STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Probate Court

The Honorable Amy W. McCulloch, Probate Judge

Appellate Case No. 2016-001960
Case No. 2016-ES-0215

Georganna Paradeses, as Personal Representative of the Estate of William D. Paradeses,.....Petitioner,

v.

Georganna Paradeses, Eleanor Glisson (Faye) (a.k.a. Faye Greeson), Pam Paradeses, Stephanie Starr, Robin Pace, Mary Paradeses and Jim Paradeses,..... Respondents.

OF WHOM

Georganna Paradeses, individually, Pam Paradeses, Stephanie Star, Robin Pace, Mary Paradeses and Jim Paradeses are.....Appellants,

AND

Eleanor Glisson (Faye) (a.k.a. Faye Greeson) is .....Respondent.

FINAL BRIEF OF RESPONDENT

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Statement of Issues on Appeal

Appellants did not include a Statement of the Issues on Appeal in their brief. From examination of Appellants' brief, it appears that they consider the only issue on appeal to be "whether a testator is free to revoke a provision in his Last Will and Testament without either revoking the entire document or recruiting two witnesses to attest to his revocation." Appellants' Brief, p. 2. As argued below, this is an incorrect statement of the issue. No one disputes the abstract principle of law that a Testator can make such a partial revocation as stated by Appellants. The issue is rather whether in this case the Testator did so and did so effectively. Respondent believes the issues on appeal to be as follows:

1. Did the Probate Court err in concluding that, even if the handwritten alterations on the face of the Will as found were made by Testator, they could not effect the partial revocation of the Will so as to eliminate the bequest of $50,000 to Respondent?

2. If the Probate Court was in error (which Respondent contends is not the case), were the alterations made by the Testator?

Respondent includes the second issue above only because, although Appellants do not seem to assign error in this regard, their brief does "note" (incorrectly) that there is an unrebutted presumption that the Testator made the alterations. Respondent addresses this below.

Statement of the Case

Respondent accepts Appellants' Statement of the Case as the same appears in Appellants' brief. However, Respondent wishes to note that she has filed a motion to dismiss this appeal on account of Appellants' failure to comply with the rules of this Court in certain material respects, which motion is now pending before this Court.

Argument

As the Probate Court (Honorable Amy W. McCulloch) noted (R. pp. 1-2), it was undisputed that the Testator made a properly executed Will in 2008, that this Will was discovered in "a Kroger shopping bag" in the Testator's kitchen after the Testator's death in 2016, and that the Will when discovered was marked with certain additions and deletions (described in the Original Order) on page 2 of the Will, which attempt to alter paragraphs 1 and 2 of Item IV of the Will. A copy of the Will with the attempted alterations is attached to the Petition for Declaratory Judgment herein as Exhibit A. (R. pp. 8-13). A copy of unaltered page 2 of the Will is attached to Respondent's Amended Answer as Exhibit A. (R. p. 30). The attempted alterations purported to place a condition on the Testator's bequest of his interest in the Saluda Investment Company to six named individuals, including Appellants, and to eliminate the Testator's bequest of $50,000.00 to Respondent, thereby increasing his residuary bequest to the same persons, including Appellants, who received the bequest of the Testator's interest in the Saluda Investment Company pursuant to Item III of the Will.[1]

As the Probate Court also noted in the same Order, it was undisputed that there were no witnesses to the making of the purported alterations. Respondent denied that the purported alterations were made by the Testator and further argued that, regardless of whether they were made by the Testator, they failed to alter the Will because they were not properly attested. Respondent's Answer, pp. 1-2. (R. pp. 24-25).

