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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY CIRCUIT COURT AND PROBATE COURT

Letitia H. Verdin, Circuit Court Judge
Debora A. Faulkner, Probate Judge

RECEIVED

MAY 08 2017

SC Court of Appeals

Case No. 2016-CP-23-02045

Wilson Garner, Jr., Ruby Lee Douglas, and Hazel Hastings as statutory heirs of the Estate of Nell
Gaines, and on behalf of all other remaining statutory heirs who may be determined hereafter,
.....Appellants,

v.

The Estate of Nell Gaines and John Allen Head, individually and acting as Personal
Representatives of the Estate of Nell Gaines,..... Respondents.

RECORD ON APPEAL

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ELECTRONICALLY FILED - 2016 Sep 14 11:59 AM - GREENVILLE - COMMON PLEAS - CASE#2016CP2302045

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Wilson Garner, Jr., et. al.

Plaintiffs/Appellants,

vs.

The Estate of Nell Gaines, et. al.,

Defendants/Respondents

IN THE COURT OF COMMON PLEAS

Civil Action No. 2016-CP-23-02045

ORDER

This matter is before the Court on Defendants/Respondents', The Estate of Nell Gaines, et. al., appeal of the Greenville County Probate Court's ("**Probate Court**") decision to admit Nell Gaines' 2008 will to probate and to govern the administration of the estate in all respects. For the reasons set forth herein, the Court **AFFIRMS** the Probate Court's decision.

The Court finds the Probate Court correctly ruled the common law doctrine of dependent relative revocation ("**DRR**") is still recognized by the courts in South Carolina and is applicable and controls in this case. By finding DRR controlling and dispositive in this case, the Probate Court impliedly and correctly found that *S.C. Code Ann.* 26-2-504 and DRR are not in conflict. The Probate Court also correctly found *Davis v. Davis*, 208 S.C. 182, 37 S.E.2d 530 (S.C. 1946) was not dispositive in this case.

For the reasons set forth above, the decision of the Probate Court is **AFFIRMED**.

AND IT IS SO ORDERED.

Letitia H. Verdin
Greenville County Circuit Court

September __, 2016

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ELECTRONICALLY FILED - 2016 Sep 14 11:59 AM - GREENVILLE - COMMON PLEAS - CASE#2016CP2302045

Greenville, South Carolina

0003



Greenville Common Pleas

Case Caption: Wilson Garner Jr. , plaintiff, et al VS Nell Gaines , defendant, et al

Case Number: 2016CP2302045

Type: Appeal/Affirmed

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Electronically signed on 2016-09-14 11:17:48 page 3 of 3

ELECTRONICALLY FILED - 2016 Sep 14 11:59 AM - GREENVILLE - COMMON PLEAS - CASE#2016CP2302045

0004

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE PROBATE COURT

WILSON GARNER, JR., RUBY LEE)
DOUGLAS, and HAZEL L. HASTINGS)
as statutory heirs of THE ESTATE OF)
NELL GAINES, and on behalf of all other)
remaining statutory heirs, who may be)
determined hereafter,)

CASE NO.:2014-ES-2301777

Petitioners,)

vs.)

THE ESTATE OF NELL GAINES and)
JOHN HEAD, individually and acting as)
Personal Representative of THE ESTATE)
OF NELL GAINES,)

Respondents.)

FILED

MAR 18 2016

GREENVILLE COUNTY
PROBATE COURT

**ORDER DENYING PETITIONERS' MOTION TO RECONSIDER/ AMEND OR ALTER
A JUDGMENT PURSUANT TO SCRCP 59(e)**

This matter is before the Court on Petitioner's motion for the Court to reconsider its judgment in the above-referenced matter and amend or alter the judgment filed on October 26, 2015. A hearing was held on January 12, 2016. The Court heard arguments from counsel and took the matter under advisement. Upon careful review of the pleadings, oral argument of counsel and the applicable law, this Court hereby ORDERS AND ADJUDGES that Petitioner's motion to reconsider and alter or amend the judgment is DENIED.

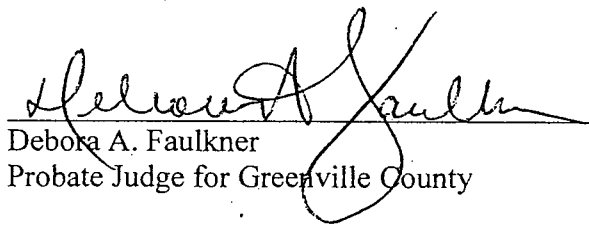
In the Court's Order of October 26, 2015, the Court found the common law doctrine of dependent relative revocation is still a viable theory of law in South Carolina and was applicable to the facts of this case. Petitioner has argued that because S.C. Code 62-2-508 and S.C. Code 62-2-506(a)(2) are so specific as to the circumstances under which a prior will may be revived, it

leaves no room for the co-existence of dependent relative revocation. This Court's Order filed October 26, 2015 found no conflict between S.C. Code 62-2-508 and the doctrine of dependent relative revocation. After careful consideration of Petitioner's argument, the Court is still convinced that S.C. Code 62-2-508 and the doctrine of dependent relative revocation are not in conflict and the doctrine of dependent relative revocation is still a viable theory of law in South Carolina and is applicable to the facts of this case.

THEREFORE, IT IS SO ORDERED Petitioners' motion for reconsideration and to alter or amend the judgment of October 26, 2015 is denied.

IT IS SO ORDERED.

March 18, 2016
Greenville, S.C.


Debora A. Faulkner
Probate Judge for Greenville County

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE PROBATE COURT

WILSON GARNER, JR., RUBY LEE)
DOUGLAS, and HAZEL L. HASTINGS)
as statutory heirs of THE ESTATE OF)
NELL GAINES, and on behalf of all other)
remaining statutory heirs, who may be)
determined hereafter,)

CASE NO.: 2014-ES-2301777

Petitioners,)

ORDER

vs.)

THE ESTATE OF NELL GAINES and)
JOHN ALLEN HEAD, individually and)
acting as Personal Representative of)
THE ESTATE OF NELL GAINES,)

Respondents.)

FILED
OCT 26 2015
GREENVILLE COUNTY
PROBATE COURT

This matter is before the court on Petitioner's Petition to Set Aside Will in the above-captioned matter. The Petitioners are intestate heirs of the decedent.

This case involves two Wills, both prepared by attorneys. The most recent of the Wills, being executed May 7, 2014, has been admitted by informal probate. It contains a revocation clause for all prior Wills; however, it is witnessed by the mother of the primary devisee.

A hearing was held on September 15, 2015. Present at the hearing were Petitioner Ruby Lee Douglas and her attorney, Richard L. Patton. Also present were Respondent John Allen Head and his attorney, Marcus W. Meetze. The Court heard testimony and arguments from counsel. Both Wills were entered as exhibits, and the Court took the matter under advisement. The Court later requested briefs and proposed orders from counsel.

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ISSUE

Because the mother of the devisee witnessed the execution of the 2014 Will, should the devise be distributed to the decedent's intestate heirs as provided by S.C. Code Ann. § 62-2-504; or, should the devise be distributed as provided for in the decedent's 2008 Will under the theory of dependent relative revocation?

FINDINGS OF FACT

1. Nell C. Donnan Gaines, a life-long resident of Greenville County, died at the age of 96 on August 13, 2014. She was the widow of Gerald Gaines, her second husband. Also predeceasing her was her first husband, Robert Donnan, along with her parents and her siblings. She never had any children.

2. Jonathan Alexander Head (hereafter known as "Alex") was her nephew by her marriage to Gerald Gaines. John and Debra Head are the parents of Alex.

3. Ms. Gaines executed a will on January 9, 2008, prepared by attorney Lesley Moore of the Wyche Firm (hereinafter referred to as the "2008 Will"). It contains a revocation clause, gives jewelry and her real estate to Alex, a car to Tony Burrell, and the rest and residue to Alex. She nominates John and Debra Head as Co-Personal Representatives. The will was properly witnessed by two disinterested witnesses. The parties stipulated to the authenticity of the 2008 will, as well as to the fact that Mrs. Gaines had testamentary capacity at the time she executed the 2008 Will. The will was marked as Respondent's Exhibit #1 and entered into the record without objection.

4. On, May 7, 2014, the decedent executed "Last Will and Testament of Nell C. Donnan Gaines", prepared by the Welch Law Firm (hereinafter referred to as the "2014 Will"). The will contains a revocation clause, it provides for her funeral arrangements, and it conveys the rest and

residue to Alex. She nominates John Head as Personal Representative with Debra Head to act as successor personal representative. The will was witnessed by Debra A. Head, who is the mother of Alex, along with one other witness, Debbie Bowles. Also, a Memorandum was executed by Ms. Gaines dated May 7, 2014, attempting to devise certain real and personal property one-half to Alex and one-half to John Head. This was entered into the record as Petitioner's Exhibit #1 without objection.

CONCLUSIONS OF LAW

1. In 1986, the South Carolina legislature passed S.C. Code Ann. § 62-2-508, which provides the following:

SECTION 62-2-508. Revival of Revoked Will.

(a) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under Section 62-2-506(a)(2) the previous will remains revoked unless it is revived. The previous will is revived if it appears by clear and convincing evidence that the testator intended to revive or make effective the previous will.

(b) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under Section 62-2-506(a)(2), a revoked part of the previous will is revived unless it appears by clear and convincing evidence that the testator did not intend the revoked part to take effect as executed.

(c) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.

Petitioners have argued that because the S.C. legislature passed S.C. Code Ann. § 62-2-508, South Carolina no longer recognizes the common law doctrine of dependent relative revocation (hereinafter known as DRR) and the doctrine is no longer a viable theory of law in South Carolina. However, I find that the revival of a revoked will and dependent relative revocation are distinct

theories. Mistaken revocations can have disastrous intent-defeating effects upon an estate plan. Although a will's dispositive provisions are ambulatory and can, therefore, be changed at any time before death, the will's revocatory effect upon the previous will is immediate. Many testators do not realize this distinction, and some have revoked their most recent will in the belief that doing so revives an earlier will.¹ Until the Code changed in South Carolina in 1986, this was generally the rule. However, with the enactment of S.C. Code Ann. § 62-2-508(a), an express revocation does not revive a prior will unless there is *clear and convincing evidence* of the testator's intent to revive. Thus, DRR is sometimes associated with the doctrine of revival. DRR goes to whether or not the testator made a valid revocation on May 7, 2014, of the 2008 will.

2. Unlike some of the other principles of the law of wills, the doctrine has not been codified.² In most jurisdictions, common law limits the permissible correction of testamentary errors to a few instances such as: mistaken descriptions of property, mistakes brought about by fraud, and dependent relative revocation.³ The Restatement of Property acknowledges this doctrine and states the doctrine is applicable in two types of cases. The first is when a testator revokes her will "in connection with an attempt to achieve a dispositive objective that fails. The second is the mistake is set forth in the writing that revoked the will and the mistake is beyond the testator's knowledge."⁴

The South Carolina Supreme Court first recognized the doctrine of dependent relative revocation in *Charleston Library Soc. vs. Citizens & Southern Nat. Bank*, 20 S.E.2d 623 (Sup. Ct. 1942). In this case, the testator's codicil revoked a clause in her will requiring certain

¹ See Richard F. Storrow, *Dependent Relative Revocation: Presumption or Probability?* (June 24, 2014) Real Property, Probate and Trust Law Journal, Vol 48, 8, No.3, 2014

² See Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. Rev. 1049, 1071 (2006)

³ See Richard F. Storrow, *supra*, 2

⁴ Restatement (Third) of Prop: Wills and other Donative Transfers sec. 4.3 (a) (1) (1999).

measures be taken to preserve her artwork for the benefit of the public. The Court found that at the time she executed the codicil she was under the mistaken belief that her art collection would be a *matter of public interest and hence of cultural benefit*. The Court stated:

While the intention to revoke may be conditional, if the revocation is subject to a condition which is not fulfilled the revocation does not take effect. This doctrine is known as that of dependent relative revocation, and is usually applied where the testator cancels or destroys a will or executes an instrument intended to revoke a will with a present intention to make a new testamentary disposition as a substitute for the old, and the new disposition is not made, or, if made, fails of effect for some reason. *Id.* at 626 (citing 68 C.J. 799).

In discussing dependent relative revocation, the Court *stated the doctrine is one of presumed intention and the theory is that the original disposition would not have been revoked unless the new could be given effect*. *Id.* at 627 (citing 28 R.C.L. at pages 182 and 183). The case has never been overturned or modified by any S.C. appellate court.

3. In view of the foregoing, I find that the *Charleston Library* case continues to be the law such that the common law doctrine of DRR is applicable in South Carolina. I find no conflict between S.C. Code Ann. § 62-5-508 and the doctrine of dependent relative revocation. Both the statutory scheme for reviving a revoked will and the common law theory of dependent relative revocation can co-exist harmoniously.

4. Having found the common law doctrine of dependent relative revocation as good law in South Carolina, I must determine if the doctrine of dependent relative revocation is applicable in this matter. There are no South Carolina cases since the *Charleston Library* case on point. Consider, however, *La Croix v. Senecal*, 99A.2d 115 (Conn. 1953). The testator revoked the residuary clause of her will, leaving one-half (1/2) of the estate to her nephew and one-half (1/2) of the estate to her friend. She did this in order to clarify the name of her nephew. Except for the clarification, the second will contained identical dispositive provisions as the first. However,

the second will was witnessed by the husband of the friend who was to receive one-half (1/2) of her residuary estate. Although the testator had assiduously sought legal advice and had made certain her will was properly executed, she had simply been unaware that the law would render her well-laid plans of no effect. The Court applied DRR to nullify the revocation of the first will.

