

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
FIFTEENTH JUDICIAL CIRCUIT

Larry B. Hyman, Presiding Circuit Court Judge

RECEIVED

NOV - 6 2012

Appellate Case No. 2012-211949
Civil Case No. 2011-CP-22-00709

S.C. Supreme Court

Jennifer H. Turner..... Appellant,

v.

Francis D. Daniels, Personal Representative of the Estate of Robert Leverne
Gilmore a/k/a Robert L. Gilmore, II, a/k/a Robert L. Gilmore, Jr., Francis D. Daniels
a/k/a Frank Daniels individually, and Patricia C. Daniels a/k/a Patti Daniels,
individually..... Respondents.

RECORD ON APPEAL

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Surfside Beach, SC 29575
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Attorney for Respondents

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Order of May 24, 2011
Granting Respondent's Motion to Dismiss in Accordance with SCRPC 12(b)(6)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE PROBATE COURT
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2010-ES-22-00307

IN THE MATTER OF ESTATE)
OF ROBERT LEVERNE GILMORE,)
A/K/A ROBERT L. GILMORE II,)
A/K/A ROBERT L. GILMORE, JR.)

Jennifer H. Turner,)
)
Petitioner,)

ORDER GRANTING
RESPONDENTS' MOTION TO DISMISS
IN ACCORANCE WITH SCRPC 12(b)6

vs.)

Francis D. Daniels, Personal Representative)
of The Estate of Robert Leverne Gilmore,)
a/k/a Robert L. Gilmore, II a/k/a Robert)
L. Gilmore, Jr., Francis D. Daniels, a/k/a)
Frank Daniels, individually, Patricia C.)
Daniels, a/k/a Patti Daniels, individually,)

PROBATE COURT
2011MAY24AM9:52
GEORGETOWN SC

Respondents.)
)
)

This matter came before me on a Summons and Petition filed by Petitioner, Jennifer H. Turner. The petition alleged three causes of action, namely:

- 1. Demand for DNA paternity tests.
- 2. Claim of inheritance.
- 3. Restraint of Personal Representative.

Attorney Richardson timely filed a NOTICE OF MOTION AND MOTION TO DISMISS in accordance with Rule 12(b)6 and timely served Petitioners' attorneys with a clocked copy of this Motion.

I conducted a hearing in this matter on May 12, 2011 in the Probate Court for Georgetown County. Petitioner's attorneys, Tracey L. Wright and Jennifer A. Mullins, appeared at this hearing

TRUE AND CORRECT COPY
ATTEST: *Patricia W. McLen*
JUDGE OF PROBATE
GEORGETOWN COUNTY
Deputy Clerk

on behalf of the Petitioner. John R. Richardson, attorney for the estate, was present at this hearing. Francis D. Daniels, Personal Representative of the estate, a/k/a Frank Daniels, was also present at the hearing. Patricia C. Daniels a/k/a Patty Daniels was also present at the hearing.

Based upon the allegations set forth on the face Petitioner's petition and the law, I hereby make the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

- A. Respondent, Francis D. Daniels a/k/a Frank Daniels is the duly appointed Personal Representative of the estate of Robert Laverne Gilmore, a/k/a Robert L. Gilmore, II, a/k/a Robert L. Gilmore, Jr. by Order of this Court dated and recorded August 12, 2010.
- B. This matter is properly before me pursuant to Section 62-1-302 of the Code of Laws of South Carolina, as amended.
- C. Venue is proper in this case pursuant to Section 62-3-201(a)(1), South Carolina Code of Laws, 1976, as amended.
- D. All interested parties have been properly served with the pleadings and were sent proper notice of the hearing.
- E. Decedent died testate on August 6, 2010. Decedent's Last Will and Testament (which was attached to Petitioner's petition as Exhibit "A" and was filed in the Probate Court on August 12, 2010) was executed by decedent on July 21, 2008.
- F. Petitioner was born on November 8, 1972.
- G. Petitioner's claim for inheritance is based upon Section 62-2-302(b) of the Code of Laws of South Carolina 1976 as amended which reads in pertinent part, "if, at the time of the execution of the Will the Testator fails to provide in his Will for a living child solely because he believes that child to be dead,...". Petitioner's Petition

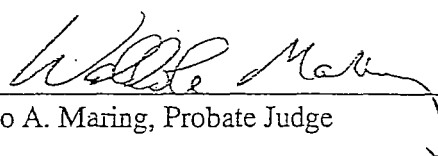
alleged that “decendent failed to provide for Petitioner as his only child because he did not know of her existence which is tantamount to believing she is dead...”. This allegation is an insufficient statement of fact sufficient to constitute a cause of action because the statute required the Testator to fail to provide in his Will for a living child “solely because he believes the child to be dead” (emphasis mine). Not knowing of a person’s existence is not the same as or tantamount to believing that a person is dead.

- H. I therefore find and conclude that Petitioner’s second cause of action, “Claim of Inheritance” fails to state facts sufficient to constitute a cause of action.
- I. I further find that Petitioner’s first and third causes of action could only be allowed to go forward if Petitioner’s second cause of action stated facts sufficient to constitute a cause of action against any of the respondents.

IT IS THEREFORE ORDERED, that the Respondents’ MOTION TO DISMISS pursuant to Rule 12(b)6 is HEREBY GRANTED.

IT IS SO ORDERED THIS 24 DAY OF MAY, 2011.

May 24, 2011
Georgetown, SC



Waldo A. Maring, Probate Judge

**Order of March 12, 2012
Order Denying Petitioner's Appeal**

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-22-709

IN THE MATTER OF ESTATE)
OF ROBERT LEVERNE GILMORE,)
A/K/A ROBERT L. GILMORE II,)
A/K/A ROBERT L. GILMORE, JR.)

Jennifer H. Turner,)
)
Petitioner,)

ORDER DENYING
PETITIONER'S APPEAL

vs.)

Francis D. Daniels, Personal Representative)
of The Estate of Robert Leverne Gilmore,)
a/k/a Robert L. Gilmore, II a/k/a Robert)
L. Gilmore, Jr., Francis D. Daniels, a/k/a)
Frank Daniels, individually, Patricia C.)
Daniels, a/k/a Patti Daniels, individually,)

Respondents.)

This matter came before me on a Notice of Appeal From Probate Court filed by
Petitioner, Jennifer H. Turner on May 26, 2011. Petitioner appealed the ORDER GRANTING
RESPONDENTS' MOTION TO DISMISS IN ACCORDANCE WITH SCRPC 12(b)6 signed
by Waldo A. Maring, Probate Judge for Georgetown County on May 24, 2011.

I conducted a hearing in this matter on September 8, 2011 in the Court of Common Pleas
for Georgetown County. Petitioner's attorneys, Tracy Wright Fisher and Jennifer A. Mullins,
appeared at this hearing. John R. Richardson, attorney for Respondents, was also present at the
hearing.

BACKGROUND

Petitioner alleged in her petition filed February 23, 2011 in the Georgetown County
Probate Court that:

1. She is the surviving child of Robert Laverne Gilmore (the decedent) who died testate on August 6, 2010.
2. Decedent did not know that petitioner may have been his only child.
3. Decedent died testate leaving his entire estate to non-relatives, Francis D. Daniels and Patricia C. Daniels with Francis D. Daniels being Personal Representative of decedent's estate.
4. Decedent did not provide for petitioner or any child in his Will as he had no knowledge of the existence of any children.
5. Had decedent realized petitioner was his child, he would have left his estate to Petitioner.
6. Petitioner made a claim against decedent's entire estate as sole surviving heir.
7. Petitioner's biological mother and decedent were never husband and wife; however, they had an intimate relationship which resulted in the mother's pregnancy.
8. Petitioner was born on November 8, 1972.
9. Petitioner never knew decedent was her father and lived under the presumption that her mother's husband was her biological father.
10. Upon decedent's death, her mother informed her that either decedent or her mother's husband was her biological father.
11. DNA testing proved the mother's husband was not petitioner's biological father.
12. Petitioner requested an Order from the Court authorizing the release of decedent's DNA from Grand Strand Regional Medical Center so that a DNA paternity test could be conducted.