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[1] All beneficiaries other than Respondent have agreed among themselves to carry out the provisions of the addition to the Will, which do not affect the bequest to Respondent. Therefore, the validity of the addition per se is not before this Court. However, as noted by the Probate Court in its Order on Appellants' motion for reconsideration, the Probate Court nevertheless properly considered all the purported changes to the Will in addressing the legal issue as to the character of the changes. Order of September 12, 2016, "Order on Reconsideration", p. 2. (R. p. 5)

The Probate Court did not reach the issue of whether the attempted alterations were made by the Testator, because the Court found that the attempted alterations as a whole amounted to an attempt to make a codicil and as such required proper attestation by two witnesses. Since such attestation was missing, the Court ordered that the Will be admitted to probate without the attempted alterations. The Court rejected Appellant's contention that that portion of the markings which struck through the bequest to Respondent amounted to a successful revocation of that bequest.

The Probate Court was correct in its conclusion. If the Probate Court was incorrect, however, the case should be returned to the Probate Court for a determination of whether the attempted alterations were made by the Testator. Appellant did not choose to include a transcript of the hearing with this appeal.

1. The Probate Court was correct: The attempted alterations, if made by the Testator, were an attempted codicil that required attestation by two witnesses.

Appellants are mistaken in their formulation of the holding of the Probate Court. The Probate Court did not hold that as a matter of law a testator cannot partially revoke a will without attestation by two witnesses. On the contrary, the Probate Court explicitly recognized that South Carolina law allows for this possibility. Original Order and Order on Reconsideration, *passim,* and particularly Order on Reconsideration, concluding sentences. (R. pp. 1-5; R. p. 4) What the Probate Court held was that, viewing this Will and these attempted alterations, consisting of both addition and deletion, thereto in their entirety, what the alterations attempted was a codicil, not merely a revocation of a specific bequest, and that therefore these particular alterations cannot be allowed as a partial revocation without attestation as required for a codicil.

The only actual error in the Probate Court's ruling alleged by Appellants in their brief is that the Probate Court erred in considering all the attempted alterations to the Will, instead of isolating and treating the striking out of the bequest to Respondent separately. Appellants' Brief, p. 4. On the contrary, case law shows that, in judging whether alterations to a will amount merely to an attempted revocation of a specific bequest, or on the other hand to an attempted codicil, the entire will and the entire alterations must be considered as a whole, as the Probate Court did.

By statute in South Carolina (now S.C. Code Section 62-2-506), it is possible for a testator to revoke a will in part, by striking out the part to be revoked, without the necessity of a new attestation. *Brown v Brown,* 91 S.C. 101 (1912).[2] However, there is an important tension between this point of law and the general requirement of South Carolina law that changes in a will must be made by a codicil attested and witnessed with the same formalities as the will itself.

If this were not so, then the requirement of attestation by two witnesses could be rendered nugatory. One could execute a will before two witnesses and then thereafter, by extensive handwritten and unwitnessed markings on the document, create what would in effect be a new will. Because of the extreme sensitivity of a last will and testament, and the obvious and great possibility for abuse (most evidently, the absence of the testator at the time of carrying out the will, which multiplies the opportunities for fraud or mistake as to his intention), the law requires

[2] As noted in the Original Order, p. 3, Appellants apparently contended that there has been a material change in South Carolina law, which at one time did not allow for a partial revocation. (R. p. 3) However, so far as Respondent can determine, South Carolina has by statute allowed a partial revocation at least since 1912. On appeal Appellants do not argue any change in the law, and Respondent has been unable to find any. The leading case of *Stevens v. Royalls,* 223 S.C. 510 (1953), discussed hereinafter, quotes the relevant statute in a form that might cast doubt on the possibility of a *pro tanto* revocation, but the Supreme Court's discussion in that case shows clearly that the Supreme Court recognized that South Carolina did at that time, as now, recognize the possibility of a *pro tanto* revocation.

particular formalities to insure that a will offered for probate is in fact what the deceased person intended to do. The formalities surrounding execution of a will are intended to create bright lines for legal determination, so as to avoid the potential morass of conflicting evidence. The most important and beneficial of these is, of course, the requirement of attestation by at least two witnesses. The law seeks to eliminate doubt by prescribing procedural requirements. In the *Brown* case above cited, which recognized that a testator can revoke a will in part by striking out the part he wishes to remove, it was stipulated that the purported alteration to the will at issue was in fact made by the testator. Thus, the whole purpose of the attestation requirement had been removed from consideration by stipulation. There was no question in *Brown* that the testator intended to revoke a bequest in the will. In this case, by contrast, it is specifically denied that the Testator made the purported alterations or intended any such thing. In the present case, unlike in the *Brown* case, it is of vital importance that the full importance and value of the attestation requirement be recognized.

