declare to be my domicile, do hereby make, publish and declare this to be my Last Will and Testament.

FIRST: I revoke all Wills and Codicils at any time heretofore made by me.

SECOND: I direct that all my just debts and funeral expenses be paid out of my estate as soon after my death as may be practicable.

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. If there be no survivor between them, then to those persons to whom and in those proportions in which the same would have been distributable if I had then died the owner thereof, intestate, and a resident of the State of New York.

FOURTH: I hereby appoint my said spouse to be the Executor of this my Last Will and Testament. 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 reason ceases to act as Executor, I hereby appoint LORINE PRESSLEY, as Executor of this my Last Will and Testament.

I direct that none of my Executors shall be required to give any bond or other security for the faithful performance of their respective duties in any jurisdiction whatsoever, or if any bond is required, no surety shall be required thereon. No fiduciary at any time acting hereunder shall be required to file periodic accountings in the Court in which this Will shall be admitted to probate unless such fiduciary shall elect to do so. To the extent that any of my Executors shall exercise discretion hereunder and make payment and/or application of assets as herein provided they shall be relieved of any and all responsibility and liability with respect to the same.

FIFTH: I hereby appoint my above-mentioned spouse as the Guardian of the person and property of my children during their respective minorities. If my spouse does not survive me, or fails to qualify, or having qualified, dies, resigns or becomes incapacitated before all of my children attain the age of eighteen (18) years, I hereby appoint GWENDOLYN LEVERETT, as Guardian of the person and property of my said children during their respective minorities. In the event my said Guardian does not survive me, or fails to qualify, or having qualified, dies, resigns or become incapacitated before all of my children attain the age of eighteen (18) years, I hereby appoint LORINE PRESSLEY as alternate Guardian of the person and property of my said children during their respective minorities. In the event my said Guardian does not survive me, or fails to qualify, or having qualified, dies, resigns or become incapacitated before all of my children attain the age of eighteen (18) years, I hereby appoint JAKOYA GRISSETT as alternate Guardian of the person and property of my

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Hempstead, New York 11763

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I direct that no Guardian shall be required to furnish any bond or other security in any jurisdiction for the faithful performance of his duties.

SIXTH: My Executor shall have discretion to make payment or distribution of any principal and/or income vesting in and payable to any minor in any one or more of the following ways:

(a) paying the same to the parent, guardian or other person having the care and control of such minor and the receipt by such payee shall be full acquiescence to my Executor,

(b) paying the same to any relative of the minor as custodian for the minor under any applicable Gifts to Minors Act, or

(c) deferring payment or distribution of any part or all thereof until the minor comes of age, meanwhile applying to such minor's use so much principal and income therefrom, and at such time or times as my Executor may deem advisable. Any income not expended by my Executor shall be added to principal and my Executor shall pay over and disburse the principal to the minor upon such minor attaining the age of eighteen (18) years or to the estate of such minor if the minor dies under the age of eighteen (18) years.

SEVENTH: My Executor shall have all the powers and authority which are now conferred upon fiduciaries (expressly including, but not limited to, those powers enumerated in the Fiduciaries Powers Act, Section 11-1.1 of the New York Estates Powers and Trusts Law) or which may hereafter be conferred by law upon Executors. In addition to the foregoing powers and authority, I fully authorize and empower my Executor to retain any and all property, and also, to invest any and all property, real or personal, which at any time may constitute part of my estate, in any stocks, bonds, common trust funds, securities of investment companies or other securities regardless of any rule regarding diversity of trust investments.

EIGHTH: I direct that all inheritance, estate, transfer, succession and death taxes or duties (including any interest thereon) imposed by any jurisdiction whatsoever by reason of my death upon or in relation to any property includable in my estate for the purposes of any such taxes or duties, whether such property passes under the provisions of this Will, or outside the provisions of this Will, be paid out of my general estate without proration or apportionment.

NINTH: Wherever the terms "Executor" or "Executors" are employed herein, the same shall be deemed to include the terms "Executrix" or "Executrices" or their alternates or successors, male pronouns shall be deemed to include the female and neuter gender as the case may be, and the singular shall include the plural.

IN WITNESS WHEREOF, I hereby sign, seal, publish and declare this to be my Last Will and Testament and initial each page, in the presence of the persons witnessing it at my request this 5th day of February, in the year 2008

Edwin Pressley L.S.

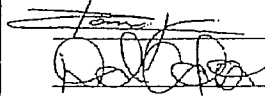
The foregoing was on said date subscribed, sealed, published and declared by the Testator, as his Last Will and Testament, in our presence and we at his request, and in his presence and in the presence of each other, subscribed our names as witnesses (the final sentence of the Will beginning with the words "IN WITNESS WHEREOF"

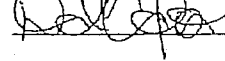
FELDMAN, KRAMER
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Attorneys At Law
330 Vanderbilt Motor Parkway
Hauppauge, New York 11788

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WILLIAMSBURG COUNTY, SC

having been read aloud in his and our presence), all of us, including the Testator being present throughout the execution and attestation of this Will.

 residing at 1350 ACACIA AVE BRX, NY 10472.

 residing at 480 HUTCHINSON RIVER PKWY E, #7E, BRONX, NY 10475

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WILLIAMSBURG COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG

Gwendolyn Leveritt

Appellant,

v.

Lorine C. Pressley as Personal Representative
of the Estate of Ervin Christopher Pressley,

Respondent.

IN THE PROBATE COURT
THIRD JUDICIAL CIRCUIT
CASE NO.: 2014-ES-45-00179

APPELLANT'S BRIEF
TO THE CIRCUIT COURT

I.

STATEMENT OF ISSUES ON APPEAL

- A. After finding and admitting 5 February 2008 Will of the Decedent Ervin Christopher Pressley as "the Last Will and Testament of the Decedent", did the Probate Court err in looking outside of that valid Will for the Decedent's testamentary intent?
- B. Did the Probate Court err in finding a spouse-survival contingency to the Decedent's expressed alternative disposition of assets expressed in his valid Will?
- C. Did the Probate Court err in holding that the Decedent's Will did not provide for the distribution of his assets in the event of a divorce?
- D. Did the Probate Court err in failing to follow the South Carolina Probate Code statutory directives -- directing only that a divorced spouse (and no other) be treated as predeceasing the Decedent?