The 2008 Will and the 2014 Will are very similar in their provisions. *The intention of the testator is the law of wills. Charleston Library, supra. (citing Pringle v. McPherson's Executors, 2 Brev. 279, 3 Am. Dec. 713).* In the case at hand, the court finds that in reviewing the terms of both wills, it is apparent that Alex was indeed the object of her bounty. The changes made in the 2014 will are minor as in *La Croix*. I find that Mrs. Gaines' revocation of the first will was a conditional revocation, the condition being that the dispositive provisions of the new 2014 will would replace the 2008 will. Although having sought and relied upon professional legal advice, an interested person was permitted to witness her 2014 will⁵ causing the obliteration of her estate plan under S.C. Code Ann. § 62-2-504(a). There is no evidence to suggest she was aware of the legal effect of having Debra Head act as a witness. Having relied upon an attorney, she had no reason to be aware of the detrimental legal effect of having Debra Head act as a witness. I find that had Ms. Gaines known the effect of this mistake upon her estate plan, she would not have revoked her 2008 will. In view of the foregoing, I find that DRR is applicable.

5. I find as a matter of law that S.C. Code Ann. § 62-2-508 is not applicable in this case which turns on whether or not the revocation of the 2014 will was valid. The revival statute applies only after first establishing that the prior will was wholly revoked. Even assuming, arguendo, that the revival statute did apply and the presumptions raised in S.C. Code Ann. § 62-2-508 were applicable, I find that after application of the DRR to the facts presented in the

⁵ See S.C. CODE ANN. § 62-2-504

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record, the Respondents have successfully carried their burden of proof and persuasion to overcome the presumption by clear, convincing and credible evidence.

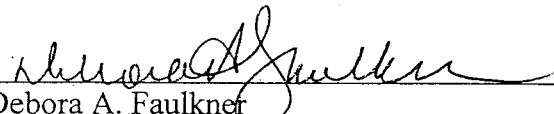
THEREFORE, IT IS SO ORDERED:

1. The testator intended her revocation to be conditional; conditional upon the disposition of her estate in accordance with the provisions of her 2014 will. However, because of the interested witness to the 2014 will, S. C. Code Ann. § 62-2-504 governs the distribution of her estate assets; the end result being that her estate assets would be distributed to her intestate heirs instead of to Alex, the object of her bounty. Therefore because the 2014 will provisions were in effect nullified by the interested witness statute, the condition of her revocation was not fulfilled such that the 2008 will was not effectively revoked.

2. The 2008 will shall be admitted to probate and shall govern the administration of the estate in all respects.

IT IS SO ORDERED.

October 26, 2015
Greenville, S.C



Debora A. Faulkner
Probate Judge for Greenville County

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I ATTEST A TRUE COPY



Clerk, Probate Court
Greenville County, SC

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

JUDGMENT IN A CIVIL CASE
CASE NO. 2014ES2301777

IN THE PROBATE COURT

Wilson Garner, Jr., Ruby Lee Douglas,
Hazel L. Hastings, as statutory heirs of the
Estate of Nell Gaines, and on behalf of all
other remaining statutory heirs, who may
be determined hereafter, Petitioners,

vs.

The Estate of Nell Gaines and John Allen Head,
individually and acting as Personal Representative of
the Estate of Nell Gaines, Respondents

CHECK ONE:

- ☒ **DECISION BY THE COURT.**
- ☐ **JURY VERDICT.**
- ☐ **ACTION DISMISSED.**
- ☐ **ACTION STRICKEN**
-

See attached Order.

Dated at Greenville, South Carolina, the 26th day of October, 2015.

Hon. Debora A. Faulkner
PRESIDING JUDGE

This judgment was entered on the 26th day of October, 2015, and a copy mailed first class this 26th day of October, 2015, to attorney(s) of record or to parties (when appearing pro se) as follows:

Richard L. Patton
819 East North Street
Greenville, SC 29601
Attorney for Petitioners

Marcus W. Meetze
P. O. Box 81118
Simpsonville, SC 29680
Attorney for Respondents

Sheryll L. Smith

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(864) 467-7179

0014

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

CASE # 2014-ES-2301777

WILSON GARNER, JR., RUBY LEE)
DOUGLAS, & HAZEL L. HASTINGS,)
as statutory heirs of THE ESTATE OF)
NELL GAINES, and on behalf of)
all other remaining statutory heirs,)
who may be determined hereafter,)

Petitioners,)

VS.)

THE ESTATE OF NELL GAINES &)
JOHN HEAD, individually and acting)
as Personal Representative of THE)
ESTATE OF NELL GAINES,)

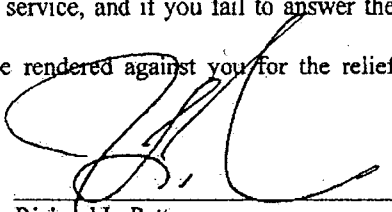
Respondents.)

SUMMONS

FILED
JUL 13 2015
GREENVILLE COUNTY
PROBATE COURT

To Respondents, above named:

YOU ARE HEREBY SUMMONED and required to answer the petition / complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the petition / complaint, judgment by default will be rendered against you for the relief demanded in the petition / complaint.


Richard L. Patton
SC Bar # 08627
Patton Law Firm
Attorney for Plaintiff
819 East North Street
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(864) 233-9790 telefax

0015

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE PROBATE COURT
CASE # 2014-ES-2301777

WILSON GARNER, JR., RUBY LEE
DOUGLAS, & HAZEL L. HASTINGS,
as statutory heirs of THE ESTATE OF
NELL GAINES, and on behalf of
all other remaining statutory heirs,
who may be determined hereafter,

Petitioners,

VS.

THE ESTATE OF NELL GAINES &
JOHN HEAD, individually and acting
as Personal Representative of THE
ESTATE OF NELL GAINES,

Respondents.

FILED

JUL 13 2015

GREENVILLE COUNTY
PROBATE COURT

PETITION TO SET ASIDE WILL

NOW COMES PETITIONERS, through counsel, petitioning the Probate Court to set aside the Last Will & Testament of Nell Gaines as filed with this Court, and further petitioning that they be declared the rightful heirs of The Estate of Nell Gaines, all for the following reasons:

1. On August 13, 2014, Nell Gaines passed away at age 96. She was a life-long resident of Greenville County.
2. On August 26, 2014, Respondent John Head filed the "Last Will and Testament of Nell C. Donnan Gaines," which is dated May 7, 2014. The Court's file contains the Will now in dispute.

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3. Upon information and belief, John Head prepared the "Last Will and Testament of Nell C. Donnan Gaines," and presented it to the decedent for her signature approximately three months prior to her death.

4. The Court has already invalidated the "Personal Property Memorandum" also filed with the Court by John Head, for reasons that will be pertinent and incidental to this Petition.

5. The invalidated portion of the estate as referenced in the "Personal Property Memorandum", should be and is the rightful property of the statutory heirs of Nell Gaines, passing under the laws of intestacy.

6. The Respondent John Head and his son Alex Head are not statutory heirs of Nell Gaines. They are related to Nell Gaines by marriage only, and not by blood.

7. Nell Gaines had no children and leaves no lineal heirs.

8. The "Last Will and Testament of Nell C. Donnan Gaines," as filed by John Head, acting as Personal Representative, purports to leave the entirety of the estate to Jonathan Alexander Head, who is the natural child of John Head and Debra H. Head.

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9. The "Last Will and Testament of Nell C. Donnan Gaines" is witnessed by Debra A. Head & Debbie Boles. The first witness appearing, "Debra A. Head," is the natural mother of Jonathan Alexander Head.

FOR A FIRST CAUSE OF ACTION

(S.C. Code § 62-2-504)

10. Petitioners reincorporate the preceding allegations of the Petition as if set forth herein verbatim.

11. Under South Carolina Probate Code § 62-2-504, at least two required witnesses must be "disinterested," which is explained more specifically in the statute to mean unrelated by marriage or parentage. If there are not two "disinterested" witnesses, then the devise is null and void as to the interested witness' spouse or issue, except to the extent the devise would otherwise pass to them under the laws of intestacy.

12. The voided portion of the devise passes by intestacy in accordance with S.C. Code § 62-2-101, "provided the share of the interested witness, the witness's spouse, or the witness' issue shall not increase due to the devise passing by intestacy."

13. S.C. Code § 62-2-504 establishes that if the devisee is the "issue" of one of the witnesses, in a Will lacking two other disinterested witnesses, the mother of said devisee

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is incompetent to be a witness, and the devise to the interested witness' "issue" is null and void.

14. Inasmuch as Jonathan Alexander Head is the lawful "issue" of the first appearing witness, Debra A. Head, the devise as stated in the "Last Will and Testament of Nell C. Donnan Gaines" is null and void.

15. The devise in question, therefore, becomes the rightful property of the statutory heirs as may be established hereafter by the laws of intestacy.

16. Jonathan Alexander Head is the natural child of John & Debra Head. John Head is believed to be the nephew of Nell Gaines second husband Gerald Gaines. As such, he and his child are solely related to the decedent by marriage and not by blood.

17. John Head, Jonathan Alexander Head, & Debra A. Head are not statutory heirs under the laws of intestacy in South Carolina.

18. Petitioners are related to the decedent, Nell Gaines, by blood. Petitioner Wilson Garner, Jr., Ruby Lee Douglas, & Hazel L. Hastings are all 1st Cousins of the decedent, each one an only child of three separate aunts related to the decedent through the decedent's mother. They are the sole statutory heirs of the decedent Nell Gaines on her mother's side. As such, they have standing to bring this Petition.

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19. By the laws of intestacy in South Carolina, Petitioners are rightful heirs of the estate of Nell C. Gaines.

FOR A SECOND CAUSE OF ACTION
(Appointment of New Personal Representative)

20. Petitioners reincorporate the preceding allegations of the Petition as if set forth herein verbatim.

21. John Head cannot be expected to serve the fiduciary duties of the Personal Representative of the decedent's estate if the devise in question to his son is determined to be null and void. In order to avoid the risk of loss to the rightful heirs, the Court should appoint a new Personal Representative.

22. Inasmuch as the devise fails under the currently filed "Last Will and Testament of Nell C. Donnan Gaines," Petitioners request that John Head be removed as the Personal Representative of the Nell Gaines estate, and that Petitioner Ruby Lee Douglas be named as the Personal Representative of the estate in his place.

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FOR A THIRD CAUSE OF ACTION

(Temporary Injunctive Relief)

23. Petitioners reincorporate the preceding allegations of the Petition as if set forth herein verbatim.

24. Until the Court can hear the merits of this matter to determine the validity of this Petition to Set Aside the Will of the decedent, Petitioners seek temporary injunctive relief on an immediate basis to prevent John Head from removing, transferring, disposing of, or otherwise affecting the assets of the estate of Nell Gaines.

FOR A FIFTH CAUSE OF ACTION

(Accounting)

25. Petitioners reincorporate the preceding allegations of the Petition as if set forth herein verbatim.

26. Petitioners request a full accounting of all assets of the estate of Nell Gaines that have been identified, collected or otherwise marshaled by the Respondent John Head.

27. Petitioners also request that the Respondent John Head account for any withdrawals or other expenditures made by him as a joint account holder on any account held jointly with the decedent Nell Gaines in the past three years. Pursuant to S.C. Code

0021

§ 62-6-201, funds held in a joint account belong to the contributor of those funds during their lifetime in proportion to their contribution. Petitioners request an accounting of any such funds expended or otherwise withdrawn by the Respondent from such jointly held accounts with the decedent Nell Gaines prior to her death in August, 2014.

28. Petitioners further request that the Respondent John Head also account for all jointly held accounts, wherever situated, for which he has claimed rights as a sole survivor or beneficiary.

WHEREFORE, the Petitioners request the relief as referenced herein, with such other and further relief as the Court deems just and proper, to wit:

1. That the "Last Will and Testament of Nell C. Donnan Gaines" be set aside as a null and void devise pursuant to S.C. Code § 62-2-504;
2. That John Head be removed as the Personal Representative of the estate of Nell Gaines;
3. That Ruby Lee Douglas be appointed Personal Representative of the intestate estate such as may be determined hereafter, and that she be appointed to act as trustee of that portion of the estate as may be determined to be the rightful property of any additional statutory heirs other than Petitioners;

0022

4. That John Head be enjoined from further action as Personal Representative, and that he provide a full accounting of all assets of the decedent's estate that have come under his are and control since her death;
5. That John Head be immediately enjoined from removing, transferring, disposing of, or otherwise affecting the assets of the estate of Nell Gaines, until the Court can hear the merits of this case
6. That John Head provide a full accounting of all bank accounts, investment accounts, or other any other account jointly held with the decedent in the past three years.

RESPECTFULLY SUBMITTED



Richard L. Patton
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THE PATTON LAW FIRM
819 East North Street
Greenville, SC 29601
(864) 233-9797

ATTORNEY FOR PETITIONERS

0023

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

CASE # 2014-ES-2301777

WILSON GARNER, JR., RUBY LEE)
DOUGLAS, & HAZEL L. HASTINGS,)
as statutory heirs of THE ESTATE OF)
NELL GAINES, and on behalf of)
all other remaining statutory heirs,)
who may be determined hereafter,)

Petitioners,)

VS.)

THE ESTATE OF NELL GAINES &)
JOHN HEAD, individually and acting)
as Personal Representative of THE)
ESTATE OF NELL GAINES,)

Respondents.)

FILED

AUG - 7 2015

GREENVILLE COUNTY

FIRST AMENDED PROBATE COURT

PETITION TO SET ASIDE

DEVISE PURSUANT TO

SC CODE § 62-2-504.

NOW COMES PETITIONERS, through counsel, petitioning the Probate Court to set aside the devise as stated in the "Last Will & Testament of Nell Gaines" as filed with this Court, and further petitioning that they be declared the rightful heirs of The Estate of Nell Gaines, all for the following reasons:

1. On August 13, 2014, Nell Gaines passed away at age 96. She was a life-long resident of Greenville County.
2. On August 26, 2014, Respondent John Head filed the "Last Will and Testament of Nell C. Donnan Gaines," which is dated May 7, 2014. The Court's file contains the Will now in dispute.