The tension between the statutory permission for a *pro tanto* revocation on the one hand, not requiring witnesses, and the salutary purpose of the law in requiring attestation by two witnesses, is exhibited in the case of *Stevens v. Royalls,* 223 S.C. 510 (1953), which is similar in significant respects to the one now before this Court. The case involved purported alterations to a will which included but were not limited to the striking of a specific bequest. It was a stronger case for the allowance of the alterations, because there was at least one witness, though imperfect, to the intention of the testator to make the alterations. Nevertheless, the Supreme Court held that this was an attempt to alter the will rather than merely a *pro tanto* revocation. In the course of reaching this conclusion, the Supreme Court discoursed at some length on the applicable principles to distinguish between a *pro tanto* revocation, on the one hand, and an alteration amounting to a

codicil, which requires separate attestation, on the other. Quoting recognized authorities, the Supreme Court concluded that "[t]he general rule, therefore, is that when an attempt has been made by erasure or obliteration to make a different disposition of the estate, the attempt will be abortive if made without the attestation required by law, and the will as originally drawn will be given effect." 223 S.C. at 515.

Because of its judgment that the purported alterations of the Will, even if made by the Testator, would not meet the requirements of South Carolina law, the Probate Court did not reach the issue of whether the purported alterations were made by the Testator. The narrow question now before the Court is whether, if these alterations were in fact made by the Testator, they would be sufficient to work a partial revocation of the Will.

The Will as written, executed, witnessed and unaltered, first makes a specific devise of certain real estate. Will, Item III. It then follows with Item IV, which makes all remaining bequests, five in all:

1. A bequest of the Testator's interest in "the Saluda Investment Company", to six persons, five of whom are Appellants herein (hereinafter "Specific Bequest to Appellants"); [3]
2. A bequest of $50,000 to Respondent;
3. A bequest of a truck and a dog to Respondent;.

[3] Apparently one of the six beneficiaries chose not to oppose the Probate Court's judgment validating the $50,000 bequest to Respondent which is the material subject of this appeal. Since this beneficiary's failure to join in the appeal has no substantive bearing on the issues, Respondent will not reiterate at each turn of her argument that there is a sixth beneficiary, both of this specific bequest and, as indicated below, of the residuary bequest.

4. A bequest of "all my stock assets" to an education trust for seven named persons, including neither Appellants nor Respondent; and
5. A residuary bequest to the same six persons, including the five Appellants herein, to whom Testator made the bequest above of his interest in "the Saluda Investment Company."

The remainder of the Will consists of non-dispository provisions, including details of the education trust.

The alterations to the Will attempt to modify and limit the bequest to Appellants of the Testator's interest in the Saluda Investment Company and to delete the cash bequest of $50,000 to Respondent, which would then go to augment the residuary bequest to Appellants. The effect of the first of these would be to impose a condition on the Testator's bequest to Appellants, such that Appellants would have no control over the Saluda Investment Company, which would remain with or be given to third persons. (Whether "remain" or "be given to" would depend on facts unknown to the Record or to the Probate Court.) The effect of the second would be to increase what is received by Appellants as residuary beneficiaries.