13. Decedent failed to provide for Petitioner as his only child because he did not know of her existence which is tantamount to believing she is dead and therefore, pursuant to §62-2-302(b), Code of Laws of South Carolina (1976) as amended, Petitioner further alleged that she is entitled to receive a share of the estate equal to the total value of the estate.
14. Petitioner further requested an Order from the Court restraining and adjoining the Personal Representative from selling, transferring, conveying or otherwise disposing of any of the assets of decedent's estate.

ISSUE

The sole issue raised by petitioner in her grounds of appeal is:

Did the Probate Court err in dismissing Appellant's petition pursuant to Rule 12(b)(6) based upon the Court's interpretation of Section 62-2-302(b) of the South Carolina Code of Laws (1976, as amended)?

STATUTORY LAW

The applicable portion of Section 62-2-302(b) PRETERMITTED CHILD reads as follows:

- (a) Not applicable.
- (b) If, at the time of execution of the Will the testator fails to provide in his Will for a living child solely because he believes that the child to be dead, the child, upon compliance with subsection (d), receives a share in the estate equal to the value to that which he would have received if the testator had died intestate.

(c) Not applicable.

(d) Not applicable.

APPLICATION

Petitioner alleged in her petition that “decendent failed to provide for Petitioner as his only child because he did not know of her existence which is tantamount to believing she is dead...”

Petitioner seeks to have this Court interpret Section 62-2-302(b) in a way which is outside of the plain meaning of the statute.

The South Carolina Supreme Court in the case, *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E. 2d 457, 459 (2007) stated, “The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000). When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a Court must apply the statute according to its literal meaning. [371 S.C. 499] *Carolina Power and Light Company v. The City of Bennettesville*, 314 S.C. 137, 139, 442 S.E. 2d 177, 179 (1994). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. *Bryant v. City of Charleston*, 295 S.C. 408, 368 S.E. 2d 899 (1998); *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E. 2d 660, 662 (1991).

Petitioner argued in her **FOUNDATIONS OF APPEAL** (page 7) that “the Probate Court’s interpretation of Section 62-2-302(b) of the Code is violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution which provides that ‘no state shall....deny any person within its jurisdiction the equal protection of the laws’ ”. Petitioner argued in her **MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS** (page 5) the Equal Protection Clause of the Fourteenth Amendment as supportive of the Petitioner’s.

argument that she should be included as a pretermitted child under Section 62-2-302 of the Code of Laws of South Carolina (1976 as amended).

Petitioner also argued at oral argument before Judge Maring the same Equal Protection argument which she argued in her memorandum (transcript of hearing regarding Motion to Dismiss Petition in Case No. 2010-ES-22-0037, page 6, lines 5-12).

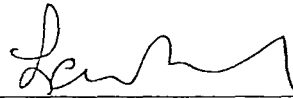
Judge Maring's **ORDER GRANTING RESPONDENT'S MOTION TO DISMISS** did not address or rule on Petitioner's Equal Protection Ground for Appeal. Petitioner did not file a Motion for Reconsideration. Therefore, Petitioner's argument regarding the Equal Protection issue was not preserved for appellate review. The South Carolina Supreme Court in *South Carolina Department of Transportation v. First Carolina Corporation of S.C.*, 372 S.C. 295, 641 S.E. 2d 903 (S.C. 207) stated, "It is well settled that an issue may not be raised for the first time in a post-trial motion." *McGee v. Bruce Hospital Systems*, 321 S.C. 340, 347, 468 S.E. 2d 633, 637 (1996). Further, it is a litigant's duty to bring to the Court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E. 2d 129, 134 (1965). Additionally, "[i]t is axiomatic that an issue can not be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for the appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E. 2d 731, 733 (1998).

Judge Maring's Order did address Petitioner's claim for inheritance based upon Section 62-2-302(b) of the Code of Laws of South Carolina, 1976, as amended. The Judge concluded that "not knowing of a person's existence is not the same or tantamount to believing that a person is dead". Thus the allegation was an insufficient statement of fact to constitute a cause of action under the statute. Judge Maring's conclusion was that the Petitioner sought to have the Court interpret Section 62-2-302(b) in a way which is outside the plain meaning of the statute.

After my hearing arguments of Petitioner's counsel and Respondent's counsel, and after my review of the documents filed in this case, including but not limited to the Probate Judge's Order and transcript of hearing, I concur with the Probate Court Judge's rationale and ruling that Petitioner's allegations were an insufficient statement of facts sufficient to constitute a cause of action. Additionally, for the reasons stated hereinabove, Petitioner's argument regarding the equal protection issue was not preserved for appellate review.

THEREFORE, IT IS SO ORDERED that the Probate Court Judge's Order granting Respondent's Motion to Dismiss in accordance with SCRCP 12(b)6 is **AFFIRMED**.

IT IS SO ORDERED THIS 12 ^{March} ~~FEBRUARY~~, 2012 .



Larry B. Hyman, Jr., Presiding Judge
for the Fifteenth Judicial Circuit

Conway, SC

Order of March 22, 2012
Denying Petitioner's Motion to Reconsider

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF GEORGETOWN
 THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2011CP2200709

Jennifer H Turner	Francis D Daniels Frank Daniels Patti Daniels Robert L Gilmore Jr	Robert Laverne Gilmore Est Patricia C Daniels Robert L Gilmore II
-------------------	--	---

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
---------------	---

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:
 Motion to Reconsider Pursuant to SCRPC 59(e)/Wright - Denied

GEORGETOWN COUNTY, S.C.
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 2012 MAR 22 PM 3:17
 ALAN A. WHITE
 CLERK OF COURT

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk:

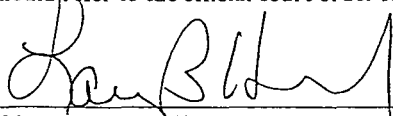
INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



Circuit Court Judge

2152

Judge Code

3/22/2012

Date

For Clerk of Court Office Use Only

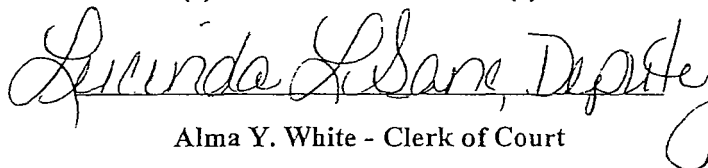
This judgment was entered on 22nd day of March, 2012, and a copy mailed first class or placed in the appropriate attorney's box on 22nd day of March, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Tracy Wright Fisher Willcox, Buyck & Williams PA 1991
Glenns Bay Road Surfside Beach, SC 29575
Jennifer Ann Mullins Willcox, Buyck & Williams, P.A.
1991 Glenns Bay Road Surfside Beach, SC 29575

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Robert Richardson McCrackin Barnett Richardson,
LLP P.O. Box 1182 Myrtle Beach, SC 29578

ATTORNEY(S) FOR THE DEFENDANT(S)


Alma Y. White - Clerk of Court

Court Reporter: Brenda R. Babb

Petition and Attachments
Dated February 18, 2011

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)
)
 IN THE MATTER OF THE ESTATE)
 OF ROBERT LAVERNE GILMORE,)
 A/K/A ROBERT L. GILMORE II,)
 A/K/A ROBERT L. GILMORE, JR.)
)
 Jennifer H. Turner,)
)
 Petitioner,)
)
 vs)
)
 Francis D. Daniels, Personal Representative)
 of The Estate of Robert Laverne Gilmore,)
 a/k/a Robert L. Gilmore, II a/k/a)
 Robert L. Gilmore, Jr., Francis D. Daniels,)
 a/k/a Frank Daniels, individually, Patricia)
 C. Daniels, a/k/a Patti Daniels,)
 Individually,)
 Respondents.)