0024

3. Upon information and belief, John Head prepared the "Last Will and Testament of Nell C. Donnan Gaines," and presented it to the decedent for her signature approximately three months prior to her death.

4. The Court has already invalidated the "Personal Property Memorandum" also filed with the Court by John Head, for reasons that will be pertinent and incidental to this Petition.

5. The invalidated portion of the estate as referenced in the "Personal Property Memorandum" should be and is the rightful property of the statutory heirs of Nell Gaines, passing under the laws of intestacy.

6. The Respondent John Head and his son Alex Head are not statutory heirs of Nell Gaines. They are related to Nell Gaines by marriage only, and not by blood.

7. Nell Gaines had no children and leaves no lineal heirs.

8. The "Last Will and Testament of Nell C. Donnan Gaines," as filed by John Head, acting as Personal Representative, purports to leave the entirety of the estate to Jonathan Alexander Head, who is the natural child of John Head and Debra H. Head.

9. The "Last Will and Testament of Nell C. Donnan Gaines" is witnessed by Debra A. Head & Debbie Boles. The first witness appearing, "Debra A. Head," is the natural mother of Jonathan Alexander Head.

FOR A FIRST CAUSE OF ACTION

(S.C. Code § 62-2-504)

10. Petitioners reincorporate the preceding allegations of the Petition as if set forth herein verbatim.

11. Under South Carolina Probate Code § 62-2-504, at least two required witnesses must be "disinterested," which is explained more specifically in the statute to mean unrelated by marriage or parentage. If there are not two "disinterested" witnesses, then the devise is null and void as to the interested witness' spouse or issue, except to the extent the devise would otherwise pass to them under the laws of intestacy.

12. The voided portion of the devise passes by intestacy in accordance with S.C. Code § 62-2-101, "provided the share of the interested witness, the witness's spouse, or the witness' issue shall not increase due to the devise passing by intestacy."

13. S.C. Code § 62-2-504 establishes that if the devisee is the "issue" of one of the witnesses, in a Will lacking two other disinterested witnesses, the mother of said devisee

is incompetent to be a witness, and the devise to the interested witness' "issue" is null and void.

14. Inasmuch as Jonathan Alexander Head is the lawful "issue" of the first appearing witness, Debra A. Head, the devise as stated in the "Last Will and Testament of Nell C. Donnan Gaines" is null and void.

15. The devise in question, therefore, becomes the rightful property of the statutory heirs as may be established hereafter by the laws of intestacy.

16. Jonathan Alexander Head is the natural child of John & Debra Head. John Head is believed to be the nephew of Nell Gaines second husband Gerald Gaines. As such, he and his child are solely related to the decedent by marriage and not by blood.

17. John Head, Jonathan Alexander Head, & Debra A. Head are not statutory heirs under the laws of intestacy in South Carolina.

18. Petitioners are related to the decedent, Nell Gaines, by blood. Petitioner Wilson Garner, Jr., Ruby Lee Douglas, & Hazel L. Hastings are all 1st Cousins of the decedent, each one an only child of three separate aunts related to the decedent through the decedent's mother. They are the sole statutory heirs of the decedent Nell Gaines on her mother's side. As such, they have standing to bring this Petition.

19. By the laws of intestacy in South Carolina, Petitioners are rightful heirs of the estate of Nell C. Gaines.

FOR A SECOND CAUSE OF ACTION

(Appointment of New Personal Representative)

20. Petitioners reincorporate the preceding allegations of the Petition as if set forth herein verbatim.

21. John Head cannot be expected to serve the fiduciary duties of the Personal Representative of the decedent's estate if the devise in question to his son is determined to be null and void. In order to avoid the risk of loss to the rightful heirs, the Court should appoint a new Personal Representative.

22. Inasmuch as the devise fails under the currently filed "Last Will and Testament of Nell C. Donnan Gaines," Petitioners request that John Head be removed as the Personal Representative of the Nell Gaines estate, and that Petitioner Ruby Lee Douglas be named as the Personal Representative of the estate in his place.

FOR A THIRD CAUSE OF ACTION

(Temporary Injunctive Relief)

23. Petitioners reincorporate the preceding allegations of the Petition as if set forth herein verbatim.

24. Until the Court can hear the merits of this matter to determine the validity of this Petition to Set Aside the Devise, Petitioners seek temporary injunctive relief on an immediate basis to prevent John Head from removing, transferring, disposing of, or otherwise affecting the assets of the estate of Nell Gaines.

FOR A FIFTH CAUSE OF ACTION

(Accounting)

25. Petitioners reincorporate the preceding allegations of the Petition as if set forth herein verbatim.

26. Petitioners request a full accounting of all assets of the estate of Nell Gaines that have been identified, collected or otherwise marshaled by the Respondent John Head.

27. Petitioners also request that the Respondent John Head account for any withdrawals or other expenditures made by him as a joint account holder on any account held jointly with the decedent Nell Gaines in the past three years. Pursuant to S.C. Code

§ 62-6-201, funds held in a joint account belong to the contributor of those funds during their lifetime in proportion to their contribution. Petitioners request an accounting of any such funds expended or otherwise withdrawn by the Respondent from such jointly held accounts with the decedent Nell Gaines prior to her death in August, 2014.

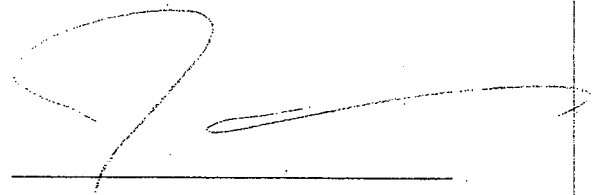
28. Petitioners further request that the Respondent John Head also account for all jointly held accounts, wherever situated, for which he has claimed rights as a sole survivor or beneficiary.

WHEREFORE, the Petitioners request the relief as referenced herein, with such other and further relief as the Court deems just and proper, to wit:

1. That the devise as stated in the "Last Will and Testament of Nell C. Donnan Gaines" be set aside as a null and void devise pursuant to S.C. Code § 62-2-504;
2. That John Head be removed as the Personal Representative of the estate of Nell Gaines;
3. That Ruby Lee Douglas be appointed Personal Representative of the intestate estate such as may be determined hereafter, and that she be appointed to act as trustee of that portion of the estate as may be determined to be the rightful property of any additional statutory heirs other than Petitioners;

4. That John Head be enjoined from further action as Personal Representative, and that he provide a full accounting of all assets of the decedent's estate that have come under his are and control since her death;
5. That John Head be immediately enjoined from removing, transferring, disposing of, or otherwise affecting the assets of the estate of Nell Gaines, until the Court can hear the merits of this case
6. That John Head provide a full accounting of all bank accounts, investment accounts, or other any other account jointly held with the decedent in the past three years.

RESPECTFULLY SUBMITTED



Richard L. Patton
SC Bar # 0008267
THE PATTON LAW FIRM
819 East North Street
Greenville, SC 29601
(864) 233-9797

ATTORNEY FOR PETITIONERS

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

CASE # 2014-ES-2301777

WILSON GARNER, JR., RUBY LEE
DOUGLAS, & HAZEL L. HASTINGS,
as statutory heirs of THE ESTATE OF
NELL GAINES, and on behalf of
all other remaining statutory heirs,
who may be determined hereafter,

Petitioners,

VS.

THE ESTATE OF NELL GAINES &
JOHN HEAD, individually and acting
as Personal Representative of THE
ESTATE OF NELL GAINES,

Respondents.

CERTIFICATE OF MAILING

FILED

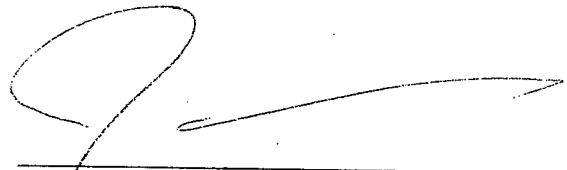
AUG - 7 2015

**GREENVILLE COUNTY
PROBATE COURT**

THE UNDERSIGNED CERTIFIES that he has served the within First Amended Petition
to Set Aside Devise upon opposing counsel by depositing a copy of the same into the
United States Postal Service with sufficient postage and addressed as follows:

Marcus W. Meetze, Esq.
PO Box 81118
Simpsonville, SC 29680

THIS 10 day of August, 2015



Richard L. Patton
Attorney for Petitioners

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

) IN THE PROBATE COURT
) FOR THE THIRTEENTH JUDICIAL CIRCUIT
)

WILSON GARNER, JR., RUBY LEE
DOUGLAS, and HAZEL L. HASTINGS
as statutory heirs of THE ESTATE OF
NELL GAINES, and on behalf of all other
remaining statutory heirs, who may be
determined hereafter,

Petitioners,

vs.

THE ESTATE OF NELL GAINES and
JOHN HEAD, individually and acting as
Personal Representative of THE ESTATE
OF NELL GAINES,

Respondents.

CIVIL ACTION NO.:2015-CP-23-4314

**REPLY AND COUNTERCLAIM OF
THE ESTATE OF NELL GAINES AND JOHN HEAD**

Respondents, The Estate of Nell Gaines and John Head (hereinafter collectively referred to as "Respondents"), by and through undersigned counsel, responding to the Petition to Set Aside Will in the above-captioned matter, reply as follows:

**AS AND FOR A FIRST DEFENSE
(General Denial)**

1. Respondents deny each and every allegation of the Petition to Set Aside Will that is not hereinafter specifically admitted.
2. Respondents admit the allegations of Paragraph 1.
3. Respondents admit the allegations of Paragraph 2.

4. Respondents deny the allegations of Paragraph 3. Upon information and belief, the "Last Will and Testament of Nell C. Donnan Gaines" was prepared by the Welch Law Firm. Prior to the execution of the "Last Will and Testament of Nell C. Donnan Gaines" referenced in Paragraph 3 of Plaintiff's complaint, Nell C. Donnan Gaines hired Wyche Burgess Freeman & Parham, P.A. to draft her last will and testament. A copy of the last will and testament drafted by Wyche Burgess Freeman & Parham, P.A. is attached as Exhibit A and incorporated herein by reference. The last will and testament drafted by Wyche Burgess Freeman & Parham, P.A. is nearly identical to the will that is the subject of the current petition.
5. The allegations of Paragraph 4 require no response from Respondents.
6. Respondents deny the allegations of Paragraph 5 and demand strict proof thereof.
7. Responding to the allegations of Paragraph 6, Respondents admit that John Head and Alex Head are related to Nell Gaines by marriage.
8. Respondents admit the allegations of Paragraph 7.
9. Respondents admit the allegations of Paragraph 8. Further responding, the "Last Will and Testament of Nell C. Donnan Gaines" referenced in Paragraph 3 of Plaintiff's complaint, is nearly identical to the last will and testament drafted by Wyche Burgess Freeman & Parham, P.A. for Nell Gaines in January of 2008.
10. Respondents admit the allegations of Paragraph 9.
11. The allegations of Paragraph 10 require no response from Respondents.
12. The allegations of Paragraph 11 call for a legal conclusion.
13. The allegations of Paragraph 12 call for a legal conclusion.
14. The allegations of Paragraph 13 call for a legal conclusion.
15. Respondents deny the allegations of Paragraph 14.

16. Respondents deny the allegations of Paragraph 15.
17. Respondents admit the allegations of Paragraph 16.
18. Respondents admit the allegations of Paragraph 17.
19. Respondents are without sufficient information to admit or deny the allegations of Paragraph 18.
20. Respondents deny the allegations of Paragraph 19.
21. The allegations of Paragraph 20 require no response from Respondents.
22. Respondents deny the allegations of Paragraph 21.
23. Respondents deny the allegations of Paragraph 22.
24. The allegations of Paragraph 23 require no response from Respondents.
25. Respondents deny the allegations of Paragraph 24.
26. The allegations of Paragraph 25 require no response from Respondents.
27. Respondents deny Petitioners are entitled to the relief sought in Paragraph 26.
28. Respondents deny Petitioners are entitled to the relief sought in Paragraph 27.
29. Respondents deny Petitioners are entitled to the relief sought in Paragraph 28.

**AS AND FOR A FIRST DEFENSE
(Unclean Hands)**

Respondents reassert and reallege the previous allegations of this Answer as fully and completely as have set forth herein verbatim.

30. Further and affirmatively answering the Petition and as an additional and complete defense thereto, Petitioners' claims are barred in whole or in part by the doctrine of unclean hands.

**AS AND FOR A SECOND DEFENSE
(Estoppel, Laches and Waiver)**

Defendant reasserts and realleges the previous allegations of this Answer as fully and completely as have set forth herein verbatim.

31. Further and affirmatively answering the Petition and as an additional and complete defense thereto, Petitioners claims are barred in whole or in part by the doctrines of estoppel, laches and waiver.

**AS AND FOR A THIRD DEFENSE AND FIRST COUNTERCLAIM
(Dependent Relative Revocation)**

Respondents reassert and realleges the previous allegations of this Answer as fully and completely as if set forth herein verbatim.

32. On or about January 9, 2008, Nell C. Donnan Gaines executed a Last Will and Testament, a copy of which is attached as Exhibit A.

33. The Last Will and Testament dated January 9, 2008 disposed of the property of the Estate of Nell Gaines in nearly the identical manner as does the will that is the subject of this matter.

34. Upon information and belief, the Last Will and Testament dated January 9, 2008 was revoked by the will that is the subject of this action.

35. If, as Petitioners allege, the will that is the subject of this action, fails for some reason, the doctrine of dependent relative revocation should be applied to revive the Last Will and Testament dated January 9, 2008.

36. Upon information and belief, Nell C. Donnan Gaines believed the will that is the subject of this action was valid.

37. Upon information and belief, Nell C. Donnan Gaines would have preferred her estate pass by the terms of the Last Will and Testament dated January 9, 2008 as opposed to intestacy.