II.

FACTS

Ervin Christopher Pressley ("Decedent") died on January 25, 2014. At the time of his death, the Decedent had become a resident of Williamsburg County after previously residing in the Bronx County, New York. *Final Order* p. 2. The Decedent's Last Will and Testament (the

“Will”) was prepared in New York and dated February 5, 2008. *Final Order* p. 1; *Last Will and Testament of Ervin Christopher Pressley*, p. 1. In compliance with the Uniform Probate Code provisions, the Will was signed by two witnesses who also verified their witness of the Will’s execution under oath before a New York notary. *Final Order* p. 1; *Last Will and Testament of Ervin Christopher Pressley*, p. 4.

At the time of his execution of the Will, the Decedent was married to Erica Pressley (“Erica”). The Decedent and Erica were married to each other in New York on July 7, 2007. The couple had no children.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* p. 2; *see Stipulation of Settlement*, November 14, 2012. After the decedent’s death, Erica brought a legal action in New York to have the Stipulation of Settlement declared null and void. That action was unsuccessful – and as the Probate Court here found 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* p. 3; *see Decision/Order of the New York Court*. The Probate Court here found that, “In essence, [the Order] affirmed the Judgment of Divorce.” *Final Order* p. 3; *see Decision/Order of the New York Court*.

His Will provided that—in the event of his wife predeceasing him—the alternative personal representative of his estate would be his mother, Lorine C. Pressley (“Lorine”). *Hearing Transcript* p. 15; *Last Will and Testament of Ervin Christopher Pressley*, p. 1. His mother presently serves in that capacity. *Final Order* pp. 1-2. The Decedent’s Will further provided that, should his wife predecease him, his estate was to be equally shared by his mother

¹ The Decedent died without children. *Final Order* p. 2.

and Gwendolyn Leveritt (the Appellant here and Decedent's mother-in-law – or former mother-in-law) ("Gwendolyn"). *Hearing Transcript* p. 12; *Last Will and Testament of Ervin Christopher Pressley*, p. 1.

This matter was originally opened by the Probate Court of Williamsburg County ("Probate Court") on an informal appointment of Lorine as the personal representative of her son's estate. *Hearing Transcript* p. 5. Subsequently, the Appellant brought a petition for formal testacy filed December 20, 2014 based upon the Will described above. *Hearing Transcript* p. 6. In response to this petition for formal testacy, Lorine sought a declaration that the Will did not dispose of the Decedent's property and that she be also be named as the Personal Representative as the alternate designated in the Will. *Final Order* pp. 1-2.

The matter came before the Probate Court for hearing on March 12, 2015. After presentation of agreed facts, relevant exhibits, and counsel argument, the matter was taken under advisement. The Probate Court issued its order dated and filed April 2, 2015 which recognized the Will (not challenged by this appeal), confirmed the appointment of Lorine (also not challenged by this appeal), and held that the Decedent's assets should "pass as if he died intestate" – despite the admission of the valid Will with its specified distributions. *Final Order* pp. 1-7.

III. APPLICABLE LAW

A. Effect of Divorce on Standing as Surviving Spouse

S.C. Code Ann. § 62-2-802(a) states: "An individual who is divorced from the decedent . . . is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death." In analyzing this section, the Court of Appeals of South Carolina opined: "'Surviving spouse' is defined in the negative as not including one who is

divorced from the decedent or whose marriage to the decedent has been annulled.” *Lovett v. Lovett*, 329 S.C. 426, 432, 494 S.E.2d 823, 826 (Ct. App. 1997).

The Reporter’s Comment to subsection (a) further expounds that: “Under Section 62-2-802(a), a valid divorce or a valid annulment deprives the putative spouse of the status of surviving spouse of the decedent and the capacity to take as such in succession to the decedent’s estate under this Code.” S.C. Code Ann. § 62-2-802(a), comment 2.

B. Revocation of Will Provisions Based on Divorce

Similar to these provisions is S.C. Code Ann. § 62-2-507, which provides:

(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;

...

(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.

Important to note is the definition of divorce:

“Divorce or annulment” means any divorce or annulment or declaration of invalidity of a marriage or other event that would exclude the spouse as a surviving spouse in accordance with Section 62-2-802. It also includes a court 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. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.

Id. at § 62-2-507(a)(2). Evidencing the similarities between § 62-2-507 and § 62-2-802, the Reporter's Comments to § 62-2-802 says:

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. Section 62-2-507 refers to Section 62-2-802 for the definition of divorce and annulment.

S.C. Code Ann. § 62-2-802(a), comment 4. Additionally, upon the codification of the "revocation by divorce" statute, authors of the statute opined:

The [South Carolina Probate Code] includes several sections that revoke a testator's will, in whole or in part, based on assumptions about the testator's intent rather than the expression of an intent to revoke. These situations include a testator who is divorced after the execution of a will (the "revocation-by-divorce" statute). When applicable, the revocation-by-divorce statute, section 62-2-507, revokes a testator's will to the extent necessary to omit an ex-spouse.

Catherine H. Kennedy and S. Alan Medlin, *2013 Amendments to the S.C. Probate Code*, 25 S. CAROLINA LAWYER 32, 35 (Ms. Kennedy chaired the South Carolina Bar study committee that drafted and recommended the 2013 amendments; Professor Alan Medlin served as the Code reporter.).

C. Will Construction

Where there is a valid and unambiguous will, South Carolina courts have consistently published that: "We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties." *United States Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009) (citing *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Finance Com.*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988)). Furthermore, "'A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.'" *Id.*; see also *Thomason v. Hellams*, 233 S.C. 11, 14-15, 103 S.E.2d

324, 325 (1958) (“It was held that the will is plain and unambiguous and there is no room for construction or interpretation of it. The court improperly took into consideration facts, such as the very advanced age of the defendant and her frail health, which were disclosed in argument; but they were not in the complaint and will not be considered by this court.”).