Appellants have included in the Record on appeal an inventory and appraisement of the Estate dated May 16, 2016. (R. pp. 31-34) There is no evidence that this appraisal was considered in any way by the Probate Court in reaching its decision, or that it was brought to the Court's attention. Presumably Appellants have included the appraisement in the Record in order to support the assertion in their brief that the bequest to Respondent, which they seek to void, is "modest in comparison to the total assets disposed of under the Will." Respondent doubts whether this document is properly in the Record herein, but since Appellants have included it, and in Respondent's judgment it does not assist Appellants' case, Respondent will argue from it as well,

while noting that there is no showing by Appellants, who have the burden of proof to sustain the handwritten and unattested alterations as a *pro tanto* revocation only, that the appraisement reflects the status of the Testator's estate at the time of the making of the undated alterations.

The appraisement reflects that about a quarter of the Estate as of May 2016 consisted of real estate that is separately devised in the Will, as to which devise no alterations are asserted. Of the remaining three quarters of the estate, about half is accounted for as "stocks and bonds". There is nothing to indicate whether this amount includes Testator's "interest in the Saluda Investment Company", there being no showing as to the nature of "the Saluda Investment Company" as a corporate or other entity. The remaining roughly one quarter of the Estate is listed as "Other Miscellaneous Assets" (most of this remaining quarter), "Notes Due Decedent and Cash" and "Annuities and Retirement Accounts Payable to the Estate".

Appellants have furnished no means for the Probate Court or this Court to determine how much of the Estate is within the Specific Bequest to Appellants, how much is within the education trust for other persons, and how much is in the form of cash or cash equivalents. Also, Appellants have furnished nothing from which the Probate Court or this Court could determine the actual effect of the attempted alterations on the Specific Bequest to Appellants. The attempted alteration of the Specific Bequest to Appellants is far from clear. The handwritten sentence declares that two otherwise unidentified persons, whose interest in the Saluda Investment Company is not established in the Record herein, "will have control until it is sold", but it is unclear whether "it" means the Company or only the Testator's interest in the Company. It is difficult to determine what the Testator's intent was in this regard. The Will as written gives the Testator's Personal Representative "the discretion to sell [the Testator's] interest. Perhaps the most reasonable guess of the intent of the attempted alteration is that the Testator intended to prohibit his Personal

Representative or Appellants from exercising any control over the operation of the Saluda Investment Company in the event that the Personal Representative exercised her "discretion" by deciding not to sell the interest therein bequeathed to Appellants.

The second alteration is more straightforward, since it consists of an obliteration, by means of what appears to be a blunt-tipped ink instrument of some kind, of the $50,000 bequest to Respondent. In the margin next to this marking appear the words apparently reading "Omit No. 2".

On this Record, it simply cannot be said that the Testator intended to revoke the money bequest to Respondent regardless of whether the other alteration was made, as would be necessary to find a partial revocation. It is equally or more plausible that, if the Testator made these alterations, he intended them more as an indication of what he might do by a new will or a codicil, an intent which he never carried out. This would explain the direction to "Omit No. 2", which appears superfluous if all that was intended was a partial revocation by obliteration. In any event, the effect would be to augment the share of the Estate going to Appellants by means of the residuary bequest, while at the same time limiting, in some way that is unclear on the present Record, Appellants' rights pursuant to the Specific Bequest to Appellants. There is no reason to believe that the Testator would have intended to augment his bounty to Appellants by deleting the money bequest to Respondent, without at the same time restricting his bounty to Appellants in the Specific Bequest to Appellants.

The above simply illustrates that, even if the Testator made the purported alterations to the Will, he certainly did not, by a deletion clearly separable from the overall testamentary scheme of his Will and his overall deletions and additions, intend or accomplish a revocation *pro tanto* of the one specific bequest to Respondent. As the Supreme Court noted in *Stevens v. Royalls, supra,*

the "general rule" is that "when an attempt has been made by erasure or obliteration to make a different disposition of the estate" without attestation, "the will as originally drawn will be given effect." In this case, the attempted alterations consist of both an addition and a deletion, both of which affect the bounty of the Testator with respect to Appellants. These alterations are manifestly more like those rejected in *Stevens v. Royalls, supra,* than they are like the straightforward deletion, admittedly directly reflecting the intention of the testator, which was allowed without attestation in *Brown v. Brown, supra.*