WHEREFORE, having fully answered the Petition herein, Respondents respectfully request the Court inquire into the matters set forth herein and

1. Expressly deny that the Petitioners are entitled to any relief requested;
2. Pray the Petition be dismissed with prejudice;
3. Pray the Court apply the doctrine of dependent relative revocation to revive the January 9, 2008 will;
4. Pray that Respondents' costs and attorneys' fees be taxed against the Petitioners; and
4. for such other and further relief as this Court may deem just and proper.

LAW OFFICE OF MARCUS W. MEETZE, LLC



Marcus W. Meetze
wes@meetzelaw.com
Post Office Box 81118
Simpsonville, South Carolina 29680
864-271-3555
864-757-8691 Facsimile
Attorney for Respondents

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF GREENVILLE) FOR THE THIRTEENTH JUDICIAL CIRCUIT
)

WILSON GARNER, JR., RUBY LEE) CIVIL ACTION NO.:2015-CP-23-4314
DOUGLAS, and HAZEL L. HASTINGS)
as statutory heirs of THE ESTATE OF)
NELL GAINES, and on behalf of all other)
remaining statutory heirs, who may be)
determined hereafter,)

Petitioners,)

vs.)

THE ESTATE OF NELL GAINES and)
JOHN HEAD, individually and acting as)
Personal Representative of THE ESTATE)
OF NELL GAINES,)

Respondents.)

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of July, 2015 a copy of an *Reply and Counterclaim of The Estate of Nell Gaines and John Head* was served upon the below stated parties via United States Postal Service with sufficient first class postage affixed thereto and addressed as follows:

Richard L. Patton
Patton Law Firm
819 East North Street
Greenville, SC 29601

LAW OFFICE OF MARCUS W. MEETZE, LLC



Marcus W. Meetze
wes@meetzelaw.com
Post Office Box 81118
Simpsonville, South Carolina 29680
864-271-3555
864-757-8691 Facsimile
Attorney for Respondents

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

CASE # 2014-ES-2301777

WILSON GARNER, JR., RUBY LEE
DOUGLAS, & HAZEL L. HASTINGS,
as statutory heirs of THE ESTATE OF
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all other remaining statutory heirs,
who may be determined hereafter,

Petitioners,

VS.

THE ESTATE OF NELL GAINES &
JOHN HEAD, individually and acting
as Personal Representative of THE
ESTATE OF NELL GAINES,

Respondents.

ANSWER TO COUNTERCLAIM

FILED

AUG 24 2015

GREENVILLE COUNTY
PROBATE COURT

NOW COMES Petitioners, through counsel, responding to the COUNTERCLAIM of the
Respondents as follows:

FOR A FIRST DEFENSE
[RULE 12(b)6]

The Respondents' Counterclaim fails to state a claim upon which the desired relief of
dependent relative revocation may be granted.

FOR A SECOND DEFENSE
[Estoppel / Waiver]

The Respondents' Counterclaim for dependent relative revocation is barred by the
doctrines of estoppel and waiver.

FOR A THIRD DEFENSE

Responding to the individually numbered paragraphs of the Counterclaim, Petitioners;

1. ADMIT the allegations of paragraph 32 of the Answer & Counterclaim;
2. DENY the allegations of paragraph 33 of the Answer & Counterclaim;
3. ADMIT the allegations of paragraph 34 of the Answer & Counterclaim;
4. DENY the allegations of paragraph 35 of the Answer & Counterclaim.
5. ADMIT the allegations of paragraph 36 of the Answer & Counterclaim;
6. Paragraph 37 calls for a legal conclusion and for speculation on the part of the Petitioners. Petitioners DENY any inference of any allegation in paragraph 37 that the decedent expressed any intention to revive the January 9, 2008 Will. To the contrary, Respondents themselves have averred in paragraphs 34 & 36 of the Answer & Counterclaim that the decedent intended to revoke January 9, 2008 Will.
7. Petitioners DENY each and every other allegation of the Counterclaim except as expressly admitted herein.

WHEREFORE, having fully answered the Counterclaim of the Respondents, Petitioners pray that the Counterclaim be dismissed with costs awarded to the Petitioners in the defense of the Counterclaim, along with such other and further relief as the Court deems just and proper.

WHEREFORE, having fully answered the Counterclaim of the Respondents, Petitioners pray that the Counterclaim be dismissed with costs awarded to the Petitioners in the defense of the Counterclaim, along with such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to be 'R. Patton', written over a horizontal line.

Richard L. Patton
SC Bar # 0008627

THE PATTON LAW FIRM
819 East North Street
Greenville, SC 29601
(864) 233-9797
(864) 233-9790 telefax
Pattonlawfirm@hotmail.com

Attorney for the Petitioners

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

CASE # 2014-ES-2301777

WILSON GARNER, JR., RUBY LEE
DOUGLAS, & HAZEL L. HASTINGS,
as statutory heirs of THE ESTATE OF
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who may be determined hereafter,

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VS.

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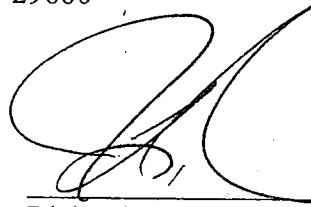
Respondents.

CERTIFICATE OF MAILING

THE UNDERSIGNED CERTIFIES that he has served the within ANSWER TO
COUNTERCLAIM upon opposing counsel by depositing a copy of the same into the
United States Postal Service with sufficient postage and addressed as follows:

Marcus W. Meetze, Esq.
PO Box 81118
Simpsonville, SC 29680

THIS 14 day of August, 2015



Richard L. Patton
Attorney for Petitioners

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE PROBATE COURT
Case # 2014-ES-2301777

FILED

NOV 06 2015

**GREENVILLE COUNTY
PROBATE COURT**

Wilson Garner, Jr., Ruby Lee Douglas,
Hazel L. Hastings, as statutory heirs of
the Estate of Nell Gaines, and on behalf
of all other remaining statutory heirs
who may be determined hereafter,

Petitioners,

VS

The Estate of Nell Gaines and John Head,
individually and acting as Personal
Representative of the Estate of Nell Gaines,

Respondents.

MOTION TO RECONSIDER /
AMEND OR ALTER A
JUDGMENT PURSUANT
TO SCRCP 59(e)

NOW COMES the Petitioners, through counsel, moving for the Court to reconsider its judgment in this case and amend or alter its judgment filed on October 26, 2015, all for the reasons set forth herein, and all pursuant to S.C.R.C.P. 59(e).

On October 26, 2015, the court issued an Order in favor of the Respondents based on its finding that the common law of "Dependent Relative Revocation" remains viable law in South Carolina, "coexisting harmoniously" with S.C. Code § 62-2-508.¹ Petitioners received the Court's Order on October 27, 2015 via the U.S. Mail Service. Petitioners have sought to set aside the devise contained in the Last Will and Testament of Nell C. Donnan Gaines dated May 7, 2014, which was filed by the

¹ Court's Order of October 26, 2015 at p. 5.

Respondents in this Court at the opening of the decedent's estate. Petitioners sought relief based on the statutory law contained in S.C. Code § 62-2-504, which precludes a devisee from taking more than his intestate share if the Will is not properly witnessed by two "disinterested witnesses." In the case at hand, all parties, and indeed the Court, acknowledge that the execution of the May 7, 2014 Last Will and Testament of the decedent violates the statutory requirements of S.C. Code § 62-2-504. The primary devisee of the Will in question is the biological son of one of the two witnesses to the Will. Respondents have asserted that the common law doctrine of "Dependent Relative Revocation" in an effort to avoid the consequences of S.C. Code § 62-2-504, which dictates that in the event of a violation of the statute, the voided devise passes to the intestate heirs of the decedent. Petitioners are those heirs.

A. PETITIONERS HAVE NOT SOUGHT TO SET ASIDE THE WILL, ONLY THE DEVISE.

The common law doctrine of "Dependent Relative Revocation" [hereinafter DRR] is a rule of law employed to revive a prior Will when a subsequent Will is determined to be invalid. In the *Charleston Library* case relied upon by the Respondents and the Court in its Order, the S.C. Supreme Court said DRR is "usually applied where the testator cancels or destroys a will or executes an instrument intended to revoke a will with a present intention to make a new testamentary disposition as a substitute for the old, and the new disposition is not made, or, if made, fails of effect for some reason." *Charleston Library Society v. Citizens & Southern Bank*, 200 S.C. 96,

_____, 20 S.E.2d 623, 626 (1942). That case, however, does not deal with the effect of improperly witnessing a Will, like the case at bar. That case is not about voiding a devise, but rather the entire Will. In the case now before the Probate Court, the sole issue is whether a violation of S.C. Code §62-2-504 is dispositive of whether the devise to Alex Head can stand, not whether the Will itself is valid. The Court asked each counsel to address whether the doctrine of DRR can overcome the statutory consequences imposed by S.C. Code § 62-2-504, or whether the two may "co-exist harmoniously." Petitioners ask that the Court readdress that issue.

First, it is unnecessary to decide in this case whether DRR has been abolished in this State because of the passage of S.C. Code § 62-2-508, which deals with "Revival of revoked will." Petitioners have already vigorously advocated that particular statute does indeed abrogate the common law rule of DRR. The Court was not persuaded by those arguments inasmuch as it does not appear that the *Charleston Library* case was ever overturned or otherwise modified even after the passage of the new statute on "Revival of a revoked will" found at S.C. Code § 62-2-508. But that may simply be because cases are not cited as being reversed or modified when the statutory law changes the common law. While this case may be an appropriate vehicle to determine whether DRR is abrogated by the statute on "Reviving a Revoked Will," it unnecessary to reach that question in light of the clear and unambiguous language of the statute found at S.C. Code § 62-2-504. That statute should be dispositive of this case. There is no way to reconcile the common law of DRR with S.C. Code § 62-2-504. They cannot "co-exist harmoniously." The consequences of improperly witnessing the 2014 Will, which

Respondents themselves submitted to probate, are mandated by the statute. There is no "saving language" under S.C. Code § 62-2-504 that allows for the application of DRR, or for that matter revival on any basis.

B. THERE IS NO BASIS TO INVALIDATE THE MAY 7, 2014 WILL / DRR IS
SIMPLY NOT RELEVANT

The Court's Order of October 26, 2015 specifically revives the 2008 Will and orders that "it shall be admitted to probate and shall govern the administration of the estate in all respects." [Court's Order of October 26, 2015 at p. 7]. But the Court offers no evidentiary basis for invalidating the 2014 Will. No evidentiary reason is given for why the 2014 Will is rendered invalid. Instead, the Court applies the common law doctrine of "Dependent Relative Revocation" in an effort to save the devise to Alex Head and avoid the harsh consequences of S.C. Code § 62-2-504. But to do that, the Court resorts to invalidating a devise to John Head in order to save a devise to Alex Head. The Court sacrifices one devisee to save another when neither side has argued that the devise to John Head was unintended. If the intention of the testator is the law of Wills, the Court's Order looks past the clear intent of the testator to save the devise to Alex. Such underpinnings are problematic, and should cause the Court to reconsider its ruling.

Without question, Respondents are hoping to avoid the harsh consequences of S.C. Code § 62-2-504 by application of the common law rule of "Dependent Relative Revocation." Indeed, that is the sole basis of their defense. This is

not, however, a case that turns on the construction of the May 7, 2014 Will. The testator's intentions are not in question. The object of her bounty was indeed unambiguous. But the intent of the statute is equally unambiguous. S.C. Code § 62-2-504 does not concern itself with issues of the testator's intent, ambiguous or not. Rather, the legislature has established a bright-line statutory rule about how to properly execute a Will with mandated statutory consequences for the violation of those requirements.

In the case of *Davis v. Davis*, 208 S.C. 182, 37 S.E.2d 530 (1946), the testator's intentions were equally unambiguous. In that case, the Will had a clearly written residuary clause that directed the devise to certain other relatives if, for any reason, the devise to the two Davis nephews was invalidated. They were invalidated because of the manner in which the Will was witnessed, such as is the case here. Their wives witnessed the Will, which violated the predecessor statute to S. C. Code § 62-2-504, and resulted in the intended devise failing and passing to intestate heirs. There was no question of the testator's intentions in that case. He clearly stated in his Will that the failed devises should pass under his residuary clause to certain *other* nephews. The S.C. Supreme Court found, however, that the intent of the testator could not be the law of Wills in the face of the clear mandate of the statute. "To construe a will in conformity with the intention of the testator is much favored by the courts but such intention cannot prevail when in conflict with some statute or rule of law." *Davis v. Davis*, 208 S.C. 182,

____, 37 S.E.2d 530, 531 (1946).² This Court seems to have dismissed the *Davis* case as being inapplicable since DRR was not argued therein.