The requirement that a Court first follow the unambiguous language of the Will itself serves to effectuate the cardinal rule of will construction “that the testator’s intent should be ascertained and given effect.” *May v. Riley*, 279 S.C. 248, 250, 305 S.E.2d 77, 78 (1983); see also *Fenzel v. Floyd*, 289 S.C. 495, 498, 347 S.E.2d 105, 107 (Ct. App. 1986) (internal citations omitted)(“In construing a will, the purpose of the courts is to discover and give effect to the intent of the testator. The first resort is always to language of the will itself. Where the terms of the will are ambiguous, the court may resort to extrinsic evidence to resolve the ambiguity.”).

D. Avoidance of Intestacy

Another long-standing principal of South Carolina jurisprudence is that “the court should ‘indulge in every presumption’ to validate a will and thereby avoid intestacy.” *In re Estate of Blankenship v. Grady*, 336 S.C. 103, 109, 518 S.E.2d 615, 618 (Ct. App. 1999); see also *Meier v. Meier*, 208 S.C. 520, 526, 38 S.E.2d 762, 765 (1946) (“The law strongly favors the sustaining of a will as opposed to its invalidation and will indulge in every presumption against intestacy.”); *Abrams v. Templeton*, 320 S.C. 325, 330, 465 S.E.2d 117, 121 (Ct. App. 1995) (“The law abhors intestacy and will indulge every presumption in favor of the validity of the will.”).

IV. STANDARD OF REVIEW

“An appellate court’s determination of the standard of review for matters originating in the probate court is controlled by whether the cause of action is at law or in equity.” *Holcombe-*

Burdette v. Bank of Am., 371 S.C. 648, 654, 640 S.E.2d 480, 483 (Ct. App. 2006). “The construction of a will is an action at law.” *Id.* “On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge’s findings.” *Blackmon v. Weaver*, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005). As outlined below, the Probate Judge in this matter has made errors of law and therefore must be reversed.

V. ARGUMENTS

A. After Finding And Admitting The February 2008 Will Of The Decedent Ervin Christopher Pressley As “The Last Will And Testament Of The Decedent”, The Probate Court Erred In Looking Outside Of That Valid Will For The Decedent’s Testamentary Intent.

The Probate Court found that the Decedent’s Will “should be admitted for filing pursuant to Section 62-2-901 of the 1976 Code of Laws of South Carolina, as amended, and finds it to be the Last Will and Testament of the decedent, Ervin Christopher Pressley.” *Final Order* p. 5. After admitting and filing the Decedent’s Will, the Probate Court should have looked exclusively to the Will, absent any ambiguity, to discern the clear intent of the testator.

In this case, the language of the Will itself was not ambiguous – indeed, it was clear. The surviving spouse was to inherit the entirety of the estate and if there was no surviving spouse, then Gwendolyn Leveritt and Lorine Pressley were to inherit the estate in equal shares if they both were alive. Because there is nothing ambiguous about these provisions, there was no need and no legal authority to consider evidence extrensic to the Will. The Probate Court, however, did consider such extrensic evidence stating “the Court has to look at the intent of the Testator, and in this case, the intent of the Testator can be gleaned from the Last Will and Testament *as*

well as the Judgment of Divorce, Stipulation of Settlement and the other documents filed as evidence.” *Final Order* p. 3 (emphasis added).

Initially, the Probate Court here correctly stated that it must look at the “intent of the Testator.” But after admitting the Will and finding no ambiguities, the Court should have confined itself to the four-corners of the Will. *See Fenzel*, 289 S.C. at 498, 347 S.E.2d at 107 (“In construing a will, the purpose of the courts is to discover and give effect to the intent of the testator. The first resort is always to language of the will itself. Where the terms of the will are ambiguous, the court may resort to extrinsic evidence to resolve the ambiguity.”); *see also Shelley v. Shelley*, 244 S.C. 598, 601, 137 S.E.2d 851, 853 (1964) (“In the construction of a will the primary purpose of the court is to arrive at testator’s intention as expressed in his will considered as a whole. His intention must be ascertained from the language he used where it is clear and unambiguous.”).

In a move of great judicial activism, the Probate Court here not only erroneously looked beyond the will, presumably based upon some non-existent ambiguity, the Court further presumed that the “Testator would not want to divide his assets in a Stipulation of Settlement which was approved by the Judgment of Divorce.” *Final Order* p. 5; *see Stipulation of Settlement*, November 14, 2012. As the Probate Court improperly directed after review of these extrinsic documents: “The Court finds that this Will does not effectively dispose of the decedent’s property so the decedent’s assets will pass as if he died intestate.” *Final Order* p. 5. As noted in the following argument, there is nothing statutorily prohibited or inherently inconsistent/unintended with a gift to a named former in-law. To the contrary, clearly identified individuals are presumed to be the intended devisee absent some statutory bar.

Such action is not in compliance with South Carolina law and rises to the degree of reversible error, *See Thomason*, 233 S.C. at 14-15, 103 S.E.2d at 325 (showing an example of reversible error where the court had an unambiguous will but “improperly took into consideration facts, such as the very advanced age of the defendant and her frail health, which were disclosed in argument”). By looking outside of the four corners of the valid Will when determining the intent of the Decedent, the Probate Court committed an error of law.

Moreover, the activism of the Probate Court here violates a long-standing principal of South Carolina jurisprudence is that “the court should ‘indulge in every presumption’ to validate a will and thereby avoid intestacy.” *In re Estate of Blankenship*, 336 S.C. at 109, 518 S.E.2d at 618. In lieu of the Probate Court looking to specifically named beneficiaries and “indulg[ing] in every presumption . . . [to] avoid intestacy,” the Probate Court committed reversible error by reverting to intestacy -- finding that the Decedent’s Will did not provide for the distribution of his assets in the event of a divorce. *Id.*

B. The Probate Court Erred In Finding A Spouse-Survival Contingency To The Decedent’s Expressed Alternative Disposition Of Assets Expressed In His Valid Will. Likewise, The Court Also Erred In Holding That The Decedent’s Will Did Not Provide For The Distribution Of His Assets In The Event Of A Divorce.