IN THE PROBATE COURT FOR THE
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NO.:2010 ES-22-00307

COA

PETITION

WALDO A. MARING
 PROBATE JUDGE
 2011 FEB 23 AM 10:15
 GEORGETOWN COUNTY, S.C.

The Petitioner above named respectfully alleges as follows:

1. Upon information and belief, Petitioner is the surviving child of Robert Laverne Gilmore, a/k/a Robert L. Gilmore, II a/k/a Robert L. Gilmore, Jr. (the "Decedent") who died on August 6, 2010.
2. Upon information and belief, Decedent did not know Petitioner may have been his only child.
3. Decedent died testate, leaving his entire estate to non-relatives Respondents Francis D. Daniels a/k/a Frank Daniels and Patricia C. Daniels a/k/a Patti Daniels and appointed Respondent Francis D. Daniels a/k/a Frank Daniels as the Personal Representative of his Estate, a copy of Decedent's Will is attached hereto and incorporated herein as Exhibit "A".
4. Respondent Francis D. Daniels a/k/a Frank Daniels has been appointed by this Court as the Personal Representative of the Decedent's Estate and is proceeding with the administration and distribution of the Estate.

5. Decedent did not provide for Petitioner or any child in his Will as he had no knowledge of the existence of any children.

6. Upon information and belief, had Decedent realized Petitioner was his child, he would have left his Estate to Petitioner.

7. Upon information and belief, Petitioner has a claim to the Decedent's entire estate as sole surviving heir and has made this claim within the later of eight months after Decedent's death or within six months after the probate of the Decedent's Will.

8. Petitioner elects to take her share of the Decedent's estate.

9. Upon information and belief, Pursuant to Section 62-1-302(c) of the Code of Laws of South Carolina (1976, as amended), this Court has jurisdiction over the parties and subject matter of this action.

**FOR A FIRST CAUSE OF ACTION
DEMAND FOR DNA PATERNITY TEST**

10. Petitioner incorporates each and every allegation of the preceding paragraphs as if repeated herein verbatim.

11. Petitioner's biological mother ("Mother") and Decedent are not now nor ever have been husband and wife. However, Mother and Defendant had an intimate relationship which resulted in Mother's pregnancy.

12. Petitioner was born on November 8, 1972.

13. Petitioner never knew the Decedent was her father and had lived under the presumption that Mother's husband was her biological father.

14. Upon Decedent's death, Mother informed Petitioner that either Decedent or Mother's husband was Petitioner's biological father. Petitioner and Mother's husband submitted DNA for testing to determine paternity.

15. The DNA testing proved that Mother's husband was not Petitioner's biological father.

14. Petitioner is informed and believes that Decedent is her biological father. She is

further informed and believes she is entitled to an Order of this Court requiring the Respondent to authorize the release of DNA of the Decedent held by Grand Strand Hospital as a result of an autopsy so that Petitioner may have DNA paternity testing conducted.

15. Petitioner is informed and believes that should paternity of the Decedent be established, she is entitled to claim his estate as his sole surviving heir.

**FOR A SECOND CAUSE OF ACTION
CLAIM OF INHERTIANCE**

16. Petitioner incorporates each and every allegation of the preceding paragraphs as if repeated herein verbatim.

17. Upon information and belief, the Decedent failed to provide for Petitioner as his only child because he did not know of her existence which is tantamount to believing she is dead; therefore pursuant to Section 62-2-302(b), Code of Laws of South Carolina (1976, as amended) the Petitioner is entitled to receive a share of the estate equal to the value to that which she would have inherited if the Decedent had died intestate.

18. The Decedent was not married at the time of his death nor did he leave any issue, other than Petitioner. Accordingly, Petitioner is entitled to receive the entire estate of Decedent pursuant to Section 62-2-103(1).

19. Petitioner is informed and believes that Decedent's entire estate should pass to Petitioner and that all devises made in the Will shall abate in accordance with Section 62-3-902, Code of Laws of South Carolina (1976, as amended).

**FOR A THIRD CAUSE OF ACTION
RESTRAINT OF PERSONAL REPRESENTATIVE**

20. Petitioner incorporates each and every allegation of the preceding paragraphs as if repeated herein verbatim.

21. Petitioner is informed and believes the Respondent may attempt to sell or

otherwise dispose of the assets in the Estate.

22. Petitioner is informed and believes that if Respondent was allowed to sell or dispose of any assets in the Estate, the Petitioner would be irreparably harmed.

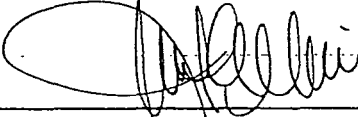
23. Therefore, Petitioner is informed and believes she is entitled to an Order of this Court, restraining and enjoining the Respondent from selling, transferring, conveying or otherwise disposing of any assets in the Decedent's estate.

24. Petitioner attempted in writing to resolve this matter with Respondent; however Respondent failed and refused and continues to refuse to negotiate with the Petitioner regarding the issues herein.

WHEREFORE, Plaintiff prays that this Honorable Court do inquire herein and issue an Order:

- a) Ordering Respondent to authorize the release by Grand Strand Hospital of samples from Decedent's autopsy sufficient to perform DNA testing;
- b) Ordering a DNA paternity test be performed on Decedent, such samples;
- c) Declaring Decedent to be the father of Petitioner;
- d) Declaring Petitioner to be the sole heir of Decedent and entitled to inherit as if Decedent died intestate leaving Petitioner as his only issue;
- e) Restraining and enjoining Respondent from selling, transferring, conveying or otherwise disposing of any assets in the Decedent's estate except in accordance with the Order of this Court;
- f) Requiring the Defendant to pay Plaintiff's attorney fees and costs; and
- g) For such other and further relief as this Court deems proper and is consistent with the allegations contained herein.

WILLCOX, BUYCK & WILLIAMS, P.A.

By:  _____

Tracy L. Wright/Jennifer A. Mullins
1991 Glenn's Bay Road
Surfside Beach, SC 29575
(843)650-6777 - Tel
(843) 650-6767- Fax
Tracy@WillcoxLaw.com
ATTORNEYS FOR PETITIONER

February 18, 2011
Surfside Beach, South Carolina

Exhibit "A "

WALDO A. HARRIS
PROBATE JUDGE

COPY

LOUGHEE MIDDLEBURY
Last Will and Testament
OF
GEORGETOWN COUNTY, S.C.

ROBERT L. GILMORE, II A/K/A
ROBERT L. GILMORE, JR.

I, Robert L. Gilmore, II a/k/a Robert L. Gilmore, Jr., a resident of and domiciled in the County of Georgetown, State of South Carolina, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all Wills and Codicils at any time heretofore made by me.

ITEM I

I direct that all my just debts, secured and unsecured, be paid as soon as practicable after my death; however, I direct that my Personal Representative may cause any debt to be carried, renewed or refinanced from time to time upon such terms and with such securities for its repayment as my Personal Representative may deem advisable taking into consideration the best interests of the devisees hereunder.

ITEM II

I devise all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises) wherever situate and whether acquired before or after the execution of this will to **Frank Daniels** and **Patti Daniels**, share and share alike.

ITEM III

If any devisee and I die under such circumstances as would render it doubtful whether the devisee or I died first, then it shall be conclusively presumed for purposes of this my Will that said devisee predeceased me.