What the Court has done in this case is conclude that DRR is available to get around the obvious conflict the 2014 Will has with the statute. The doctrine of "Dependent Relative Revocation" should not be used to subvert the purpose of the statute, but the court's ruling renders that result. Simply put, the issue before the Court under S.C. Code § 62-2-504 has nothing to do with a revocation of either the 2014 Will or the 2008 Will. It has only to do with whether the devises contained in the 2014 Will duly submitted for probate are to be followed. In all other respects, the 2014 Will stands. This is not a case where the Petitioners have attacked the validity of the 2014 Will, or challenged the clarity of the testator's language. This is not and has never been a Will contest. Only the devise contained within the 2014 Will is at issue. As the court appropriately noted at the hearing on September 15, 2015, the appointment of Mr. Head

² This Court also seems to have dismissed the applicability of the *White v. Wilbanks* case found at 301 S.C. 560, 393 S.E.2d 182 (1990) apparently on the basis that it dealt with a different common law rule and not DRR. Petitioners concede that *White* dealt with the well-established common law rule that destruction of a subsequent Will revives the prior Will as a matter of law, it being presumed that the testator preferred testacy over intestacy. The *White* case clearly says that the new statute reverses the presumption of revival, and that now there must be a showing by clear and convincing evidence that the testator intended to revive the prior Will, and that showing must involve demonstrable evidence as outlined in S.C. Code § 62-2-508. Petitioners ask the Court herein to reconsider whether the common law rule that happens to be at stake isn't simply a difference without a distinction. How can it be that one common law rule is supplanted by the statute but not others? Furthermore, the record in this case is devoid of any evidence that Nell Gaines intended to revoke her 2014 Will and thereby revive her 2008 Will. The Court, instead, resorts to DRR to find a presumed intent to revive the 2008 Will, something that directly contradicts the legislative intent as expressed in S.C. Code § 62-2-508 as well as the basis for the decision in *White*. The burden shift laid down in *White* is simply not recognized by the Court, apparently because DRR was not argued in that case. Isn't the end result of this Court's decision that DRR can be used as an "end-around" to avoid the statute? How can that be?

as the Personal Representative under the 2014 Will remained unaffected, even to the point of collecting a statutory fee. Upon hearing that ruling from the bench, counsel for the Respondents did not challenge or even attempt to argue that such provisions of the 2014 Will should be set aside. Neither did counsel for the Petitioners. Once again, that's because this is not a Will contest. The Court, therefore, has already properly recognized in open court that the 2014 Will is the testator's Last Will and Testament. The Court's Order, however, now appears to contradict, *sua sponte*, that earlier ruling from the bench by a finding that this is indeed a Will contest, and that the 2014 Will is invalid in its totality due to the readily apparent and uncontroverted violation of S.C. Code § 62-2-504. If it is a Will contest, it would be a contest Respondents are having with themselves. The Respondents offered the 2014 Will to Probate, not the Petitioners. Petitioners have never challenged the validity of the 2014 Will. Only the devise contained within that Will is in question.

The court's emails that followed after the hearing suggest that the court was and is reluctant to apply the consequences of the statute, questioning whether the testator would have wanted "these people" to have her estate. Petitioners respectfully submit that S.C. Code § 62-2-504 does not concern itself with the testator's intent. Under that statute, the testator's intent (actual or presumed) is irrelevant. Because it is irrelevant, the common law doctrine of dependent relative revocation, which is a doctrine intended to derive the testator's intent, is not relevant to the determination of this case. The court's consideration of the theory, therefore, was misplaced, and the Petitioners respectfully request that the court alter its Order to reflect that the theory of "Dependent

Relative Revocation" is not relevant to a determination of this case in light of the clear mandate of the legislature as codified at S.C. Code § 62-2-504. The theory of DRR cannot co-exist harmoniously with that statute, even if the Court feels it can with S.C. Code § 62-2-508.

C. CAN THE THEORY OF DRR CO-EXIST WITH S.C. CODE § 62-2-508?

It is noteworthy that the court's Order of October 26, 2015 only finds that the theory of DRR can co-exist harmoniously with S.C. Code § 62-2-508.³ Nothing in the Order finds that DRR can co-exist with S.C. Code § 62-2-504. Petitioners have argued and continue to argue as additional grounds that the passage of S.C. Code § 62-2-508, entitled "Revival of Revoked Wills," thereafter precludes the application of DRR, inasmuch as the statute now controls in what manner a prior Will may be revived. The Petitioners submitted a proposed Order outlining their argument, which was rejected by the Court in favor of applying DRR to the facts of this case. The Court's Order of October 26, 2015 found that DRR can harmoniously exist with S.C. Code 62-2-508. There is a well-settled principle of statutory construction to wit: "expressio unius est exclusio alterius alterus," which holds that "to express or include one thing implies the exclusion of another or of the alternative," or restated: "inclusio unius est exclusio alterius," which holds that "to include one thing implies the exclusion of the other." *See, Riverwoods, LLC, v. County of Charleston*, 349 S.C. 378, 384, 563 S.E.2d 651, ____ (S.C. 2002). The court in *Riverwoods* pointed out that under this canon of construction,

³ Court's Order of October 26, 2015 at p. 5.

"the enumerations of exclusions [or inclusions] from the operation of a statute indicates that the statute should apply in all cases not specifically excluded." *Id.* at p. 384.

In S.C. Code § 62-2-508, the legislature spoke as to the manner in which a revoked Will may be revived. There is no mention or allowance for an alternative method formerly known as "Dependent Relative Revocation." It cannot be argued that the legislature was unaware of the common law at the passage of this statute. It was such a departure from the common law, that there can be no doubt of that consideration. The S.C. Supreme Court recognized that departure from the common law in *White*, in a case that turned solely upon whether the new statute was enforceable against a Will that was executed prior to the effective date of the statute in question. The theory of DRR was not argued in *White*, so the court had no opportunity to specifically overrule the *Charleston Library* case. It did, however, recognize that South Carolina now had a specific statute that addressed whether and under what circumstances an earlier Will may be revived. Having considered the *White* case, this Court seems to have acknowledged and concluded that a different common law rule was at stake in *White*, and that the theory of DRR was neither the basis or even affected by the ruling. Petitioners respectfully submit that if one common rule falls in the face of the statute, all fall. They all fall for the same reason. Once the legislature speaks the courts must follow. Chief Judge Toal determined that was so in *White* when she said: "Until enactment of the Probate Code, South Carolina followed the common law rule that a former will is presumed revived by the destruction of a subsequent Will, unless there is clear evidence this was not the testator's intent. The Probate Code reverses this presumption." *White v. Wilbanks*, 301 S.C. 560, 561, 393 S.E.2d 182, ____ (1990). Now we have an express statute that says that the revocation

of a subsequent Will [which is what the Court has done] "shall not revive or make effective any former will unless it appears that the testator intended to revive or make effective the former will." Id. The statute itself [S.C. Code § 62-2-508] specifically says that in order for the question to even arise, there must be "a revocatory act under Section 62-2-506 (a)(2)." In the absence of that showing, "the previous will remains revoked unless it is revived." S.C. Code 62-2-508(a). S.C. Code 62-2-506 (a)(2) provides that there must be a showing that the testator demonstrated by some physical act an intent and purpose to revoke the subsequent Will. Clearly, the "revival" contemplated in S.C. Code 62-2-508(a) was only in those instances where there was a showing of a demonstrable act revoking a subsequent Will, along with a showing by clear and convincing evidence that the testator intended to revive the prior will by that same demonstrable act as enumerated in S.C. Code 62-2-506(a)(2).⁴ But that's not what happened in this case. Respondents offered the 2014 Will for Probate. There is no evidence in the record showing that the testator even attempted to revoke the 2014 Will. In fact, the record is to the contrary. Every witness who testified admitted there was never any attempt to revoke the 2014 Will. Respondents never even alleged a revocatory act in their pleadings.

Given that S.C. Code § 62-2-508 & S.C. Code § 62-2-506(a)(2) are so specific as to the circumstances under which a prior Will may be revived, it leaves no room for the co-existence of DRR. Otherwise, the common law rule of DRR would provide for an alternative method of reviving a previously revoked Will outside and

⁴ The Reporter's comments immediately following this code section within the S.C. Code make this clear by specifically stating "there is a presumption against revival where the subsequent will wholly revokes the previous will. The presumption against revival is intended to be heightened by the requirement of 'clear and convincing evidence' to rebut it."

beyond the means included in the statute. The canon of construction "inclusio unius est exclusio alterius" precludes any coexistence of DRR with the statute.

D. THE 2014 WILL HAS NEVER BEEN REVOKED BY ANY REVOCATORY ACT. NONE WERE EVEN ALLEGED BY THE RESPONDENTS

The Court notes in its Order that there are only "minor" differences between the 2014 Will and the 2008 Will. Those "minor" differences, however, will now be defeated by the ruling of the Court, and this is so even though the Respondents have not sought such relief. Having concluded that John Head is a 1/2 devisee under the terms of the 2014 Will under the special memorandum, the Court now unilaterally voids that devise by invalidating the 2014 Will in its totality. In a twist of irony, his devise is defeated for the identical reasons Petitioners have sought relief. While Mr. Head will not likely object to that ruling, inasmuch as it avoids the more harsh results sought by Petitioners, it nonetheless points out the lengths to which the court has gone to invalidate an otherwise perfectly valid Will. Mr. Head should take whatever portion of the estate he is legally entitled to take. He should serve as the Personal Representative. The Court, however, offers no explanation as to why Mr. Head is no longer entitled to his share of the estate, or to why he is no longer entitled to serve as the sole Personal Representative of the Nell Gaines estate with all rights to a statutory fee. Whether Mr. Head prefers one result over another isn't the point. The 2014 Will remains valid, having never been revoked by any revocatory act. In hoping to effectuate the intention of the testator in one

instance, the court, on its own initiative, defeats the intention of the testator in another.

Surely the court sees that inconsistency.

WHEREFORE, for all the reasons stated herein, Petitioners move the Court to reconsider its Order of October 26, 2015 and enter judgment instead on behalf of the Petitioners in accordance with the statutory law of South Carolina, and the case law of this State, as set forth herein.

Respectfully Submitted,

Richard L. Patton
SC Bar # 0008627
THE PATTON LAW FIRM
819 East North Street
Greenville, SC 29601

Attorney for Petitioners

Greenville, SC
November 6, 2015

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

Case # 2014-ES-2301777

FILED

NOV 06 2015

**GREENVILLE COUNTY
PROBATE COURT**

CERTIFICATE OF MAILING

Wilson Garner, Jr., Ruby Lee Douglas,)
Hazel L. Hastings, as statutory heirs of)
the Estate of Nell Gaines, and on behalf)
of all other remaining statutory heirs)
who may be determined hereafter,)

Petitioners,)

VS)

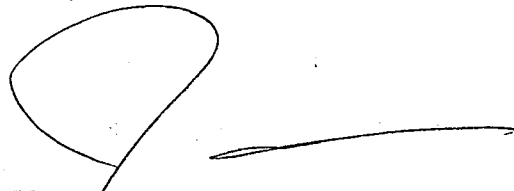
The Estate of Nell Gaines and John Head,)
individually and acting as Personal)
Representative of the Estate of Nell Gaines,)

Respondents.)

The undersigned certifies that he has caused to be served upon opposing counsel the within Motion for Reconsideration / Amend or Alter a Judgment by depositing a copy of the same into the United States Postal Service with sufficient postage affixed thereto, and addressed as follows:

Wes Meetze, Esq.
PO Box 81118
Simpsonville, SC 29680

THIS 4th day of November, 2015


Richard L. Patton
SC Bar # 0008627
THE PATTON LAW FIRM
819 East North Street
Greenville, SC 29601
(864) 233-9797

0055

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE PROBATE COURT

WILSON GARNER, JR., RUBY LEE)
DOUGLAS, and HAZEL L. HASTINGS)
as statutory heirs of THE ESTATE OF)
NELL GAINES, and on behalf of all other)
remaining statutory heirs, who may be)
determined hereafter,)

CASE NO.:2014-ES-2301777

Petitioners,)

vs.)

THE ESTATE OF NELL GAINES and)
JOHN HEAD, individually and acting as)
Personal Representative of THE ESTATE)
OF NELL GAINES,)

Respondents.)

**RESPONDENTS' RESPONSE TO PETITIONERS' MOTION TO RECONSIDER/
AMEND OR ALTER A JUDGMENT PURSUANT TO SCRCP 59(e)**

Respondents, the Estate of Nell Gaines and John Head, individually and as personal representative of the Estate of Nell Gaines, responds to Petitioners' motion to reconsider/ amend or alter this Court's Order of October 26, 2015 pursuant to SCRCP 59(e) as follows:

I. The Court correctly ruled that because the mother of a devisee witnessed the execution of the 2014 Will, the devise should be distributed as provided for in the decedent's 2008 Will under the theory of dependent relative revocation.

A. The Court correctly ruled there is no conflict between S.C. Code 62-2-508 and the doctrine of dependent relative revocation.

As the Court noted, South Carolina adopted the doctrine of dependent relative revocation in *Charleston Library Soc. vs. Southern Nat. Bank*, 20 S.E.2d 623 (Sup. Ct. 1942) and the case has

never been overturned or modified by any S.C. appellate court; accordingly, the doctrine of dependent relative revocation is still the law in S.C.

While there are no S.C. cases directly on point, numerous other jurisdictions have addressed the precise issue and reached the same conclusion as this Court. In *the Estate of Melton*, 272 P.3d 668, the Nevada Supreme Court held:

Therefore, because anti-revival statutes restrict the fundamentally distinct doctrine of revival, they should not be interpreted to preclude the doctrine of dependent relative revocation. See *In re Nutting's Estate*, 82 F.Supp. 689, 691 (D.D.C.1949) (explaining that a statute relating to revival "has no bearing" on the issue of whether dependent relative revocation applies); *Larrick v. Larrick*, 271 Ark. 120, 607 S.W.2d 92, 96 (Ark.Ct.App.1980) (Newbern, J., concurring) (explaining that an anti-revival statute does not preclude the doctrine of dependent relative revocation because "the [anti-revival] statute only comes into effect if there has been a 'revocation' [and][i]t is to determine precisely that question, i.e., whether there has been a revocation, that the doctrine is applied"); see also *Restatement (Third) of Prop.: Wills and Other Donative Transfers* § 4.3 reporter's note 1 (1999) (criticizing courts that have interpreted anti-revival statutes as precluding the doctrine of dependent relative revocation). We therefore conclude that NRS 133.130 does not preclude the doctrine of dependent relative revocation.

This Court, as numerous other jurisdictions have previously held, correctly ruled that there is no conflict between S.C. Code 62-2-508 and the doctrine of dependent relative revocation.