The Probate Court here never clearly states what, if any, ambiguity it felt warranted consideration of extrinsic evidence. The Probate Court merely found the “Will does not dispose of the decedent’s property as the contingency that the former spouse not survive him did not occur.” *Final Order* p. 6. Perhaps the Court felt that the operation of the statutory ex-spouse exclusion found in S.C. Code § 62-2-507 somehow created an ambiguity in the Will, *but it does*

not; that statutory exclusion only serves to trigger the contingent beneficiaries unambiguously provided for in the express terms of the Will.² The contingency in the Will stated:

[A]ll 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 DANIELLE 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 LEVERITT and LORINE PRESSLEY.

Last Will and Testament of Ervin Christopher Pressley, p. 1.

In this case, the beneficiaries, described in the contingency above, are not defined by class (such as “parents”) but are two named individuals. This clear unambiguous language suggest an intent that the testator wanted to devise *to these persons* – regardless of the existence or survival of any spouse or former spouse. If this were not the testator’s intent, he could have changed his Will – but he did not. It is not the Court’s place to change his will for him and presume that he could not have intended to devise anything to a specific person he chose to name. To the contrary, the law presumes that named person to have remained close to the testator – regardless of his change in marital state; moreover, it is common for affectionate bonds of extended family and in-laws to outlive a marriage. Thus, the Supreme Court of Texas affirmed the enforcement of a contingent bequeath to a named “beloved” step-child even after divorce. In re Estate of Nash, 220 S.W. 3d 914 (2007) (Court refusing to extrapolate the clear

² This is the result reached by the trial court in *Estate of Hermon*, 39 Cal. App. 4th 1525 (1995). The California Court of Appeal reversed the trial court – *but not* because it found the Will ambiguous -- rather it found that the contingent gift to the testator’s children and “my spouses children” was a class gift to a class of persons, not named, and statutorily no longer in existence. Indeed, the appellate court provided that “If different language had been employed in the dispositive portions of the will, we may have reached a contrary result.” *Moreover, it was the absence of identifying names that led the court to conclude that this was a class gift and not a gift to individuals.*

statutory language of statutory exclusion to some greater exclusion). Some state legislatures have broadened the statutory exclusion, ours has not.³

As discussed in Section B, S.C. Code Ann. § 62-2-802(a) states: “An individual who is divorced from the decedent . . . is not a surviving spouse.” Thus, the divorce and Stipulation of Settlement of the Decedent and Erica revoked any disposition by the Decedent to Erica. *See Stipulation of Settlement*, November 14, 2012. Notwithstanding this limited statutory mandate, the Decedent’s Will clearly directed, “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

³ In the Probate Court, Respondent sought to make this matter turn on a issue of fact. Respondent argued “Erica Pressley literally survived Ervin Pressley,” and thus “the contingent request [doesn’t] come into play because the contingency didn’t happen. She didn’t predecease.” *Hearing Transcript* p. 20.

However, S.C. Code Ann. § 62-2-802(a) states: “An individual who is divorced from the decedent . . . is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death.” *See also* S.C. Code Ann. § 62-2-507(a)(2) (defining divorce as any “divorce or annulment or declaration of invalidity of a marriage or other event that would exclude the spouse as a surviving spouse in accordance with Section 62-2-802. It also includes a court order purporting to terminate all marital property rights.”). Further, the Reporter’s Comment to subsection (a) further expounds that: “Under Section 62-2-802(a), a valid divorce or a valid annulment deprives the putative spouse of the status of surviving spouse of the decedent and the capacity to take as such in succession to the decedent’s estate under this Code.” S.C. Code Ann. § 62-2-802(a), comment 2.

Thus, even though “Erica Pressley literally survived Ervin Pressley” the Probate Code and its Reporter’s Comments unequivocally mandate a divorce “deprives the putative spouse of the status of surviving spouse.” *Id.*; *Hearing Transcript* p. 20. Hence, because the Probate Court found there to have been a valid divorce and Stipulation of Settlement, by operation of law Erica did not survive the Decedent. The Probate Court did not appreciate or properly apply this statutory classification, as it stated, “However, as stipulated in the Will, that the wife – if the wife predecease him, then Ms. Gwendolyn and Ms. Lorine would inherit. However, we all can clearly say that, you know, she did survive him.” *Hearing Transcript* p. 19. Based upon this anti-statutory conclusion of survival, the Probate further concluded that the remaining contingent “provisions concerning the disposition of the assets of the estate are not relevant,” and that the “Will does not effectively dispose of the decedent’s property so the decedent’s assets will pass if he died intestate.” Order p. 5. The Probate Court’s conclusions result from errors of law and warrant reversal.

surviving issue, then to GWENDOLYN LEVERITT and LORINE PRESSLEY, equally or all to the survivor between them.” *Final Order* p. 3; *Last Will and Testament of Ervin Christopher Pressley*, p. 1. Again, Lorine was the Decedent’s mother, while Gwendolyn was the Decedent’s mother-in-law.

This clear provision directing the contingent disposition of the Decedent’s assets are relevant, as it spells out the intent of the Decedent that, should his spouse not take under his Will, Gwendolyn and Lorine should take equally between them. *See Fenzel*, 289 S.C. at 498, 347 S.E.2d at 107 (internal citations omitted) (“In construing a will, the purpose of the courts is to discover and give effect to the intent of the testator.”). *Failure to give effect to this clear valid directive of the testator was an error of law.*

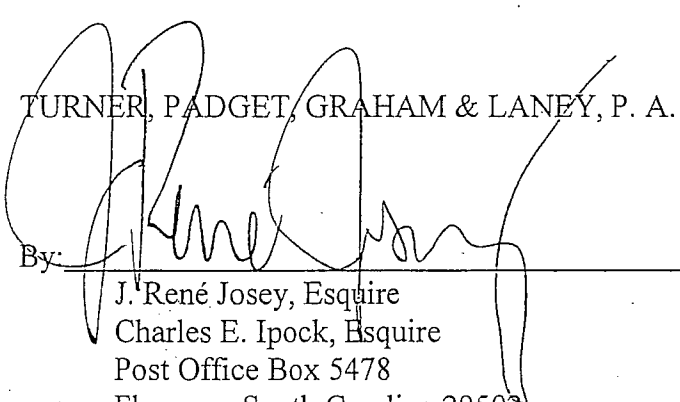
VI. CONCLUSION

For the foregoing reasons, the Probate Court committed reversible error and the Final Order of Judge Betty F. Matthews, filed on April 2, 2015, should be vacated and this matter should be remanded back to the Probate Court for an Order in compliance with the above findings.