The alterations to the Will attempt to modify and limit the bequest to Appellants of the Testator's interest in the Saluda Investment Company and to delete the cash bequest of $50,000 to Respondent, which would then go to augment the residuary bequest to Appellants. The effect of the first of these would be to impose a condition on the Testator's bequest to Appellants, such that Appellants would have no control over the Saluda Investment Company, which would remain with or be given to third persons. (Whether "remain" or "be given to" would depend on facts unknown to the Record or to the Probate Court.) The effect of the second would be to increase what is received by Appellants as residuary beneficiaries.

In support of their theory that the Probate Court should not have considered all of the alterations to the Will in reaching its conclusion, Appellants rely on a case from the State of Washington that is inapposite in the present context. *In re Estate of Appleton,* 2 P.2d 71 (Wash. 1931) involved hand-written alterations on a will which were admittedly made by the testator. The court gave effect to alterations that did not in any way change any bequest, but it refused to give effect to any alteration that changed what anybody under the will would receive. In no way does this case stand for the proposition that a court, when confronted with a will on which more than

one alteration has been made, should not consider all the alterations in determining whether any one of them amounts clearly and of itself to a partial revocation.

If anything, the *Appleton* case supports Respondent's contention. There were numerous handwritten deletions or interlinear alterations to the testator's will, all concededly made by the testator. (The court noted that "there seems to be no serious contention but that the lines and the interlineations . . . were actually made by [the testator]. 2 P.2d at 72.) The court went carefully through each of these attempted changes, validating those that did not effect a significant change in the amount or conditions of any bequest, but rejecting those which did so. There is nothing in the decision that even suggests that a court would be barred from considering the total effect of all alterations on the testamentary scheme of the will.

The subsequent Washington case cited by Appellants, *In re Estate of Eastman,* 812 P.2d 521 (Wash.App. 1991), is likewise inapposite. It found that eliminating one of two residuary beneficiaries was more akin to a codicil, requiring witnesses, than a *pro tanto* revocation, and therefore disallowed the handwritten change. In dictum, the court stated the unexceptional proposition that an increase in what residuary beneficiaries receive does not, standing alone, prevent a *pro tanto* revocation. This is obvious: if the law were otherwise, the exception would swallow the rule.

By contrast, in the present case, even if we assume that the additions and deletions to the Will were made by the Testator, we find that thereby he sought significantly to limit a gift to Appellants in one place by specific wording (although how significantly the Record does not allow us to determine), while at the same time increasing what Appellants would receive in another place, by striking out a specific bequest of funds to Respondent amounting to approximately 5% of the entire estate. This is an attempted change in the dispository scheme of the Will and required the

attestation of two witnesses to be effective. The Probate Court was right in so concluding. To do otherwise would have been to pile inference on inference to construct, as a matter of law moreover, a suppositious intention of the Testator for which there is no sufficient basis in the Will, the alterations, or the evidence noted by the Court.

2. If the Probate Court were incorrect in its determination, the case would have to be remanded for a determination of whether the Testator made the attempted alterations.

Appellants did not choose to include a transcript of the hearing in this appeal. However, even without a transcript there is a very substantial question whether the purported alterations to the Will were made by the Testator at all. It is evident from the two orders she entered that Judge McCulloch made a very careful survey of the law in reaching her conclusion. However, if this Court were to disagree with Judge McCulloch's legal conclusion, as to the ineffectiveness of the purported alterations even if they were truly made by the Testator, then the case would have to be remanded for a hearing on whether the alterations were in fact made by the Testator. The Probate Court noted testimony that the Will with the handwritten purported alterations was "discovered in a Kroger shopping bag in Mr. Paradeses' kitchen among his things." Original order, p. 3. (R. p. 3) It did not find that these alterations were made by the Testator.