Robert L. Gilmore II
AKA Robert L. Gilmore Jr

2010ES2200307

ITEM IV

I hereby nominate, constitute and appoint as Personal Representative of this my Last Will and Testament, **Frank Daniels**, and direct that he shall serve without bond. In the event he does not or cannot serve, then I nominate, constitute and appoint **Patti Daniels** as Personal Representative and direct that she shall serve without bond.

ITEM V

Whenever the word "Personal Representative" or any modifying or substitute pronoun therefor is used in this my Will, such words and respective pronouns shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter genders thereof, and shall apply equally to the Personal Representative named herein and to any successor or substitute Personal Representative acting hereunder, and such successor or substitute Personal Representative shall possess all the rights, powers and duties, authority and responsibility conferred upon my Personal Representative originally named herein.

ITEM VI

By way of illustration and not of limitation and in addition to any inherent, implied or statutory powers granted to personal representatives generally, my Personal Representative is specifically authorized and empowered with respect to any property, real or personal, at any time held under any provision of this my Will to: allot, allocate between principal and income, assign, borrow, buy, care for, collect, compromise claims, contract with respect to, continue any business of mine, convey, convert, deal with, dispose of, enter into, exchange, hold, improve, incorporate any business of mine, invest, lease, manage, mortgage, grant and exercise options with respect to, take possession of, pledge, receive, release, repair, sell, sue for, make distribution in cash or in kind or partly in each without regard to the income tax basis of such asset, and in general, to exercise all of

Robert L. Gilmore II

AKA *Robert L. Gilmore Jr*

the powers in the management of my estate which any individual could exercise in the management of similar property owned in its own right, upon such terms and conditions as to my Personal Representative may seem best, and to execute and deliver any and all instruments and to do all acts which my Personal Representative may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a court order.

I, Robert L. Gilmore, II a/k/a Robert L. Gilmore, Jr., the Testator, sign my name to this instrument this 21st day of July, 2008, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and Testament, and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Robert L. Gilmore II AKA Robert L. Gilmore, Jr. (SEAL)
Robert L. Gilmore, II a/k/a Robert L. Gilmore, Jr.

We, the undersigned witnesses, sign our names to this instrument, and at least one of us, being first duly sworn, does hereby declare generally and to the undersigned authority, that the Testator signs and executes this instrument as his Last Will and Testament and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the Testator, hereby signs this Last Will and Testament as witness to the Testator's signing, and that to the best of our knowledge the Testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Vivian D. Raynette
1st Witness

John R. Richardson
2nd Witness

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

Subscribed, sworn to and acknowledged before me by the undersigned Testator and
subscribed and sworn to before me by the above-signed witnesses this 21st day of July, 2008.

Robert L. Gilmore II a/k/a Robert L. Gilmore, Jr. (L.S.)
Robert L. Gilmore, II a/k/a Robert L. Gilmore, Jr.

Johanna R. Richardson (SEAL)
Notary Public for South Carolina
My Commission Expires: 12/13/2011

Petitioner's Memorandum in Opposition to Motion to Dismiss
Dated May 12, 2011

STATE OF SOUTH CAROLINA
 COUNTY OF GEORGETOWN

IN THE MATTER OF THE ESTATE OF

ROBERT LAVERNE GILMORE,
 A/K/A ROBERT L. GILMORE, II,
 A/K/A ROBERT L. GILMORE, JR.

JENNIFER H. TURNER,
 Petitioner,

vs.

FRANCIS D. DANIELS, PERSONAL
 REPRESENTATIVE OF THE ESTATE OF
 ROBERT LAVERNE GILMORE, A/K/A
 ROBERT L. GILMORE II, A/K/A ROBERT
 L. GILMORE JR., FRANCIS D. DANIELS,
 A/K/A FRANK DANIELS, INDIVIDUALLY,
 AND PATRICIA C. DANIELS, A/K/A
 PATTY DANIELS, INDIVIDUALLY,

Respondents.

COPY
 IN THE PROBATE COURT

Case No. 2010-ES-22-00307

**PETITIONER'S MEMORANDUM IN
 OPPOSITION TO MOTION TO DISMISS
 FILED BY DEFENDANTS FRANCIS D.
 DANIELS, PERSONAL
 REPRESENTATIVE OF THE ESTATE
 OF ROBERT LAVERNE GILMORE,
 A/K/A ROBERT L. GILMORE II, A/K/A
 ROBERT L. GILMORE JR., FRANCIS D.
 DANIELS, A/K/A FRANK DANIELS,
 INDIVIDUALLY, AND PATRICIA C.
 DANIELS, A/K/A PATTY DANIELS,
 INDIVIDUALLY**

WALTON A. MARING
 PROBATE JUDGE
 GEORGETOWN COUNTY, S.C.
 MAY 11 1 PM 3:36

The Petitioner, Jennifer H. Turner, submits this memorandum in opposition to the Motion to Dismiss filed by all above-named Respondents. The Respondents' motion to dismiss should be denied for the reasons stated herein.

FACTS

The Petitioner filed her Petition for: (i) Demand for DNA and Paternity Test, (ii) Claim for Inheritance, and (iii) Restraint of Personal Representative.

In her Petition, Petitioner alleges upon information and belief, she is the surviving child of Robert Laverne Gilmore, a/k/a Robert L. Gilmore, II, a/k/a Robert Laverne Gilmore, Jr. ("Decedent"), and further, that Decedent was unaware during his lifetime that Petitioner may

have been his daughter and only child. (Petition ¶¶ 1 to 2). Petitioner alleges, upon information and belief, that Decedent and Petitioner's biological mother ("Mother") had an intimate relationship which resulted in Mother's pregnancy, and that though Decedent and Mother never married, Decedent is Petitioner's biological father. (Petition ¶ 11). Petitioner further alleges that neither Decedent nor Petitioner knew that Petitioner was Decedent's daughter during Decedent's lifetime, as Mother disclosed that information to Petitioner only after Decedent's death. (Petition ¶ 13 and 14). Petitioner further alleges that Decedent died testate, leaving his entire estate to non-relative Respondents Francis D. Daniels a/k/a Frank Daniels, and Patricia C. Daniels, a/k/a Patty Daniels, and appointing Respondent Francis C. Daniels a/k/a Frank Daniels as Personal Representative of Decedent's Estate ("Personal Representative"). (Petition ¶ 3). Additionally, Petitioner alleged that Personal Representative is proceeding with administration and distribution of the Decedent's estate. (Petition ¶ 4). Petitioner further alleged that Decedent did not provide for Petitioner or any children in his Will, as Decedent had no knowledge that he was the father of a living child during his lifetime; however, upon information and belief, Decedent would have provided for Petitioner in his Will if he had been aware that Petitioner was his daughter and only child. (Petition ¶¶ 5 and 6).

ARGUMENTS

I. THE COMPLAINT SHOULD NOT BE DISMISSED IN THIS ACTION PURSUANT TO S.C.R. CIV. P. 12(b)(6).

The standard under which Rule 12(b)(6) motions are reviewed is well-settled. The Court must base its ruling solely upon the allegations set forth on the face of the Complaint without consideration of any potential defenses. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 878 (2006). A 12(b)(6) motion should be denied if the facts alleged and inferences reasonably deducible from the complaint

would entitle the Plaintiff to any relief on any theory of the case. Baird, 333 S.C. at 527, 511 S.E.2d at 73; Spence, 368 S.C. 106 at 116, 628 S.E.2d at 874 (2006). Additionally, a complaint should not be dismissed merely because the Court doubts the Plaintiff will prevail in the action. Dye v. Gainey, 320 S.C. 65, 68, 463 S.E.2d 97, 99 (Ct. App. 1995); Spence, 368 S.C. at 116-117, 628 S.E.2d at 874.