B. The Court correctly applied the doctrine of relative revocation to this facts this case.

The Court correctly applied the doctrine of dependent relative revocation to the facts of this case. In this matter, the 2008 Will and 2014 Will are nearly identical. The Court correctly ruled that "Mrs. Gaines' revocation of the first will was a conditional revocation, the condition being that the dispositive provisions of the new 2014 Will would replace the 2008 Will."

C. The Court correctly ruled that S.C. Code Ann. 62-2-508 is not applicable in this case.

S.C. Code Ann. 62-5-508 deals with cases in with there was a valid revocation. The doctrine of dependent relative revocation applies in cases where the revocation was conditional, and if the

condition is not met, the revocation is invalid. As the Arkansas Court of Appeals held in *Larrick v. Larrick*, 271 Ark. 120, 607 S.W.2d 92, 96 (Ark.Ct.App.1980) (Newbern, J., concurring), an anti-revival statute does not preclude the doctrine of dependent relative revocation because "the [anti-revival] statute only comes into effect if there has been a 'revocation' [and][i]t is to determine precisely that question, i.e., whether there has been a revocation, that the doctrine is applied."

CONCLUSION

The intention of testator in the law of wills. *Charleston Library*, supra. (citing *Pringle vs. McPherson's Executors*, 2 Brev. 279, 3 Am. Dec. 713). The Court correctly applied the doctrine of dependent relative revocation to honor the intention of the testator in this case. For the foregoing reasons, Petitioners' motion to reconsider/ amend or alter a judgment should be denied.

LAW OFFICE OF MARCUS W. MEETZE, LLC



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Attorney for Respondents

November 16, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE PROBATE COURT

WILSON GARNER, JR., RUBY LEE)
DOUGLAS, and HAZEL L. HASTINGS)
as statutory heirs of THE ESTATE OF)
NELL GAINES, and on behalf of all other)
remaining statutory heirs, who may be)
determined hereafter,)

CASE NO.:2014-ES-2301777

Petitioners,)

vs.)

THE ESTATE OF NELL GAINES and)
JOHN HEAD, individually and acting as)
Personal Representative of THE ESTATE)
OF NELL GAINES,)

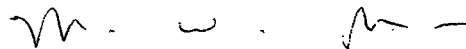
Respondents.)

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of November, 2015 a copy of an *Respondents' Response to Petitioners' Motion to Reconsider/ Amend or Alter a Judgment* was served upon the below stated parties via United States Postal Service with sufficient first class postage affixed thereto and addressed as follows:

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Greenville, SC 29601

LAW OFFICE OF MARCUS W. MEETZE, LLC



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Attorney for Respondents

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2016-CP-23-02045

Wilson Garner, Jr., et al, ... Appellants,

v.

The Estate of Nell Gaines, et al, ... Respondents.

NOTICE OF APPEAL

Wilson Garner, Jr., et al appeal the Order of the Honorable Letitia H. Verdin dated September 14, 2016. Appellant received electronic notice of entry of Order on September 14, 2016, which was then downloaded from the ECF system for Greenville County Courts.

September 22, 2016

s/ Richard L. Patton
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Attorney for Appellants

Other Counsel of Record:
Marcus W. Meetze
PO Box 81118
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Attorney for Respondents

0060

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2016-CP-23-02045

Wilson Garner, Jr., et al, ... Appellants,

v.

The Estate of Nell Gaines, et at, ... Respondents.

PROOF OF SERVICE

THIS IS TO CERTIFY that the undersigned has served upon opposing counsel in this case the following documents: (1) Notice of Appeal directed to the S.C. Court of Appeals (2) Copy of Judge Verdin's Order dated September 14, 2016 from which this appeal is taken. Service is being perfected by means of the Greenville County Court's e-filing system, as well as by United States mail addressed as follows:

Marcus W. Meetze, Esq..
PO Box 81118
Simpsonville, SC 29680

THIS 22nd day of September, 2016

s/ Richard L. Patton
SC Bar # 0008627
The Patton Law Firm
819 East North Street
Greenville, SC 29601
ATTORNEY FOR APPELLANTS

0061

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE) Case No(s) .: 2016CP2302045
)
Wilson Garner, Jr., et al)
)
 Plaintiff,)
)
 -VS-) TRANSCRIPT OF RECORD
)
The Estate of Nell Gaines,)
)
 Defendant.)

August 30, 2016
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

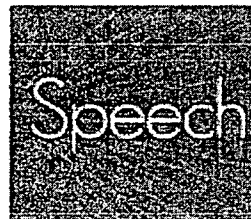
A P P E A R A N C E S:

RICHARD L. PATTON, Esquire
Attorney for the Plaintiff

MARCUS W. MEETZE, Esquire
Attorney for the Defendant

Teresa B. Johnson, CVR-M, CM
Certified Court Reporter
P.O. Box 2812
Greenville, S.C. 29602

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EXHIBITS PAGE

NO.

DESCRIPTION

ID EV

PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

1
2 **THE COURT:** Y'all think we are ready to
3 get started?

4 Yes, sir.

5 **MR. PATTON:** Ready when you are, Judge.

6 **THE COURT:** I'm ready.

7 **MR. PATTON:** May it please the Court.

8 **THE COURT:** Yes, sir.

9 **MR. PATTON:** Good morning, Judge Verdin.
10 This is case is before you today on an appeal
11 from the Greenville County Probate code, uh,
12 court. Judge Faulkner was the presiding judge
13 over our case. Comes to you under South
14 Carolina Code 62-1-308. We filed a notice of
15 appeal in this case on March the 28th, 2016.
16 Both sides have filed briefs and you have a
17 record on appeal.

18 **THE COURT:** Yes, sir.

19 **MR. PATTON:** Let me say at the outset that
20 I think this would make a terrific bar exam
21 question. You have two clerks there. I
22 appreciate that.

23 Let me give you a brief history, Your
24 Honor, before we get into the argument. On
25 August the 13th, 2014, Nell Gaines passed away

1 at age 96. She was a resident of Greenville
2 County. Prior to her death, she had executed,
3 as best we can tell, two separate wills. The
4 first one that we know of was executed in 2008.
5 That will, however, was not submitted to
6 probate.

7 **THE COURT:** Okay.

8 **MR. PATTON:** There was a second will that
9 was executed on May the 7th of 2014, roughly
10 three months prior to her death, that was
11 submitted to probate. That will left her estate
12 to Alex Head and John Head. Now, it did it in a
13 little bit of an unusual way. It did it by
14 referring to a memorandum, a special memorandum
15 which was often referred to as a personal
16 property memorandum.

17 **THE COURT:** Right.

18 **MR. PATTON:** Which did appear with the
19 will, was filed in conjunction with the will. I
20 believe that was filed on August the 28th of
21 2014, if memory serves. There's a problem with
22 the 2014 will. It is without question that at
23 the time that will was filed, the respondents
24 did not realize that there was such a problem.
25 Otherwise, I think we can logically conclude

1 they wouldn't have filed it. They would have
2 filed the 2008 will. But they believed that the
3 2014 will was the last will and testament of
4 Nell C. Gaines and submitted it as such.

5 The problem with that will is it was
6 witnessed by two witnesses, one of whom was the
7 devisees. You had two devisees, John Head and
8 Alex Head. John Head was married to Debra Head.
9 She was one of two witnesses. She is the mother
10 of Alex Head.

11 **THE COURT:** Okay.

12 **MR. PATTON:** By statute, that means she is
13 not a disinterested witness. We have a statute
14 that codifies the rule of law that says
15 devisees and legatees can not be subscribing
16 witnesses. That's a long-standing common law
17 rule. It goes back to England.

18 Our state, however, has codified that rule
19 so that now we don't have to depend on the
20 common law. We have a statute that addresses
21 that question. The first time we had such a
22 statute was in 1942, section 8919 of the 1942
23 code was the first time that a legislature
24 addressed this common law rule and codified it.
25 And when they did, Your Honor, they added the

1 fact that no spouse of a subscribing witness
2 could take under a will where the subscribing
3 witness was their spouse. It did not include
4 children. Oddly enough, that comes later.

5 There are going to be three revisions to
6 this statute, one in 1986, one in 1990 and the
7 last one being in 2013 which took effect in
8 January of 2014. It did take effect prior to
9 Ms. Gaines' death and prior to the execution of
10 her will in 2014.

11 Now, of course, I think the Court's already
12 aware and the Court's read the brief, I'm sure,
13 that having an interested witness doesn't
14 necessarily invalidate the will.

15 **THE COURT:** All right.

16 **MR. PATTON:** A interested witness can be
17 used to prove a will so long as there are two
18 disinterested witnesses under the statute. The
19 statute in question now is known as code
20 section 62-2-504. That's an important point,
21 Your Honor, because the legislature, in all the
22 iterations of this statute, have constantly
23 reviewed it. They have tweaked it. They have
24 changed the wording. They have added to it. But
25 in every single iteration of the statute, they

1 have included a forfeiture provision if, in
2 fact, any devisee is related to a subscribing
3 witness, either as their issue or as their
4 spouse.

5 The legislature has had ample opportunity
6 to take that forfeiture provision out is my
7 point. And for 70 years, Your Honor, they kept
8 it in. The legislature then has created this
9 forfeiture. It is not a forfeiture that comes
10 from common law. The common law rule was that a
11 devisee or a legatee can't take. It is a
12 statutory iteration of that rule that says that
13 their spouse can not take or their issue can
14 not take. That's not a common law rule. That is
15 a rule that is created by the legislature.

16 Your Honor, in the brief, I cite the
17 statute. I don't think there's any question
18 about the legitimacy of that statute.

19 **THE COURT:** Okay.

20 **MR. PATTON:** On August the 7th of 2015, we
21 filed a motion to set aside the voided devise.
22 My clients are the blood heirs of Nell Gaines.
23 When they became aware of the May 7th, 2014
24 will and they became aware of the fact that one
25 of two subscribing witnesses was related to the

1 devisees, either as the mother or as the
2 spouse. Then it became apparent that there was
3 a violation of the statute.

4 So we filed a petition to set aside the
5 devise, not to set aside the will. I'm not sure
6 if that hasn't gotten confused in this case
7 along the way. At no time have my clients ever
8 asked to set aside the will. We believe the
9 2014 will is a validly executed will. It is.
10 The only thing that fails under the statute is
11 the devise to Alex Head and to John Head.

12 Now, I realize the other side is going to
13 argue and say they are the only devisees. The
14 legislature doesn't distinguish whether there
15 were any other devisees left or not. It simply
16 says that that devise is going to fail. That
17 would not mean that Mr. Head could not continue
18 to serve as the personal representative under
19 the 2014 will. He could. It does not mean that
20 he couldn't collect his statutory fee for
21 serving in that capacity. He could. It doesn't
22 mean that the personal property memorandum that
23 bought in personal property validly through
24 that special memorandum would not be his to
25 claim or his son's. That would. But the fact

1 that there's a devisee that's related by issue,
2 mother or by marriage, spouse, those devises
3 are going to be void pursuant to the statute.

4 Now, what happened was in this case, once
5 the respondents realized that there was a
6 conflict with the 2000 -- I'm sorry -- 62-2-
7 504, what they did was they sought to
8 essentially revive the 2008 will under a theory
9 of dependent relative revocation, sometimes
10 referred to as conditional revocation in this
11 state.

12 The first case that addressed this in South
13 Carolina was the Charleston Library Society
14 versus Citizens and Southern National Bank
15 case. I'm going to give you the unofficial
16 cite, 20 S.E.2d, beginning at page 623. On page
17 626 of that case, here's what our Supreme Court
18 said in adopting this common law rule,
19 dependent relative revocation is usually
20 applied where the testator cancels or destroys
21 a will or executes an instrument intended to
22 revoke a will with a present intention to make
23 a new testamentary disposition as a substitute
24 for the old, and the new disposition is not
25 made, or, if made, fails of effect for some

1 reason.

2 There has to be a reason that the devise
3 fails. In this case, Your Honor, we're not left
4 to guess what that reason is. In Judge
5 Faulkner's order on page 7, she says -- the
6 very end of her order says -- she's referring
7 back to South Carolina code annotated 62-2-504
8 specifically, she says, therefore, because the
9 2014 will provisions were in effect nullified
10 by the interested witness statute -- there's
11 the reason. There's your trigger -- the
12 condition of her revocation was not fulfilled
13 such that the 2008 was not effectively revoked.

14 So she found that dependent relative
15 revocation allowed for the probating of the
16 2008 will precisely because, Judge, it ran
17 afoul of the statute. The 2014 will ran afoul
18 of the statute. That was the trigger. That was
19 the reason that the devise failed of effect.

20 You can't just grab dependent relative
21 revocation and apply it because you liked one
22 will better than you liked another will. There
23 has to be a reason to bring in that common law
24 rule of dependent relative revocation. Yes, it
25 is a conditional revocation question.

1 And that begs the question as to whether or
2 not the testator would have revoked the prior
3 will had she understood the effect of, even
4 presumably, the statute. I will concede that
5 she did not understand the effects of the
6 statute. It's of no moment, because the
7 legislature has spoken. They have determined
8 that there is a forfeiture provision. Yes, the
9 intent of the testator is the law of wills.
10 Yes, it is, unless and until the legislature
11 has spoken.

12 Ironically, Judge, we have a case that was
13 decided four years after the Charleston Library
14 Society case. It's the Davis versus Davis case,
15 which I cite to you. In that case, our Supreme
16 Court, recognizing four years earlier the
17 legislature had passed a statute that mandated
18 a forfeiture in the event that the statute was
19 not followed, in the event that it turned out
20 that one of the subscribing witnesses was an
21 interested witness and there were not two other
22 disinterested witnesses, our Supreme Court said
23 although it is -- although to construe a will
24 in conformity with the intention of the
25 testator is much favored by the courts, such

1 intention can not prevail when in conflict with
2 some statute.