Florence, South Carolina

June 18, 2015

TURNER, PADGET, GRAHAM & LANEY, P. A.

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ATTORNEYS FOR THE APPELLANT

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CASE NO: 2015-CP-45-00198
(CASE NO: 2014-ES-45-00179)

IN THE MATTER OF THE ESTATE OF)
ERVIN CHRISTOPHER PRESSLEY,)
)

Gwendolyn Leveritt,)

Petitioner,)

vs.)

Lorine C. Pressley as Personal)
Representative of the Estate of)
Ervin Christopher Pressley,)

Respondent.)
)

RESPONDENT'S BRIEF
IN
THE CIRCUIT COURT

FILED

8/14/2015
Williamsburg County
Clerk of Court
Kingstree SC

STATEMENT OF ISSUES ON APPEAL

A. Did the Probate Court, in its Order of April 2, 2015, properly construe the Last Will and Testament of Ervin Christopher Pressley?

B. Did the Probate 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?

C. Did the Probate Court properly find that the evidence, facts and plain language of the Last Will and Testament of Ervin Christopher Pressley resulted in intestacy?

D. After finding and admitting the will of the Decedent Ervin Christopher Pressley dated February 5, 2008, as "the Last Will and Testament of the Decedent", did the Probate Court err in looking outside of that valid will for the Decedent's testamentary intent?

E. Did the Probate Court err in finding a spouse-survival contingency to the Decedent's expressed alternative disposition of assets expressed in his valid will?

F. Did the Probate Court err in holding that the Decedent's will did not provide for the distribution of his assets in the event of a divorce?

I **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, 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 WILL

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)

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)

In determining the intent of a testatrix and in reaching proper construction of a Will, a primary resort to the words used by the testatrix is required. *Padgett v. Black*, 229 S.C. 142, 92 S.E.2d 153 (1956). True intent of a testator must be gathered from the four corners of his Will. *Padgett v. Black*, 229 S.C. 142, 92 S.E.2d 153 (1956).

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 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 provision in a will that benefits, empowers or appoints a former spouse and 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)

VI
STATEMENT OF 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 (Hearing Transcript, 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 (Hearing Transcript 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, 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 p. 2; see Stipulation of Settlement, November 14, 2012.)

After the Decedent's death, Erica brought a legal action in New York to have the Stipulation of Settlement declared null and void. That action was unsuccessful – and as the Probate Court here found, 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 p. 3; see Decision/Order of the New York Court). The Probate Court here found that, “In essence, (the Order) affirmed the Judgment of Divorce.” (Final Order p. 3; see Decision/Order of the New York Court.)

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. 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. 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. Accordingly, the Probate Court held that there was an intestacy. The Appellant, Gwendolyn Leveritt has appealed the Order of the Probate Court dated April 2, 2015.

VII 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 the Decedent executed his will, he 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.

Also, the Decedent separated from his wife prior to his death and they had executed Stipulation of Settlement dated November 14, 2012 which was approved by a New York Court. (Final Order p. 2; see Stipulation of Settlement, November 14, 2012). 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. 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. The Court in New York also approved the parties' Stipulation of Settlement, after taking testimony from each party.

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 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 null and void and had no force and effect. 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 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 back in 2012. 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. The 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.

The Probate Court here found that, "In essence, (the Order) affirmed the Judgment of

Divorce.” Final Order p. 3; see Decision/Order of the New York Court.

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 bequest 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 Stipulation as set forth in the Transcript, 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 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. 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.

VIII ARGUMENTS

A. IN ITS ORDER OF APRIL 2, 2015, THE PROBATE COURT FOR WILLIAMSBURG COUNTY PROPERLY CONSTRUED THE LAST WILL AND TESTAMENT OF ERVIN CHRISTOPHER PRESSLEY. THE PROBATE COURT PROPERLY APPLIED 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 PRESSELY.

In order to properly interpret and construe the Last Will and Testament of the Decedent, a review of 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 benefits, empowers, 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 has 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.

Additionally, the reporter's comments to *S.C. Code Ann. §62-2-802* clearly state 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. The clear intent of the legislature is evidenced by these statutes and the reporter's comments indicate that the revocation is limited to the spouse and only to those provisions that benefit, empower or appoint the spouse. The condition precedent does not, in any manner, empower, benefit or appoint Erica Pressley. Additionally, the language of the condition precedent uses the mandatory word "shall". There is no statutory basis for the revocation of that 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 indicates that the contingent provision would only be effective if Erica Pressley did not survive him. 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 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. Pointing out first that such statute did not, in word or intent, have any reference to deeming a divorced spouse civilly dead, and secondly, that 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 court said that since such contingency had not occurred, the result was intestacy. 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.

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 State of South Carolina has not made any such addition or change to extend the revocation. Rather, the limitation to of the revocation by law based upon a divorce or other action by order of actions by the parties to revoke provisions of a will are 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 court held that provisions in the decedent's will, which was executed during a marriage which had been dissolved prior to his death by divorce, granting certain bequest in the event his spouse predeceased him to his children and spouse's children and his issue and his spouse's issue, 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 very 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 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 relatives of the former spouse, 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. Also, that statute did not make provisions if the specific contingency in his will for the benefit of his former spouse did not survive the testator. In essence, that court found that the bequest to the wife failed because the contingency required, i.e., the death of the spouse, did not occur. Therefore, the decedent's estate descended to his heirs-at-law.

The will of the Decedent requires a holding that the death of the spouse was a sole condition precedent to the effectuation of the gift over. 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 that 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, there is a necessity for giving meaning and effect to the express language and terminology employed by a testator, and where such language is clear and unambiguous, it may not be cut down, or added to, under the guise of construction. Stated otherwise, courts should adhere to the principle 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 that 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 is clear that the provision for the spouse only occur if she survives the testator. The probate code (*Section 62-2-507(e)*) requires the provision in a will for a former spouse to be treated as to that provision of the will as if the former spouse predeceased the testator and that that section as well as *Section 62-2-802* provided a former spouse is not a surviving spouse. 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 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. He used a mandatory requirement that his spouse survived him. 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. If there is no other expression of testatorial intention, other than his spouse must not survive him, then the property should pass by intestate succession. In fact, 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.