The Court must view the Complaint in the light most favorable to the Plaintiff and decide whether, with every doubt resolved in his behalf, the Complaint states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987); Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997). Even where allegations of a claim give rise to competing inferences on a question of material fact, dismissal under Rule 12(b)(6) is not appropriate. Camp. v. Springs Mortgage Corp., 310 S.C. 514, 426 S.E.2d 304, 306 (1993). In the present case, this minimal procedural hurdle has been satisfied. Petitioner has made claims for: (i) a DNA paternity test pursuant to Section 62-2-109 (ii), Code of Laws of South Carolina, (1976, as amended); (ii) a claim of inheritance as the sole surviving heir of Decedent in this matter, pursuant to Section 62-2-103(1), Code of Laws of South Carolina (1976, as amended); and (iii) for Restraint of Personal Representative in this matter as Petitioner would be irreparably harmed if Personal Representative disposed of the assets of Decedent's estate while Petitioner's claims are pending before this Court. The Petition clearly alleges facts, which, if proven, would entitle the Petitioner to relief. Therefore, the Court should deny the Respondents' motion to dismiss under Rule 12(b)(6).

II. THE PETITIONER HAS ADEQUATELY STATED CAUSES OF ACTION FOR A DEMAND FOR PATERNITY TEST, CLAIM OF INHERITANCE, AND FOR RESTRAINT OF PERSONAL REPRESENTATIVE.

South Carolina Code of Laws Section 62-1-302 (a)(6)(c) provides that this Court has jurisdiction to hear and determine issues related to paternity in connection with "actions pending

before it.” As previously stated, Petitioner’s claim of inheritance requires that this Court hear and adjudicate the issue of Decedent’s paternity as it relates to Petitioner. Petitioner alleges that, upon information and belief, Decedent’s biological material necessary to determine such paternity is currently being held by Grand Strand Hospital, and an adjudication of Petitioner’s paternity requires a release or authorization of the Personal Representative this matter or this Court’s order to Grand Strand Hospital to release a sample of that material for comparison testing.

Petitioner has made a claim for inheritance in this matter, alleging that as decedent’s unknown daughter, Petitioner is entitled to receive that share of Decedent’s estate to which Petitioner would be entitled if Decedent had died intestate, pursuant to Sections 62-2-302(b) and 62-2-103(1) of the Code. Petitioner alleges that as a daughter about which Decedent was unaware, Petitioner’s position with regard to Decedent’s estate is analogous to that of a pretermitted child.

Though factually different than the statutory definition of a pretermitted child, the Petitioner in this matter is of a similar class of individuals intended to be so protected by Section 62-2-302 of the Code. While Decedent’s Will was executed after the birth of petitioner, Decedent was never given an opportunity during his lifetime to provide for her; moreover, Decedent’s Will evidences no testamentary intent to omit or include petitioner, or any other children of Decedent. Without knowledge of Petitioner’s paternity or existence as his child, Decedent lacked the information necessary to make a meaningful direction with regard to Petitioner in his Will.

In Trimble v. Gordon, 430 U.S. 702, 97 S. Ct. 1459 (1976), the Supreme Court held that

an Illinois state statute precluding illegitimate children from inheriting from their intestate fathers could not “be squared with the Equal Protection Clause of the Fourteenth Amendment.” Trimble 430 U.S. at 776, 97 S. Ct. at 1468. The South Carolina Supreme Court adopted the principals in Trimble as they related to South Carolina’s intestacy statutes. Wilson v. Jones, 281 S.C. 230, 314 S.E. 2nd 341 (1984). Petitioner is similarly situated as those illegitimate children in Trimble. Decedent and Petitioner were denied the opportunity during Decedent’s lifetime to become aware of Petitioner’s paternity or develop a parent-child relationship, and as a result, Decedent was not given the opportunity to provide for his daughter in his Will.

Petitioner has also made a claim for restraint of the Personal Representative in this matter from selling or transferring property, and from making disbursements or distributions from the estate pursuant to Section 62-3-607 of the Code while Petitioner’s claims remain pending before this Court. As a party with an interest in Decedent’s estate, Petitioner’s interests will be jeopardized if Personal Representative disposes of the assets of the estate.

CONCLUSION

For the reasons stated herein, the Respondents’ motion to dismiss should be denied.

WILCOX, BUYCK & WILLIAMS, P.A.

By: _____


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ATTORNEYS FOR PETITIONER

May 12, 2011
 Surfside Beach, South Carolina

**Transcript of Hearing on Motion to Dismiss
Held May 12, 2011**

2

1 THE COURT: Okay. This morning we're
2 hearing the Estate of Robert Laverne Gilmore, case
3 number 2010-ES-22-00307. I have before me a
4 motion to dismiss petition and so I'll let the
5 petition--- excuse me, not petition, I guess, but
6 counsel has filed a motion here for --

7 MR. RICHARDSON: Thank you, Your
8 Honor. I'm John Richardson. I'm the attorney for
9 the Estate of Robert Gilmore. And with me today
10 is Francis Daniels, called Frank Daniels. He's
11 the personal representative and his wife is
12 Patricia Daniels and she's also here today. Your
13 Honor, the petitioner filed a summons and a
14 petition for relief alleging three causes of
15 action. First cause of action was a demand for a
16 D.N.A. paternity test asking that the Estate
17 authorize the release of materials from the
18 decedent to be tested for the paternity to
19 determine if their client is the child of -- or
20 the child of the decedent. That was the first
21 cause of action. The second cause of action was a
22 claim for inheritance. And the third cause of
23 action was a restraint of the personal
24 representative to present -- to prevent the
25 personal representative from distributing assets,

1 disposing of assets, etcetera.

2 The crux of this whole case is within
3 the second cause of action because if the
4 petitioner has failed to state a claim sufficient
5 to allow the second cause of action to go forward,
6 the first cause of action piggybacks on the second
7 cause of action as well as the third. In other
8 words, if the -- if the petitioner has no claim
9 for inheritance, then the D.N.A. testing is not
10 relevant nor would the cause of action to restrain
11 the personal representative be relevant because
12 the petitioner would have no rights to any portion
13 of the estate. And I'd like to zero in on the --
14 on the most important point of this whole motion,
15 and that is paragraph 17 of the second -- of the
16 second cause of action, which says, upon
17 information and (inaudible) the decedent failed to
18 provide for the petitioner as his only child
19 because he did not know of her existence which is
20 tantamount to believing she is dead. Therefore,
21 pursuant to section 62-2-302(b), the petitioner is
22 entitled to receive a share of the estate equal to
23 the value of which she would have received or
24 inherited had the decedent died intestate.

25 Well, in this case, the decedent did

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1 not die intestate. He died with a will. The will
2 is attached to the petition as exhibit "A". The
3 will was executed on July the 21st of 2008. The
4 petitioner in her petition alleges that she was
5 born on November 8th of 1972. So the will was
6 executed after the petitioner was born. The
7 section that's relied on in the second cause of
8 action is 62-2-302b, which reads pre-permitted
9 children and states, if at the time of execution
10 of the will the testator fails to provide in his
11 will for a living child solely because he believes
12 that child to be dead, the child then becomes
13 compliant (inaudible) receives a share.

14 Well, in this case, the allegation is
15 that the decedent did not know of her existence,
16 and the petitioner is saying, not knowing of her
17 existence is the same thing as believing the child
18 is dead, and that defies logic because to believe
19 she's dead the decedent would have to have
20 believed that she existed. So for that reason,
21 the allegation in 17 does not state an allegation
22 or fact which would be allowed under the statute
23 for the petition to be covered.