3 I'm not clear on how Davis was either
4 distinguished or somehow not followed in the
5 lower court. That's never been clear to me. I
6 think that case is directly on point. In
7 fairness, Judge Faulkner had some worry, some
8 concern, and it's in her materials and her
9 order that DRR was not argued in the Davis case
10 below. That's conjecture. We don't see it in
11 the published opinion. We don't know whether
12 they considered it or disallowed it or whatever
13 they may have thought.

14 The fact of the matter is in that case what
15 our Supreme Court had said is when the statute
16 creates a conflict, you have to follow the
17 statute. It wouldn't matter if DRR was argued
18 in the lower courts is my point. It would not
19 have concerned the Supreme Court because they
20 had a clearly worded statute that had a
21 forfeiture provision in it that mandated when
22 this happens, then this is what follows. The
23 statute says it shall pass by intestacy
24 pursuant to code section 62-2-101. That's the
25 forfeiture provision that has always been in

1 the statute. Every single amendment, four
2 versions of this statute, every single one of
3 them, had that forfeiture provision.

4 So Your Honor, here's my point, then I'm
5 done. Dependent relative revocation requires
6 that there be some reason. Here, the lower
7 court judge, Judge Faulkner, realized that that
8 some reason was the collision of the interested
9 witness statute. We know what the reason is.
10 She simply decided that while that was the
11 reason that nullified the 2014 will, she was
12 not going to apply the consequences that were
13 mandated in the statute. And I don't think you
14 can do that is my argument. I think it's all or
15 nothing. You either take the statute and apply
16 it, forfeiture and all, or you don't apply it
17 at all.

18 **THE COURT:** All right. Thank you. I
19 appreciate it.

20 Yes, sir.

21 **MR. MEETZE:** Thank you, Your Honor. May it
22 please the Court. Marcus Meetze on behalf of
23 John Head, the personal representative with the
24 estate of Nell Gaines and the estate of Nell
25 Gaines, Your Honor. Your Honor, we believe that

1 the probate court correctly ruled that DRR is
2 still good law in South Carolina and is
3 applicable to the facts of this case. The
4 intention of the testator at the time the will
5 was executed is the primary inquiry of the
6 court. That's what the South Carolina Supreme
7 Court said in Rikard versus Miller.

8 In Pringle versus McPherson, they are even
9 more succinct. The intention of a testator is
10 the law of the wills. To effectuate the
11 intention of the testator the South Carolina
12 Supreme Court, in 1942, formally adopted the
13 doctrine of relative revocation. It's never
14 been reversed. It's never been overturned.
15 There's been no other decision that even
16 addresses the doctrine of dependent relative
17 revocation other than the Charleston Library
18 case. That's still good law in South Carolina
19 and it's still applicable. The probate court
20 was correct to find it was applicable on this
21 case to effectuate the intention of the
22 testator in this case, which I don't believe
23 there is any question as to the intent of the
24 testator in this case.

25 Ms. Gaines, in 2008, had a will prepared by

1 Leslie Moore of the Wyche Firm. In that will,
2 it contains a revocation clause, it gives
3 jewelry and her real estate to Alex Head, a car
4 to Tony Burrell and the rest and residue to
5 Alex. That's her 2008 will. That's her first
6 will.

7 Then, in 2014, she executes a second will.
8 In her second will, she again leaves the rest
9 and residue of her estate to Alex Head. So
10 there's no question that the bounty of her
11 desire, who she wanted her estate to go to, is
12 Alex Head. Now, that is why the court applied
13 the doctrine of DRR.

14 Now, before I get into the facts specific
15 in this case, I think it's important that we go
16 back and look at how the doctrine of DRR became
17 adopted in South Carolina. There's two cases.
18 The first case -- well, the case that formally
19 adopts it is Charleston Library Society, First
20 Citizens and Southern National. That's 20
21 S.E.2d, 623. But before that case, there was
22 the Medical Society of South Carolina versus
23 South Carolina National Bank of Charleston.
24 That was in 1941. In that case, the court found
25 that a codicil to the will of Ms. Ross was a

1 violation of the rule against perpetuities. And
2 since that -- since that codicil was a
3 violation of the rules against perpetuities,
4 that -- all that was left of that codicil had
5 to pass by intestacy.

6 In 1942, the Charleston Library comes in
7 and they file a suit. They don't question the
8 holding of the Medical Society case. What they
9 argue is the theory of dependent relative
10 revocation. Clause 8 of the original will left
11 Number 1 Meeting Street to the Charleston
12 Library Society being kept as to Ross Memorial
13 branch of the Charleston Library. That was Ms.
14 Ross' first will.

15 In the codicil, she leaves Number 1 Meeting
16 Street to the trustees of the Ross Memorial and
17 revoked clause 8 of the original will. The
18 court found that the trust -- the trustees of
19 the Ross Memorial, that was not a charitable
20 trust. That's why it failed as a violation of
21 the rule against perpetuities.

22 But what they found in the Charleston
23 Library case was that the intention of the
24 intestate was clear in that case. They said
25 they think it is quite clear that Ms. Ross, had

1 she been informed that the museum provisions of
2 her codicil were ineffective, would not have
3 intended her property should go in the
4 residuary clause, which would thus defeat the
5 purpose to provide upon the charity for
6 cultural education together with the memorial
7 to her deceased brothers but rather that the
8 library should be restored, the condition on
9 which they had been revoked having failed.

10 We think that's the exact same position we
11 have in this case. If you had told Ms. Gaines
12 that her bounty, her entire estate would not
13 pass pursuant to her desires, but would pass to
14 her intestacies, to members of her family that
15 she never names in her wills, that are distant
16 relatives to her. We think it's clear that she
17 would have preferred to have the 2008 will
18 submitted to probate as opposed to the 2014
19 will under the doctrine of dependant relative
20 revocation.

21 Judge Faulkner, in her thorough opinion,
22 goes through the doctrine of dependent relative
23 revocation, looked at other states that have
24 examined this, found no conflict with the
25 disinterested witness statute, found no

1 conflict with the revocation statute and, in
2 fact, found that those worked together. The
3 reason that the will fails, and a will has to
4 fail for some reason under dependant relative
5 revocation, was a statutory violation.

6 It's similar to the violation that we had
7 in the Charleston Library case. It's a
8 violation against the rule against
9 perpetuities, and there was a bright-line
10 penalty if you violate the rule against
11 perpetuities and that is it would pass by
12 intestacy. The same thing that we've got here.
13 Bright-line penalty if you've got disinterested
14 witnesses. They would pass by intestacy. So
15 we've got the exact same setup that we had in
16 Charleston Library that we have here.

17 So what the court did was apply the
18 doctrine of dependent relative revocation to
19 effectuate the intention of the testator
20 because that is the law of the wills. The
21 intention of the testator is the law of the
22 will.

23 **THE COURT:** Does the will fail here? I
24 mean, there's -- there's statutory construction
25 that tells us what to do in this -- or,

1 seemingly, would tell us what to do in this
2 instance. Now, is that not right? Now, I'm
3 persuaded -- I'm persuaded very much by you're
4 saying about the intent of the testator and
5 carrying out the intent of the testator. I'm
6 just asking you this question.

7 **MR. MEETZE:** Yes, Your Honor. I believe
8 that the Charleston Library case addressed that
9 exact issue. You have a violation of the rule
10 against perpetuities. That violation, similar
11 to a violation of a disinterested witness would
12 void that.

13 I think it's kind of interesting is that
14 opposing counsel said that they never filed an
15 action to set aside the will. The original
16 action filed on July 13th was a petition to set
17 aside the will. They later amended the petition
18 to set aside the devise. In our opinion, that
19 is a distinction without a difference, Your
20 Honor. The entire resting residue of the estate
21 was to go to Alex Head. If you void that
22 devise, you void that entire will. There's no
23 other provision for it to go anywhere else. So
24 we believe that is a distinction without a
25 difference when we talk about whether we are

1 devising -- whether we are trying to set aside
2 the devise or whether we are trying to set
3 aside the will. Their original petition was to
4 set aside the will. The effect of setting aside
5 the devise would have the effect of setting
6 aside the will. So we believe that's a
7 distinction without a difference, Your Honor.

8 **THE COURT:** All right. Okay. I appreciate
9 it.

10 **MR. MEETZE:** Thank you, Your Honor.

11 **THE COURT:** Thank you. Anything in reply?

12 **MR. PATTON:** Yes, briefly, Your Honor. We
13 did mislabel the petition originally, but the
14 Court has the original petition as well as the
15 amended one. The body of the petition is
16 exactly the same. We're arguing the devise be
17 set aside. It's the title that was mislabeled,
18 but we promptly amended it. I think it was the
19 next day that we amended that.

20 The rule against perpetuities resulted in
21 the devise being voided and passing by
22 intestacy. That's the result the statute
23 mandates here.

24 I'll only add, Your Honor, briefly, the
25 Davis case -- let me read you a quote from the

1 Supreme Court. Appellants contend that it is
2 clear that the intestator did not intend to die
3 intestate -- I heard him argue that at least
4 three times -- and that such intentions should
5 control. The law of wills is the intent of the
6 testate. I heard him argue that. To construe a
7 will in conformity with the intention of the
8 testator is much favored by the courts. But
9 such intention, the intention of the testator,
10 which is normally the law of wills can not
11 prevail when in conflict with some statute.

12 It is clearly in conflict. DRR will result
13 in the revival of the 2008 will, which was not
14 even originally filed for probate in this
15 court, Your Honor, until my clients asserted a
16 violation of the statute. Clearly, that was the
17 trigger event. The statute, however, won't
18 revive the 2008 will. It's going to leave the
19 2014 will in place and void the devises. That's
20 a conflict.

21 You're right, Your Honor. You do have the
22 direction of the legislature. The court sits as
23 the judiciary, not as the legislative branch,
24 unless the statute is unclear or ambiguous.
25 There's no ambiguity here in the statute. It is

1 crystal clear what the forfeiture provision is.

2 THE COURT: All right. All right. Well,
3 you definitely have given, uh, me some food for
4 thought for the next few days. I anticipate I'd
5 have a decision pretty shortly in this matter,
6 but I do want to read over everything one more
7 time very thoroughly and think about your
8 outstanding arguments on both sides. All right.
9 Thank y'all.

10 MR. MEETZE: Thank you, Your Honor.

11 MR. PATTON: Thank you, Your Honor.

12

13 (END OF PROCEEDING)

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CERTIFICATE

24

STATE OF SOUTH CAROLINA)

)

COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville, South Carolina, on this 25th day of October, 2016.

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

Teresa B. Johnson

Official Court Reporter

0085

1 STATE OF SOUTH CAROLINA)
2) IN THE PROBATE COURT
3 COUNTY OF GREENVILLE) COPY

4 IN THE MATTER OF:

5 NELL C. DONNAN GAINES, Deceased

6 CASE NUMBER:

7 2014ES2301777.

8 WILSON GARNER, JR., RUBY LEE DOUGLAS, HAZEL L.
9 HASTINGS,

10 Petitioners.

11 JOHN ALLEN HEAD,

12 Respondent.

13 - - - - -

14 Probate hearing taken in the aforementioned
15 matter was heard before the Honorable Judge
16 Debora A. Faulkner taken before Donna B.
17 Friddle, Court Reporter and Notary Public,
18 at Probate Court, Greenville County Square,
19 301 University Ridge, Greenville, South
20 Carolina, on the 12th day of January, 2016,
21 commencing at the hour of 11:06 o'clock,
22 a.m.

23 - - - - -

24
25
26

1 APPEARANCES:

2 **RICHARD L. PATTON, Esquire**

3 Patton Law Firm

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5 Greenville, South Carolina 29601

6 Attorney for Petitioners.

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10 Simpsonville, South Carolina 29681

11 Attorney for Respondent.

12 - - - - -

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19 THERE WERE NO EXHIBITS INTRODUCED.

20 - - - - -

21 (In the following transcript, a dash [---] is used to
 22 indicate an unintentional or purposeful interruption in a
 23 sentence, or to indicate halting speech or an unfinished
 24 sentence in dialogue.)

25

26

1 THE COURT:

2 We're here today in the Estate of Nell
3 C. Donnan Gaines, decedent. Case File
4 14-1777. Personal Representative is
5 John Allen Head. This matter is set to
6 argue a Motion to Reconsider filed by
7 the Petitioner's attorney, Mr. Patton,
8 who is present. On behalf of the
9 Estate, Mr. Meetze is present with
10 Personal Representative, John Head.
11 The Court issued its Order in this
12 matter. And the Motion to Reconsider
13 was timely filed and served and set a
14 hearing for arguing Motion. And, Mr.
15 Patton, I will turn it over to you.

16 MR. PATTON:

17 Thank you, Your Honor. May it please
18 The Court. Let me begin by thanking
19 The Court for giving us this hearing.
20 I have been before you on several
21 occasions, and I understand that your
22 policy is to -- it's just as important
23 to get it right as it is to get it
24 finished.

25 THE COURT:

1 Exactly.

2 MR. PATTON:

3 And with that said, I will begin by
4 saying having read your Order I think
5 that we can all agree -- or start at a
6 point where we can agree, before we get
7 to a divergence. We can all agree here
8 that the question of Dependent Relative
9 Revocation is a confusing question.
10 There is only but one case. There are
11 some cases cited by the Charleston
12 Library case within that case to give
13 us a little more help. But there's
14 been no decision since that case that
15 has provided any further enlightenment
16 on whether subsequent Statutes have
17 impacted the authority of that case.
18 I'm not going to argue that today. I
19 will tell you that as late as 7:30 last
20 night I checked for subsequent history,
21 and I can represent to The Court there
22 is no subsequent history as of last
23 night on the Charleston Library case
24 or for that matter the case that I'm
25 arguing upon, the Davis versus Davis

1 case.