B. AFTER THE CONSIDERATION OF THE EVIDENCE, FACTS, PLAIN LANGUAGE OF THE LAST WILL AND TESTAMENT OF ERVIN CHRISTOPHER PRESSLEY AND THE APPLICABLE LAW, 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 benefiting 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 Respondent acknowledges that 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)

C. ONCE THE WILL OF THE DECEDENT, ERVIN CHRISTOPHER PRESSLEY, DATED FEBRUARY 5, 2008, WAS ADMITTED TO PROBATE, THE PROBATE COURT PROPERLY CONSIDERED THE MARITAL LITIGATION AND STIPULATION OF THE DECEDENT AND ERICA PRESSLEY AND ONLY LOOKED

OUTSIDE THE WILL TO APPLY THE LIMITED AND SPECIFIC REVOCATION TO THE DECEDENT'S WILL, AS REQUIRED BY S.C. CODE ANN. §62-2-802(B) AND S.C. CODE ANN. §62-2-507.

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 a required mandatory condition precedent that did not occur and that resulted in an intestacy.

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

D. THE PROBATE COURT DID NOT HOLD THAT THE DECEDENT'S WILL DID NOT PROVIDE FOR THE DISTRIBUTION OF HIS ASSETS IN EVENT OF DIVORCE, RATHER THE PROBATE COURT HELD THAT DECEDENT'S WILL DID NOT PROVIDE FOR THE DISTRIBUTION OF HIS ASSETS SINCE THE CONDITION PRECEDENT DID NOT OCCUR.

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

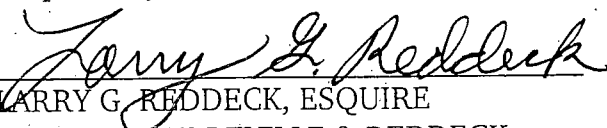
the Decedent. As previously stated, the Probate Court properly applied the applicable code sections to the Decedent's Will. The applicable law limits the statutory revocation to the provisions that benefit, empower or appoint the putative spouse and the applicable law was not intended to override the 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 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.

IX CONCLUSION

For the foregoing reasons, the Final Order of The Honorable Betty L. Matthews, Judge of Probate for Williamsburg County, filed on April 2, 2015, should be affirmed.

Respectfully submitted,


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TABLE OF CONTENTS

Statement of Issues on Appeal	1
Standard of Review	2
Statutory Construction	3
Construction of Will	4
Statutory Partial Revocation of Wills S.C. Code §62-2-802 and S.C. Code §62-2-507 ..	5
Intestacy	7
Statement of Case	8
Statement of Facts	9
Arguments	12
Conclusion	20
Table of Authorities	21

TABLE OF AUTHORITIES **CASES**

<i>In re: Howard</i> , 434 S.E.2d 254, 315 S.E. 356 (1993)	2
<i>Bob Jones University V. Strandell</i> , 344 S.C. 224, 543 S.E.2d 251(Ct. App., 2001)	2, 4, 5, 7, 13, 18
<i>NationsBank of South Carolina v. Greenwood</i> , 321 S.C. 386, 468 S.E.2d 658 (Ct.App.1996)	2
<i>Townes Assocs. v. City of Greenville</i> , 266 S.C. 81, 221 S.E.2d 773 (1976)	2
<i>Grier V. Amisub of South Carolina, Inc.</i> , 397 S.C. 532, 725 S.E.2d 693(2012)	3, 4
<i>Matter of Clark</i> , 308 S.C. 328, 417 S.E.2d 856.(1992)	4

<i>In re Estate of Fabian</i> , 326 S.C. 349, 483 S.E.2d 474 (Ct.App.1997)	4, 18
<i>Fenzel v. Floyd</i> , 289 S.C. 495, 347 S.E.2d 105 (Ct.App.1986)	4, 18
<i>Albergotti v. Summers</i> , 203 S.C. 137, 26 S.E.2d 395 (1943)	4, 7, 18
<i>In re Estate of Blankenship</i> , 336 S.C. 103, 518 S.E.2d 615 (Ct.App.1999)	4, 7, 18
<i>Padgett v. Black</i> 229 S.C. 142, 92 S.E.2d 153 (1956)	5
<i>Cornelson v. Vance</i> , 220 S.C. 47, 54, 66 S.E.2d 421, 424 (1951) , 220 S.C. at 58, 66 S.E.2d at 426	5, 7, 13, 18
<i>Re Will of Lampshire</i> , (1968) 57 Misc 2d 332, 292 NYS2d 578	13
<i>Hermon vs. Urteago</i> , 46 Cal.Rptr.2d 577, 39 Cal.App.4 th 1525 (1995)	15
<i>Jones v. Peddy</i> , 122 CAL. App. 4 th 326 (2004) citing <i>Hermon v. Urteago</i> , Id.	15
<i>In Re Estate of Marvin Nash</i> , 164 S.W.3d 856 (TX, 2005)	15

STATUTES

<i>S.C. Code Ann.</i> §62-2-802	1, 5, 6, 7, 9, 12, 13, 17, 19
<i>S.C. Code Ann</i> §62-2-507	1, 6, 7, 9, 12, 13, 18, 19, 20
<i>Section 62-2-101 et seq.</i>	5
<i>Section 62-2-201 et seq.</i>	5
<i>Section 62-2-301 et seq.</i>	5
<i>Section 62-2-401 et seq.</i>	5
<i>Section 62-3-203</i>	5
<i>Section 62-2-802(a)</i>	11
<i>Section 62-2-802(b)</i>	7, 13, 19, 20

<i>Section 62-2-507(e)</i>	17
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OTHER AUTHORITIES

<i>Estates, Powers and Trusts Laws § 5-1.4</i>	14
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STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CASE NO: 2015-CP-45-00198

IN THE MATTER OF THE ESTATE OF)
ERVIN CHRISTOPHER PRESSLEY,)

Gwendolyn Leveritt,)

Appellant,)

vs.)