24 And that's the reason why we have
25 brought this motion to dismiss, because taking all

1 the allegations of the petition as if they were
2 accurate or true still does not state a cause of
3 action because they did not state that the
4 decedent believed that his child was dead, which
5 is what the legislature in the statute requires.
6 They only stated that the decedent did not know
7 that the child existed. And also under section
8 62-302(A), it provides that if the testator fails
9 to provide his will for (inaudible) for his
10 children born or adopted after the execution of
11 the will, then (inaudible). So in this case, the
12 facts don't lead to that either because this young
13 lady was born in 1972. The decedent made his will
14 in 2008, I believe I said. And that's our
15 position.

16 MS. MULLINS: Good morning, Your
17 Honor.

18 THE COURT: Good morning.

19 MS. MULLINS: I'm Jennifer Mullins and
20 this is Tracy Wright. And we're obviously here in
21 behalf of the petitioner. We wouldn't necessarily
22 agree with the position of the respondent,
23 typically because the claims are piggybacking. We
24 believe that they are separate and independent of
25 each other, first of all. But moreover, we

1 understand that this is to some extent a new area
2 of law and we don't believe that the legislature
3 intended for the pre-permitted children statute to
4 be exhausted in terms of the remedies it provided
5 for children born outside of wedlock. And I think
6 that the case law is pretty clear that in terms of
7 equal protection clause -- protection for
8 different types of illegitimate children -- that
9 categorizing them separately and treating them
10 differently has been interpreted by the courts to
11 be violative of the protection laws of the
12 Constitution. And really the spirit of the
13 pre-permitted children statute is that if a
14 Testator is unaware of a child, that he is not in
15 a position to form any testament or intent as to
16 that child. How could we without knowing that the
17 child is alive? And in that sense, Ms. Turner is
18 analogist to a pre-permitted child, if a child
19 that you don't know exists is similar to a child
20 that you mistakenly believe to be deceased.
21 Obviously, the facts are alleged in the petition
22 that this, that Ms. Turner believes that she
23 was -- based on information provided by her
24 mother, that she was born, you know, conceived
25 outside of marriage, and that neither she nor

1 Mr. Gilmore were given the opportunity during
2 their lifetime to form any type of parent-child
3 relationship. And likewise, he wasn't given the
4 opportunity to form any testament or intent as to
5 her as his only living heir. There's nothing in
6 the will where he's indicating that he's providing
7 for other children, and to the best of our
8 knowledge, there were no other children. And he
9 had no other living relatives at the time of his
10 death. And so as his only living relative --
11 that's the basis of Ms. Turner's claim.

12 In addition to that, Your Honor, the
13 standards -- the hurdle for 12(b)6 -- for a 12(b)6
14 motion to be denied is so low that really, if
15 she's entitled to any relief on any claim, then at
16 least at this stage, the 12(b)6 should not be
17 granted for these respondents.

18 THE COURT: I agree that the standards
19 are low and I had an opportunity to review cases
20 involving this, but in the reading of the statute
21 which you referred to in your petition, I do not
22 find a cause of action under 62-2-302. Therefore,
23 I'm going to grant the motion and I would ask that
24 you would prepare me a proposed order.

25 MR. RICHARDSON: Yes, sir.

1 THE COURT: Nothing further and court
2 is adjourned.

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**Transcript of Hearing on Petitioner's Appeal
Held September 8, 2011**

1 THE COURT: What exactly do we here -- have here? Mr.
2 Richardson, are you the moving party?

3 MR. RICHARDSON: No, sir.

4 THE COURT: Ms. Turner, you're the moving party?

5 MS. WRIGHT: Ms. Turner's my client. I'm Tracy Wright
6 with the Wilcox Law Firm --

7 THE COURT: Okay.

8 MS. WRIGHT: -- representing the petition -- the --
9 the petitioner, Ms. Turner.

10 THE COURT: All right. Tell me what we have here.
11 This some sort of appeal.

12 MS. WRIGHT: Yes, Your Honor. This is an appeal from
13 the Georgetown County Probate Court. The -- the genesis of
14 -- of this claim, basically, is the story of -- of Ms.
15 Turner.

16 She, for her entire life like any of us would believe,
17 believed that her -- the man that was married to her mother
18 was her father. In the -- in -- in her thirties, she came
19 to -- to know that he may not be her father. There was
20 another man that her mother had had a relationship with --
21 (coughs) excuse me -- at the same time as -- as her
22 conception. This man, Mr. Gilmore, is the decedent in this
23 case.

24 And the respondents -- Mr. Gilmore, is the -- I'm
25 sorry, Mr. Daniels, Mr. and Mrs. Daniels, are the personal

1 representative of the estate of Mr. Gilmore.

2 THE COURT: All right. Mr. Gilmore was not the man
3 who reared her and who's home she lived in.

4 MS. WRIGHT: No, Your Honor.

5 THE COURT: Okay. All right.

6 MS. WRIGHT: So, when Ms. Turner gets this information
7 from her mother, she decides that she -- you know, she
8 needs to know, as anyone would.

9 She goes to who she believed to be her father and said
10 --

11 THE COURT: Mr. Gilmore?

12 MS. WRIGHT: No, no.

13 THE COURT: Okay.

14 MS. WRIGHT: Mr. Turner --

15 THE COURT: Okay.

16 MS. WRIGHT: -- who had been married to her mother --

17 THE COURT: All right. Okay.

18 MS. WRIGHT: -- who she believes to be her father her
19 whole life.

20 THE COURT: Okay.

21 MS. WRIGHT: She goes to her dad and says, "Would you
22 take a DNA test, so we can just put this to rest?"

23 She believed that it was her father and that this test
24 was gonna prove it. They go have the DNA test, it comes
25 back they are not blood related at all.

1 So, now she wants to -- to know who her father is, as
2 anyone would in this situation. Unfortunately, Mr. Gilmore
3 had passed away when my client learned that he could
4 potentially be her father.

5 She makes a request of the personal representatives,
6 can she have the DNA sample, and they refused. And here we
7 are.

8 So, we have filed a petition, asking for the Court to
9 allow her to -- to get a DNA sample from the hospital that
10 we have confirmed is holding tissue of Mr. Gilmore, so it
11 would not be invasive or intrusive. Actually, she could
12 just go to the hospital and get the tissue. She's going to
13 pay for the DNA test.

14 THE COURT: When did Mr. Gilmore pass away?

15 MS. WRIGHT: August of 2010.

16 THE COURT: Mr. Richardson --

17 MR. RICHARDSON: Yes, sir, Your Honor.

18 THE COURT: You represent Mr. Gilmore or ---

19 MR. RICHARDSON: I represent the estate and --

20 THE COURT: All right.

21 MR. RICHARDSON: --- the personal representatives.

22 THE COURT: Let me hear from you.

23 MR. RICHARDSON: Your Honor, first I'd like to hand up
24 respondents' return to their petitioner's grounds for
25 appeal.

1 (Mr. Richardson hands up a document to the Court.)

2 THE COURT: Okay.

3 (Brief pause.)

4 THE COURT: Mr. Richardson?

5 MR. RICHARDSON: Yes, sir.

6 THE COURT: I'm ready.

7 MR. RICHARDSON: Your Honor, the -- Ms. Turner
8 requested not only a DNA sample, but she also requested
9 that she be determined the sole heir of Mr. Gilmore, and
10 that she take the shares the sole heir would take under the
11 statute; which in this case would be the entire estate of
12 Mr. Gilmore. Mr. Gilmore died testate, and he died with a
13 will that was made after Ms. Turner was born.

14 And so, our contention with our 12(B)(6) motion was
15 that the DNA request piggy-backed on the -- on the request
16 that they were making under the statute, that she be
17 allowed as an heir. And if that statute didn't apply and
18 she not have a cause of action, then there's no reason to
19 have DNA samples done.

20 The judge, Judge Maring, granted -- granted our
21 motion, our 12(B)(6) motion, that she did not stay the
22 cause of action under the statute; and therefore, denied
23 the request for the DNA sample.