At the hearing below Appellants contended that since the Will was found in the Testator's home after his death, it must be presumed that he made the purported alterations. There is no such presumption in South Carolina law. Such a presumption, particularly where it is relied upon for a partial rather than a complete revocation of the will, would be illogical and destructive of the salutary purpose of the requirement that a Will be properly attested. While the location of the altered Will when found might be evidentiary, it could not be dispositive. At the very least, there would have to be evidence that no one else had access to the document at any relevant time. Of

course, the finding of such a document with alterations in an unknown hand, even among the decedent's papers, is not logically proof that the alterations were anything more than proposals or considerations which the Testator never actually adopted. Much more, however, it is not evidence that the alterations were made by the decedent.

Appellants are incorrect in claiming that where "a will is discovered among the decedent's personal effects after his death with the strikeouts already made", it is to be presumed that the "strikeouts" were made by the testator. Appellants' Brief, p. 3. Appellants rely exclusively on *Goriczynski v. Poston,* 449 S.E.2d 423 (Va. 1994), a Virginia case interpreting Virginia law. The case does not in fact stand for the proposition asserted by Appellants at all. The Virginia court specifically stated that "[t]here is no dispute on appeal that the handwriting and marks on the will were made by the testator." 449 S.E.2d at 424. This is not the situation in the case before this Court. The presumption recognized by the Virginia court was not that the testator had made the alterations, but rather that in doing so he had intended a partial revocation.

Even if there were such a presumption in South Carolina law, and even if it were extended to a case of partial revocation, rather than total revocation, the presumption would not stand unrebutted in this case, even on the Record submitted by Appellants. As noted, Appellants have not provided a transcript of the hearing. Had they done so, Respondent states that it would have included evidence that persons other than the Testator had access to his personal papers even before his death, for the stated reason of obtaining information to assist in his care.[4] Even the limited Record before the Court, however, itself demonstrates evidence countering the supposed

[4] Respondent wishes to state that she makes no accusations against any person. She notes the facts merely to illustrate the wisdom of the law in requiring attestation and certainty as to testamentary dispositions, and the importance of the burden of proof in case of an alleged unattested partial revocation.

presumption. The handwriting of the alterations, including the signature of the Testator, appears markedly different from the hand by which the Testator signed the original Will. In addition, it appears that in at least one place the Testator's last name is actually misspelled, a fact noted by the Probate Court itself. Original Order, p. 1. (R. p. 1). Thus it is not correct for Appellants to say, as they do at p. 4 of their brief, that there is "no evidence . . . to suggest that Decedent did not himself revoke [the bequest to Respondent]."

The Probate Court concluded rightly, after a careful analysis of applicable law, that the alterations found on the Will would not be sufficient to effect a *pro tanto* revocation of the bequest to Respondent, even if made by the Testator. This ruling furthers the purposes of both the law requiring sufficient formalities with respect to testamentary dispositions and the exception permitting a partial revocation. It upholds a Will attested with all the formalities required by the law, as against a dubious and unattested claim of partial revocation. Even if Judge McCulloch were wrong in this conclusion, however, a remand would be required to determine whether the Testator made the alterations and his intent in doing so, questions on which Appellants, as the proponents of the purported alterations to the Will, would have the burden of proof.

Conclusion

Respondent asks that the judgment of the Probate Court be affirmed and that the Will be admitted to probate as originally written, without attempting to give effect to (some but not all of) the markings in an unknown hand found on the face of the Will when it was discovered. Anything else would be unfair to Respondent and would violate the principles that require attestation of a will and require certainty as to an alleged *pro tanto* revocation. The bequest of $50,000.00 to Respondent should be allowed.

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Certificate of Rule 211(b) Compliance

The undersigned counsel for Respondent hereby certifies that Respondent's Final Brief complies with Rule 211(b) of the SCACR.

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