Lorine C. Pressley as Personal)
Representative of the Estate of)
Ervin Christopher Pressley,)

Respondent.)

) MOTION TO ALTER OR AMEND
) JUDGMENT PURSUANT TO RULE
) 59(e) AND RULE 60, SCRPC
)

FILED
1-4-2016
Williamsburg County
Clerk of Court
Kingsree SC

TO: JON RENE JOSEY, ESQUIRE, ATTORNEY FOR APPELLANT

PLEASE TAKE NOTICE that the Respondent, Lorine C. Pressley, as Personal Representative of the Estate of Ervin Christopher Pressley, by and through her undersigned attorneys, will move before The Honorable R. Lawton McIntosh, Circuit Judge, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, at the time and place to be scheduled by the Court, for an Order altering and amending the Order and Judgment of the Court dated December 3, 2015, filed on December 9, 2015, and received by Respondent's counsel on December 21, 2015, pursuant to **Rule 59(e), SCRPC**, and **Rule 60, SCRPC**, and all applicable South Carolina Rules of Civil Procedure and appellate procedure on the grounds and for the reasons as set forth herein. A copy of the Order dated December 3, 2015 is attached hereto and incorporated herein by reference.

It is respectfully submitted that the Court should reconsider the matter and the Order of December 3, 2015 should be altered and amended to dismiss the Appeal of the Appellant and to affirm the Order of the Probate Court as follows and to provide for the following:

1. Alter and amend the Order of December 3, 2015 to dismiss the appeal of the Appellant and affirm the Order of the Probate Court for Williamsburg County dated April 2, 2015.

2. Alter and amend the Order of December 3, 2015 to specifically find and hold that the Probate Court for Williamsburg County properly construed the Last Will and Testament of Ervin Christopher Pressley by its Order dated April 2, 2015 .

3. Alter and amend the Order of December 3, 2015 to specifically find and hold that the Probate Court for Williamsburg County, properly applied S.C. Code Ann. §62-2-802 and S.C. Code Ann. §62-2-507 in the construction and interpretation of the Last Will and Testament of Ervin Christopher Pressley in its Order of April 2, 2015.

4. Alter and amend the Order dated December 3, 2015 to specifically find and hold that the Order of April 2, 2015 of the Probate Court of Williamsburg County properly found that the evidence, facts, and plain language of the Last Will and Testament of Ervin Christopher Pressley resulted in an intestacy.

5. Alter and amend the Order of April 2, 2015 to specifically find and hold that the Will of Ervin Christopher Pressley did not provide for the distribution of his assets, since Erica Pressley did not survive him, which resulted in an intestacy.

6. Alter and amend the Order of December 3, 2015 to specifically find and hold that when the fact that Erica Pressley survived Ervin Christopher Pressley was applied to the mandatory language of the Will, an intestacy was the result, as held by the Probate Court.

7. Alter and amend the Order of December 3, 2015 to specifically find and hold that since the findings of the Probate Court for Williamsburg County were supported by the evidence in the record, those factual findings of the Probate Court should not be disturbed and the Order of April 2, 2015 should be affirmed.

8. Alter and amend the Order of December 3, 2015 to specifically find and hold that Item III of the Last Will and Testament of Ervin Christopher Pressley provided for contingent beneficiaries and/or takers of his estate under his Will, only if Erica Pressley did not survive Ervin Christopher Pressley.

9. Alter and amend the Order of December 3, 2015 specifically find and hold that, since Erica Pressley survived the Decedent Ervin Christopher Pressley, the condition precedent of Item III of the Last Will and Testament of Ervin Christopher Pressley, was not fulfilled, which therefore resulted in an intestacy.

10. Alter and amend the Order of December 3, 2015 to specifically find and hold that the Third Item of the Last Will and Testament of Ervin Christopher Pressley created a contingent devise or bequest that would only be effective if Erica Pressley did not survive him; and since Erica Pressley survived the Decedent, the mandatory condition precedent was not fulfilled, and thereby created an intestacy.

11. Alter and amend the Order of December 3, 2015 to specifically find and hold that the clear intention of Ervin Christopher Pressley, as expressed in his Last Will and Testament,

was that the contingent beneficiaries would only take if Erica Pressley did not survive him.

12. Alter or amend the Order of December 3, 2015 to specifically find and hold that the application of S.C. Code Ann. §62-2-507 in this matter only revoked the provisions in the Last Will and Testament of Ervin Christopher Pressley that benefitted, empowered or appointed Erica Pressley; and since the requirement that Erica Pressley not survive Ervin Christopher Pressley was for the contingent beneficiaries to take under his Last Will and Testament was not a benefit, an empowerment, an appointment of Erica Pressley, accordingly, that provision of the Will of Ervin Christopher Pressley was not affected by either §62-2-802 or §62-2-507.

13. Alter or amend the Order of December 3, 2015 to specifically find and hold that the Last Will and Testament of Ervin Christopher Pressley expressly provided that for the contingent beneficiaries to take under Item III of his Will, Erica Pressley had to die before Ervin Christopher Pressley.

14. Alter or amend the Order of December 3, 2015 to specifically find and hold that S.C. Code Ann. §62-2-802 only revokes a provision of a Will that “affects the putative spouse” and that the contingent provision requiring that Erica Pressley survive Ervin Christopher Pressley was not affected by S.C. Code Ann. §62-2-802, since it did not affect Erica Pressley, but only affected other beneficiaries.

15. Alter or amend the Order of December 3, 2015 to specifically find and hold that the contingent beneficiary provision of 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 Ann. §62-2-802 or S.C. Code Ann. §62-2-507, but is governed by existing South Carolina law

concerning contingent beneficiaries in Wills. Accordingly, that the existing law of succession would only allow the contingent beneficiaries under Item III of the Last Will and Testament of Ervin Christopher Pressley to take if Erica Pressley did not survive Ervin Christopher Pressley.

16. Alter or amend the Order of December 3, 2015 to specifically find and hold that the Probate Court in Williamsburg County correctly and properly found that failure of the condition precedent in the dispositive provision, Item III of the Last Will and Testament of the Decedent, resulted in an intestacy.