24 So, the reason that petition was brought was not just
25 to request a DNA sample. The ultimate reason, we believe,

1 was for her to be found as the heir and to be the heir of
2 Mr. Gilmore's entire estate.

3 THE COURT: Okay. Now, the -- the Probate Court
4 granted your 12(B)(6) ---

5 MR. RICHARDSON: Yes, sir.

6 THE COURT: --- motion; is that correct?

7 MR. RICHARDSON: They granted the 12(B)(6) motion.

8 THE COURT: All right.

9 MR. RICHARDSON: And actually, the -- the -- the ---

10 THE COURT: Well, tell me what the heir was, Counsel.

11 MS. WRIGHT: Your Honor, we believe that -- that my
12 client is -- is a protected class, and is similarly
13 situated to the two classes that are defined in that
14 statute.

15 I'm at statute 62-2-302. That allows a child to take
16 their portion as if it were an intestate succession, for a
17 child who was born posthumously or for a child that a
18 testator did not know was alive. They presumed incorrectly
19 that the child was dead.

20 And our argument is that, yes, in fact ---

21 THE COURT: Who presumed she was dead?

22 MS. WRIGHT: That the testator had to presume that
23 they had a child that was dead, and they ---

24 THE COURT: Okay.

25 MS. WRIGHT: --- did not provide for them in the will.

1 THE COURT: All right. But she's not that way, is
2 she? Isn't she just a child ---

3 MS. WRIGHT: She's a child that he had no knowledge
4 of.

5 THE COURT: Okay.

6 MS. WRIGHT: And that's our argument, that it is a
7 similarly situated class. It is protected by the 14th
8 amendment, equal protection, of the United States
9 Constitution, the same way that the *Trimmel vs. Gordon* case
10 -- that an illegitimate child could not be treated
11 differently than a legitimate child and in -- intestate or
12 probate statute's mistake.

13 Our argument is that -- that the statute is not
14 prohibiting this particular class, that the statute should
15 be interpreted to include this class, because it is -- it --
16 -- it's the public policy in that statute that -- that we
17 are -- that --

18 THE COURT: Tell me what the statute says.

19 MS. WRIGHT: The statute says that a --

20 THE COURT: And how it affects your client since this
21 was a testes.

22 MS. WRIGHT: It defines pretermitted children (as
23 read): "If a testator fails to provide in his will for any
24 of his children, born or adopted after the execution of his
25 will, the omitted child, upon compliance with subsection

1 (d), receives a share of his estate, equal in value to that
2 which he would have received if the testator had died
3 intestate; unless it appears from the will that the
4 omission was intentional," which of course, that's not the
5 case here.

6 "When the will was executed, the testator had one or
7 more children and devised substantially all of his estate
8 to his spouse;" not the case here.

9 "The testator provided for the child by transfer
10 outside the will, and the intent of the transfer be in --
11 be in lieu of the testamentary provision;" again, not the
12 case.

13 "Or if at the time of the execution of the will, the
14 testator fails to provide in his will for a living child,
15 solely because he believes the child to be dead, that child
16 upon compliance with subsection (d), receives a share of
17 the estate equal to the value of what she would have
18 received if the testator -- had the testator died
19 intestate."

20 So, what we're arguing is that although he did not
21 believe the child to be dead, he didn't know of her
22 existence. So, he could not form the -- the necessary
23 testamentary capacity to make an adequate will, because he
24 didn't know about her.

25 So, again, our argument is the -- is an interpretation

1 of this statute, that we believe that the -- the public
2 policy of this state would be to protect children. He had
3 no -- no children that he knew of; he had no spouse at his
4 death. This would be his only living heir, if in fact it
5 is his -- his child.

6 I mean, we would like the DNA first. And -- and
7 obviously, if the DNA comes back wrong ---

8 THE COURT: Well, Mr. Richardson, why would you
9 believe that a potential child should not -- even though it
10 may be an illegitimate child, should not take in the
11 estate?

12 MR. RICHARDSON: Because ---

13 THE COURT: I mean, there -- this has been expanded
14 for years now. But Courts used to say that illegitimates
15 didn't -- or that used to be the law in South Carolina.
16 But that's been greatly expanded over the years, hasn't it?

17 MR. RICHARDSON: It has been expanded.

18 THE COURT: I mean, there's a statute that allows it
19 in the case of mothers and to disallow it in the case of a
20 -- a father. Wouldn't that be unconstitutional?

21 MR. RICHARDSON: That would be unconstitutional, and
22 there was a case on that -- that provided that -- that --
23 that for a father -- it must be the same situation for
24 fathers as for mothers. But that's not the situation that
25 we have here.

1 The statute here -- the crux of the statute says (as
2 read): "If at the time of the execution of the will the
3 testator fails to provide in his will for a living child,
4 solely because he believes the child to be dead," okay.

5 The -- the petitioner is arguing that the decedent
6 failed to provide for petitioner as his only child because
7 he did not know of her existence, which is tantamount to
8 believing that she is dead. The statute -- South Carolina
9 law provides that the cardinal rule for a statutory
10 interpretation is to ascertain and effectuate the intention
11 of the legislature.

12 And what we're saying is, is that here, the statute is
13 -- is clear and unambiguous. There's no ---

14 THE COURT: And -- and Counsel, doesn't -- doesn't it
15 appear that what we have here is nothing more than a
16 situation where the legislature has -- has made some
17 exception for children that were not provided for in the
18 will. And they were very specific as to what it would be.

19 Do you suppose that there's a possibility that they
20 may have said, well -- or -- or may not have considered
21 children born outside the marriage? I mean --

22 MS. WRIGHT: Your Honor, I believe ---

23 THE COURT: Do you believe that this legislature
24 overlooked that?

25 MS. WRIGHT: I believe that they, at the time ---

1 THE COURT: Probably a few of them sitting right there
2 in that committee.

3 MS. WRIGHT: Probably. I believe that the statute, at
4 the time it was drafted, the DNA testing was not as
5 prevalent, it was not as available, it was not as reliable;
6 so that there was a huge opportunity for abuse of this.

7 Anybody could come up and say, "I was his kid," you know.
8 And it was -- it was a lot more difficult to -- to prove.

9 It's a -- it's simple to prove it now. I mean, they
10 do DNA testing every day at LabCorp. All you have to do is
11 go down there ---

12 THE COURT: I understand.

13 MS. WRIGHT: --- and have a sample.

14 THE COURT: And I think it's probably something that
15 needs to be done, and I hope you get it done. But I don't
16 think the statute provides for it now.

17 I'm gonna follow the law. I'm gonna uphold or affirm
18 the -- the probate judge's decision in this matter. I hope
19 you will appeal it and take it up. But I hope I get
20 reversed.

21 MS. WRIGHT: Thank you, Your Honor.

22 THE COURT: Okay.

23 MS. WRIGHT: I appreciate it.

24 THE COURT: Thank you. Mr. Richardson, prepare an
25 order.

1

MR. RICHARDSON: Thank you, Your Honor.

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--- END OF TRANSCRIPT OF RECORD ---

**Transcript of Hearing on Petitioner's Motion to Reconsider
Held March 22, 2012**

Motion to Reconsider - March 22, 2012

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1 The Court: All right, who's the moving party?

2 Ms. Wright: I am, Your Honor.

3 The Court: All right, let me hear from you, Ms.
4 Wright.

5 Ms. Wright: Your Honor, in September 8, 2011,
6 we were before you on an appeal from a probate court order
7 which granted the respondent's motion for a 12(b)(6). At
8 that time you ruled that the statute that we were
9 questioning, which is probate court statute 62-3-202, you
10 held at that point in the transcript page thirteen lines
11 fourteen through twenty, "I think it's probably something
12 that needs to be done and I hope you get it done but I
13 don't think the statute provides for it now. I'm going to
14 follow the law. I'm going to uphold, affirm the probate
15 judge's decision in this matter. I hope you will appeal it
16 to take it up but I hope I get reversed."

17 At that point we received only a form order so
18 out of an abundance of caution we went ahead and filed our
19 motion to reconsider based on the form order.

20 We were back before you on February 9th, excuse
21 me, where we, you heard our motion to reconsider the form
22 order. At that time you held that Mr. Richardson needed to
23 prepare a formal order and that we could appear again to,
24 to argue our motion to reconsider based on that form, the
25 formal order.

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1 We received, Mr. Richardson, excuse me, he, he
2 sent us the order that Your Honor had signed on March 12,
3 we received it on March 19th, and we are here now arguing
4 our motion to reconsider based on that order.

5 The Court: All right, tell me about it.

6 Ms. Wright: Well there's is actually ---

7 The Court: I remember this case, this is the
8 one where there was a child that he did not or that had
9 died.

10 Ms. Wright: The child he did not know. He did
11 not realize our client, Ms. Turner, was his child and he
12 had deceased and there was no way that she could or that he
13 knew about her and that she knew about him until after his
14 death.

15 The Court: All right, well tell me how I should
16 go against precedent in this case.

17 Ms. Wright: Well there's actually four issues
18 that we would like to bring to your attention. First is
19 the statute interpretation. We do believe Your Honor has
20 the authority to interpret the statute. It is not
21 specifically allowed in this particular circumstance but we
22 do believe that the statute should be interpreted to
23 include. It doesn't exclude her category of, of children,
24 it doesn't specifically include it but it doesn't exclude
25 it and we were asking Your Honor to interpret the statute

Motion to Reconsider - March 22, 2012

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1 liberally to include our client.

2 The second argument, which is the equal
3 protection Fourteenth Amendment argument, where we believe
4 that the Fourteenth Amendment protects this type of class
5 because it treats the two classes differently. She's a
6 child similar to, similarly situated to a child who was
7 born after the testator made his will or that a testator
8 did not know about because we believe that the basis for
9 those exemptions are that the testator did not have enough
10 information to form the necessary testamentary intent,
11 therefore, those are similarly situated classes of, of
12 children and that they should be treated the same under the
13 Fourteenth Amendment.

14 The third issue we have is the DNA. We've
15 requested that DNA be released so that we could test the
16 DNA and determine if in fact this was her father as she
17 believes.

18 And lastly, we had asked the Court to rule that
19 no sale of assets by the estate until, until this
20 litigation is, is completed through the appellate process.
21 It's our understanding they have the house, which is the,
22 the main asset of the estate listed for sale at this time.

23 Mr. Richardson brings up in his, or in the order
24 that he drafted, that we did not adequately preserve the
25 issue of the Fourteenth Amendment from the probate court's

Motion to Reconsider - March 22, 2012

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1 order and we would argue, and there were four cases cited
2 in the order.

3 The first three cases really had to do with
4 issues not being brought up at trial. This issue of the
5 Fourteenth Amendment was brought up in our petition. It
6 was brought up at the probate court hearing; it was brought
7 in front of the appeal hearing. It was brought up in front
8 of the last motion to reconsider, so we believe it was
9 adequately brought up at trial.

10 Now as far as filing a 59(e) on that particular
11 issue, I don't believe it's necessary in this case and if
12 you look at the last case that is cited in the order,
13 Wilder Corp. v. Wilkie, in that case there was a dispute
14 between the buyer and the seller under a bond for title
15 agreement. There was a, one side had an amortization
16 schedule that they liked, another side had an amortization
17 schedule that they liked. They basically stipulated in
18 Court that the map was right in the amortization schedule
19 but the basis for each amortization schedule was what the
20 conflict was. The side that won filed a motion afterwards
21 and said, no, that that was not preserved for appeal
22 because it was ruled on by the Court. The Supreme Court
23 held that "in this case the trial court ruled on the
24 seller's objection by expressly adopting buyers
25 amortization schedule in its order, consequently it's

Motion to Reconsider - March 22, 2012

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1 unnecessary to preserve to make post trial motions." There
2 was no need for an explicit ruling in order to be
3 considered ruled on and when the probate court judge ruled
4 that the statute was not, there was no claim under the
5 statute, under the 12(b)(6), he implicitly ruled that it
6 was constitutional. He didn't have to specifically say I'm
7 rule this statute is constitutional. He said that, that
8 the statute did not apply to my client in order for it to
9 implicitly rule that the statute was constitutional, and
10 that's our argument, Your Honor.

11 The Court: All right. Mr. Richardson?

12 Mr. Richardson: Your Honor, the petitioner
13 alleged in her petition that the decedent failed to provide
14 for petitioner as his only child because he did not know of
15 her existence which is tantamount to believing she is dead.
16 Believing the child is dead was what the statute required.

17 The South Carolina Supreme Court in Sloan v.
18 Hardee stated "the cardinal rule of statutory
19 interpretation ascertain and effectuate the intention of a
20 legislature when the statute's terms are clear and
21 unambiguous on their face there's no room for statutory
22 construction and the court must apply the statute according
23 to its literal meaning" and that's, that's what happened
24 here and the trial judge so ordered; and when it was
25 appealed that was what this Court affirmed, so that's our

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1 position as far as statutory construction.

2 As far as the issue of the constitutionality that
3 was not ruled on by the trial judge, the probate judge,
4 there was no request for reconsideration or a motion made
5 by the adversary party for the judge to have ruled on that
6 and, therefore, that's waived, and that's our position,
7 Your Honor.

8 The Court: All right, Ms. Wright, the, the,
9 I'll hear you again, did you have something else you wanted
10 to add?

11 Ms. Wright: Judge, just one thing on the
12 statutory construction. We, we do believe it would have
13 been the legislature's intent to provide for children that
14 were not known to the testator. Again like I said, it
15 doesn't specifically mention our class of, of children but
16 it doesn't exclude them either so constructing,
17 interpreting the statute does not go afoul of what we're
18 asking the court to do.

19 The Court: And I believe that this is a
20 situation that we're going to see more and more in the
21 future; however, I believe my ruling does correctly state
22 the law. As I said in the first hearing, I may not
23 necessarily agree with it, I think it is the law and I
24 would deny your motion for reconsideration. Take it up and
25 see what happens, okay.

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9

1 Ms. Wright: Thank you, Your Honor.

2 End of Requested Transcript....

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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.

October 13, 2012



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S.C. Supreme Court

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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Jennifer H. Turner, Appellant vs. Francis D. Daniels, Personal Representative of the Estate of Robert Leverne Gilmore a/k/a Robert L. Gilmore, II, a/k/a Robert L. Gilmore, Jr., Francis D. Daniels a/k/a Frank Daniels individually, and Patricia C. Daniels a/k/a Patti Daniels, individually, Respondents
Appellate Case No. 2012-211949

Dear Mr. Shearouse:

Please find enclosed herewith the following items in connection with the above referenced appeal:

- (1) Original unbound and sixteen (16) bound copies of the Final Brief of Appellant, including the Certificate of Counsel and Proof of Service; and
- (2) Original unbound and sixteen (16) bound copies of the Record on Appeal.

Please return a file-stamped copy to me in the enclosed envelope, and file the original and remaining copies in your records.

By copy of this letter, we are hereby serving the Appellant with a copy of the same. Thank you for your assistance with this matter.

Very truly yours,

WILLCOX, BUYCK & WILLIAMS, P.A.



Tracy L. Wright

Attorney for Appellant Jennifer H. Turner

TLW/aw

Enclosures as stated

CC: George M. Hearn, Jr., Attorney for Respondents