17. Alter or amend the Order of December 3, 2015 to specifically find and hold that the Probate Court of Williamsburg County properly considered the divorce and property settlement agreements between the parties to revoke only those provisions of the Last Will and Testament of Ervin Christopher Pressley that benefitted, empowered or appointed Erica Pressley.

18. Alter or amend the Order of December 3, 2015 to specifically find and hold that the Probate Court properly found and held that the Last Will and Testament of Ervin Christopher Pressley did not provide for the distribution of his assets since the condition precedent, that Erica Pressley not survive him, did not occur.

The above Motion is based upon, and incorporated herein by reference are, the applicable South Carolina Rules of Civil Procedure and the Statutory and Decisional Law of this State, the pleadings in this matter, the Transcript of the hearing before this Court, the Brief of the Respondent, the Record on Appeal, this Memorandum and the entire record in this matter. The Respondent further requests that this matter be scheduled for oral arguments at

a time and place as directed by the Honorable R. Lawton McIntosh, Circuit Judge. If, in the discretion of Court, this matter is to be decided on Memoranda submitted by the parties, the Defendant respectfully requests the Court to set a schedule of submission of memoranda by the parties pursuant to the South Carolina Rules of Civil Procedure.

Respectfully submitted.

December 30, 2015
Lake City, SC


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STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
CASE NO: 2015-CP-45-00198

IN THE MATTER OF THE ESTATE OF)
ERVIN CHRISTOPHER PRESSLEY,)

Gwendolyn Leveritt,)

Appellant,)

vs.)

Lorine C. Pressley as Personal)
Representative of the Estate of)
Ervin Christopher Pressley,)

Respondent.)

MEMORANDUM IN SUPPORT
OF RESPONDENT'S MOTION TO
ALTER OR AMEND JUDGMENT
PURSUANT TO RULE 59(e), SCRPC
AND RULE 60, SCRPC, AND
ALL APPLICABLE APPELLANT
RULES AND RULES OF CIVIL
PROCEDURE

**THE RESPONDENT RESPECTFULLY SUBMITS THIS MEMORANDUM IN
SUPPORT OF THIS MOTION TO ALTER OR AMEND JUDGMENT AND ORDER OF
THE COURT DATED DECEMBER 3, 2015.**

The Respondent, by and through her undersigned attorneys, respectfully requests the Court to alter and amend the Order of December 3, 2015 to dismiss the appeal of the Appellant for the reasons as set forth in her Motion to Alter and Amend on all grounds as set forth therein and also all grounds and reasons as set forth in the Respondent's Brief. The Respondent's Brief and the Record on Appeal are incorporated herein by reference.

In addition to, and as a part of, the foregoing, the Respondent specifically makes this motion on the ground that, since Erica Pressley survived Ervin Christopher Pressley and since S.C. Code Ann. §62-2-507 and §62-2-802 only affected the provisions of the Last Will and Testament of Ervin Christopher Pressley that benefitted, empowered or appointed Erica Pressley, neither §62-2-507 nor §62-2-802 had any affect on the requirement that the contingent beneficiaries take only if Erica Pressley did not survive Ervin Christopher Pressley. Additionally, since the Last Will and Testament of Ervin Christopher Pressley only provided for contingent takers if Erica Pressley did not survive him, the result was an intestacy of the Estate of Ervin Christopher Pressley.

The Respondent incorporates by reference all grounds, as set forth in her Motion to Alter or Amend, the Respondent's Brief on Appeal, and the entire Record on Appeal, to support of the Respondent's Motion to Alter or Amend the Order of December 3, 2015 and to dismiss the appeal of Gwendolyn Leveritt.

Each and every specific ground and request, as set forth in the Respondent's Motion to Alter or Amend the Order of December 3, 2015, is important, and the Respondent respectfully requests this Court to include every ground in an Order to Alter or Amend the Order of December 3, 2015. However, the central question in this matter is, "Should the application of S.C. Code Ann. §62-2-507 and/or S.C. Code Ann. §62-2-802 be extended past the clear language of the statute, and the Reporters Comments to those code sections, to a portion of the Last Will and Testament of Ervin Christopher Pressley that does not benefit, empower, or appoint Erica Pressley?" The Respondent respectfully submits that the answer is "no".

STATUTORY CONSTRUCTION

In applying the above code sections, the law clearly states that the statute should be strictly construed so as to follow the plain language of the statute. 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, 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)

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)

CONSTRUCTION OF WILL

Our law further states that when the language of a Will is construed, the reviewing tribunal must give the words contained in the document their ordinary and plain meaning, unless it is clear that testator intended a different since or such meaning would lead to an inconsistency with the testator's declared intention. In re: *Estate of Fabian*, 326 SC 349, 483SE 2d 474 (Ct. App. 1997). The first reference by the Court should be to the language of the Will itself to continue a Will. *Fenzell v. Floyd*, 289 SC495, 347SE 2d 105 (Ct. App. 1986). The intent of the testator has priority. *S.C. Code Ann.* §62-2-201. There is nothing in the Will of Ervin Christopher Pressley that indicates that he intended anything other than the contingent beneficiaries would only take if Erica Pressley did not survive him.

Item III of the Will of Ervin Christopher Pressley provides for alternative devisees of his estate upon the failure of Erica Pressley to take under his Will.

As the Respondent set forth in her brief in this matter, 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 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 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 that 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 and expansion of those code sections and extend them 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.

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 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.

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 U.S.C. 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.

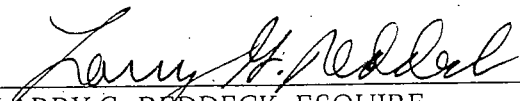
CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Order of December 3, 2015 of this Court be altered and amended, as set forth in her Motion, to uphold the Order The Honorable Betty L. Matthews, Judge of Probate for Williamsburg

County, filed on April 2, 2015, and thereby affirming the same and dismissing the Appeal.

Respectfully submitted,

December 30, 2015
Lake City, SC


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
The Honorable R. Lawton McIntosh

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 COUNSEL

The undersigned hereby certifies that the Record on Appeal
contains all material proposed to be included by any of the parties
and not any other material.

November 7, 2016
Lake City, SC



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