2 THE COURT:

3 Okay.

4 MR. PATTON:

5 This is a fascinating case, because I
6 think we have all been confused
7 collectively. And I will begin by
8 pointing out that in the counterclaim
9 Plaintiff's -- or Respondent's counsel
10 raised the point that he wanted to
11 revive the 2008 Will. The Court in its
12 Order on page four said that DRR,
13 Dependent Relative Revocation, is
14 sometimes associated with revival. And
15 the case law bears that out, depending
16 on which jurisdiction you're looking
17 at. So that created a great deal of
18 confusion I think in everyone's mind.
19 Because I think we can agree, and I
20 think The Court has correctly seen, so
21 I'm going to make a concession here --
22 I think The Court has correctly seen
23 that Dependent Relative Revocation may
24 still be viable in the state of South
25 Carolina. Because as it occurs, I

1 think, to all of us now, Dependent
2 Relative Revocation deals with whether
3 the revocation was effective. And if
4 the revocation was never effective,
5 then the old Will never died. So
6 you're not reviving an old Will. The
7 old Will is still breathing. You never
8 killed it. So with that being, I
9 think, a clearer understanding of
10 Dependent Relative Revocation, I
11 understand The Court's ruling that
12 because of the impact of the interested
13 witness Statute, we now have to concern
14 ourselves with whether DRR might be
15 applicable to this case. So can DRR
16 co-exist with code section 62-25-508
17 (sic). And I think the answer to that
18 question is yes. I will concede that
19 point. Although I do have remaining
20 questions in light of other cases that
21 talk about whether or not in fact is a
22 reliable Statute, or whether or not the
23 common law doctrine of DDR is in fact
24 associated with revival. There are
25 cases that seem to suggest one way or.

1 the other. So it does remain somewhat
2 confusing. I think we all agree that
3 we were sort of distracted by that in
4 this case early on. The difficulty
5 arises in this case in light of the
6 1986 Amendment to the South Carolina
7 Probate Code. Prior to 1986, the
8 interested witness Statute did not
9 include a provision for what's to be
10 done with the void gift. The old
11 Statute under the 1942 code simply said
12 the gift would not be valid. It in
13 effect codified the common law that a
14 legatee -- an interested witness cannot
15 be a legatee. And then by extension on
16 that common law it picked up, it cannot
17 include your spouse or your children.
18 In 1986 the legislature did something,
19 which to me changes the complexion of
20 this case entirely. They added a
21 provision that in the event the devise
22 is determined to be voided, either
23 because of an interested witness being
24 related by marriage or by birth, the
25 legislature told us what was to happen.

1 It mandated a consequence. Now, that's
2 not the end of the inquiry. The Court
3 cited the LaCroix versus Senecal case
4 out of Connecticut. And when I read
5 that case, quite frankly, I thought to
6 myself, "This is as close as we're
7 going to get." The problem though, as
8 you read a little further and as you
9 look at the Statute in Connecticut,
10 there's no provision in the Connecticut
11 Statute for what's to happen to the
12 voided devise. It simply incorporates
13 the common law rule that a legatee --
14 an interested witness, cannot be a
15 legatee. It doesn't go any further
16 than that. In essence, Judge, this
17 Statute does what a lot of Statutes
18 have done over the years. It simply
19 codified common law, but it didn't
20 expand upon that. In our Statute, we
21 did. The legislature did expand on
22 what was to happen in the event a
23 devise was determined to be void. So
24 the LaCroix case I don't think is on
25 all fours. And here's why. In the

1 Connecticut case of LaCroix versus
2 Senecal, The Court had to figure out,
3 "Okay, now, that we know that the
4 devise is void, what are we going to
5 do?" What do we do with this devise?
6 There was no resort to a Statute. No
7 Statute addressed what was to be done.
8 There's nothing in the Connecticut
9 Statutes that gave The Court any
10 instruction. So they did what courts
11 always do, they resorted to common law,
12 in this case Dependent Relative
13 Revocation. There's The Court's
14 choice. You can either look at
15 statutory law, if it addresses what's
16 to be done with that voided gift, or in
17 the absence of a Statute, a clear
18 expression of the legislature, your
19 only remaining choice is common law.
20 Therein I think is the mistake that I
21 would like to call The Court's
22 attention to. I think The Court has
23 only seen the question of DRR in the
24 light of whether code section 62-2-504
25 is nothing more than a codification of

1 common law. And therefore only a
2 trigger event that takes us out of
3 "Okay, now, the devise is void," it
4 takes us out of that arena, puts us in
5 a different arena. What are we going
6 to do with this voided devise? If all
7 you're looking at is the ruling in
8 LaCroix, you could say this case would
9 be similar to LaCroix. But it isn't
10 because our Statute addresses what's to
11 be done with that voided devise.
12 That's what brings me back to the
13 decision in Davis versus Davis. And it
14 says plainly -- this is the case cited
15 at 208SC18237S.E.2nd@530. It says, "To
16 construe a Will in conformity with the
17 intention of the testator is much
18 favored by The Courts." Let's pause
19 there. That's DRR. That's the common
20 law rule of trying to derive the
21 testator's intent. That's the common
22 law rule of Pringle that says that the
23 testator's intent is the law of Wills.
24 That's the expression of what the
25 common law has been. To construe a

1 Will in conformity with the intention
2 of the testator is much favored by The
3 Courts, but such intention cannot
4 prevail when in conflict with some
5 Statute or rule of law. Now, in order
6 for The Court then to bypass code
7 section 62-2-504, I respectfully submit
8 that The Court would have to find that
9 there's no conflict with that Statute.
10 In the case of LaCroix versus Senecal,
11 The Court could have found, and indeed
12 did find that. The Court said, "We
13 don't find any language in the Statute
14 that conflicts with the DRR." Well,
15 here we do. DRR is a common law rule
16 that's intended to guide The Court on
17 what do we do with this voided devise.
18 The Statute addresses that
19 specifically, and I might add so
20 specifically that it speaks to whether
21 or not the husband can take an issue of
22 that witness can take, and the fact
23 that they might still be able to take
24 as intestate Heirs. There's a
25 significant plan, if you will, or

1 legislative plan for what's to happen,
2 and how that impacts even interested
3 witnesses. So, Your Honor, I think
4 this case really then comes down to
5 Rosenbloom versus Kokofsky.

6 THE COURT:

7 There's a new one I haven't heard of.

8 MR. PATTON:

9 There's a new one. Now, I found this
10 case as I was researching subsequent
11 history for the Davis case. Davis
12 versus Davis is cited by the
13 Massachusetts Court. This is, of
14 course, outside the jurisdiction, but
15 then again so is the Connecticut case.
16 It is some authority for the case. It
17 is persuasive authority, not binding.
18 I understand those rules. But The
19 Court will notice if you'll turn to the
20 second page in Kokofsky, it -- well,
21 actually on the first page towards the
22 bottom. Let's begin there where it
23 says, "In response to a Petition for
24 instructions filed by the
25 Administrator." It says, "On the basis

1 of GL, General Law 191, section two,
2 which voids testamentary gifts to a
3 subscribing witness to a Will, or to
4 the spouse of such a witness, the
5 legacy and devise to Mrs. Ely were void
6 because her husband was one of three
7 subscribing witnesses to the Will." If
8 you turn further to the second page,
9 you'll see in the first full paragraph
10 at the top -- or the top half of the
11 page. It's in the Davis case citing.
12 Then coming down towards the bottom it
13 says, "It is clearly possible that
14 under code section two will at times
15 produce harsh results. However, the
16 question whether an alternative
17 formulation would be more equitable is
18 beyond our authority to decide. The
19 scope of the authority of this court to
20 interpret and apply Statutes is limited
21 by its constitutional role as a
22 judicial, rather than a legislative
23 body." Then at the end "It is our duty
24 to ascertain and implement the intent
25 of the legislature." So when we have a

1 conflict, Your Honor, as I read this
2 case, and the Davis case, and the
3 Statute, when there is a conflict
4 between the intention of the testator
5 and the intention of the legislature, I
6 know who wins that contest every time.
7 So what The Court has to decide is
8 whether the legislature did indeed
9 express clearly and unambiguously an
10 intention for what was the happen to
11 the voided devise, that previously was
12 the rule under the common law. So for
13 those reasons, Your Honor, I
14 respectfully request that The Court
15 consider that DRR in this case is not
16 relevant. It is still a viable theory.
17 I will grant that, but it's not
18 relevant in light of the clear mandate
19 of the legislature in code section
20 62-2-504. And I would like The Court
21 to consider the fact that that Statute
22 is more than just a trigger. The
23 common law rule would have been just
24 the trigger without telling us what do
25 we do with that voided devise. It's

1 more than just the trigger. It's
2 giving you the answer for what you do
3 with that voided devise. That, I
4 think, makes the difference in this
5 case. And I'm not sure we can get
6 caught up in what Ms. Gaines'
7 intentions were, what her testamentary
8 intentions were. My point is, Your
9 Honor, in light of this Statute,
10 they're simply not relevant because the
11 legislature has given us a hard and
12 fast -- albeit harsh, a hard and fast
13 direction for what's to be done with
14 that voided devise. The question of --
15 and I'll just leave this briefly. The
16 question of whether the Latin phrase --
17 you may have caught in that -- in the
18 case of the Richfield --

19 THE COURT:

20 Uh-huh.

21 MR. PATTON:

22 -- case that I cited. I'm going to
23 concede -- for purposes of this
24 argument, I'm going to table that,
25 because I think the greater argument --

1 the greater question for The Court to
2 consider is the Statute 62-2-504, and
3 whether it has to be followed, because
4 the legislature has expressed clearly
5 its intention for what's to be done
6 with that voided devise. That's what
7 makes it different from LaCroix.
8 That's what takes it out from under the
9 application of DRR. Thank you.

10 THE COURT:

11 Okay. Mr. Meetze.

12 MR. MEETZE:

13 Thank you, Your Honor. May it please
14 The Court. Your Honor, it's our
15 position that The Court was correct in
16 this ruling in October. The doctrine
17 of Dependent Relative Revocation and
18 the anti-revival Statute 62-5-508 can
19 exist co-harmoniously in South
20 Carolina. And we believe that that's
21 supported by -- well, there's no South
22 Carolina case directly on point.
23 Numerous other jurisdictions have
24 addressed this exact issue and have
25 come down on the side that anti-revival

1 Statutes have nothing to do with the
2 doctrine of Dependent Relative
3 Revocation, because they're different
4 applications on the two concepts. DRR
5 or Dependent Relative Revocation
6 applies when we are determining whether
7 or not there was a valid revocation.
8 Anti-revival Statutes apply when
9 there's no question there was a valid
10 revocation. So they can co-exist
11 because they address two different
12 theories in the law. One is whether or
13 not we have a valid revocation, and the
14 anti-revival Statute comes into play
15 when we do have a valid revocation.
16 And this is supported by the District
17 of Columbia's decision. Arkansas has
18 also ruled on this decision. And also
19 there is a statement, third, of
20 property, also criticizes states that
21 have adopted the view that anti-revival
22 Statutes eliminate the common law of
23 Dependent Relative Revocation. And
24 since we're here on the Motion for
25 Reconsideration, we have to look at the

1 grounds for a Motion for
2 Reconsideration. And there are four
3 grounds. One is to prevent manifest
4 injustice. I don't believe that's
5 applicable in this case. I believe
6 that manifest injustice would be to
7 defeat the intent of Ms. Gaines, and
8 that was to leave her Estate to Alex.
9 She expressed that in two different
10 Wills, that were prepared by two
11 different law firms. So her intentions
12 are clear. And I think The Court has
13 recognized that. And both parties have
14 conceded that it -- that Ms. Gaines'
15 intent in this case, unambiguous. She
16 wanted her Estate to pass to Alex Head.
17 So I believe to prevent manifest
18 injustice it's not a ground for
19 reconsideration in this case. Another
20 ground would be to accommodate a change
21 in law. There's been no change in law
22 since we were here in October, so that
23 one doesn't apply. The next would be
24 newly discovered evidence. There's no
25 newly discovered evidence in this case.

1 So we come down to the last, and that
2 is to correct the clear error of law.
3 In fact, I don't believe there's been a
4 clear error law or fact in this case.
5 The Court went through and examined the
6 principle and Dependent Relative
7 Revocation and found that it could co-
8 exist with 508, and found that it did
9 apply to the facts in this case. We
10 believe that decision is correct. We
11 believe it's supported by decisions in
12 other jurisdictions. And we believe
13 that there are no grounds for the
14 Motion for Reconsideration, and that it
15 should be denied. The Order was
16 thorough and in its finding of facts.
17 The Order was thorough on its
18 examination of the law. We believe
19 there's no clear error of law or fact
20 in this case that would warrant a
21 reconsideration of the Judge's Order of
22 October. We ask that you just uphold
23 the Order of October and deny the
24 Motion for Reconsideration.

25 THE COURT:

1 Well, let me ask you this, Mr. Meetze.
2 Mr. Patton has made a very good
3 argument with regard to the
4 legislature's intention as to how a
5 voided devise should be disposed of.
6 And I believe that his argument is that
7 once the legislature speaks to that,
8 then that is the rule of law on that
9 case, and I am bound to go by what that
10 Statute requires. What is your
11 response to that argument?

12 MR. MEETZE:

13 Our response to that argument is the
14 reason that The Court allows common law
15 doctrine such as DRR is because they
16 can't address every theory under the
17 sun, and every possible factual
18 scenario under the sun. And given the
19 unique circumstances of this case --
20 the facts and circumstances of this
21 case, we believe it warrants the
22 imposition of DRR as opposed to the
23 harsh realities of what the Statute
24 will require, because there's an
25 interested witness. We believe that

1 the reason that The Court has not
2 overturned the Charleston Library case
3 is specifically for facts just like
4 this, that are presented in this case
5 where you have an unambiguous intent of
6 a testator. And the only reason that
7 that intent is not followed through is
8 because of an error that the testator
9 was not aware of at the time she
10 entered into the Will. Because the
11 legislature can't speak to every single
12 fact scenario, we have common law
13 doctrines that can coincide with the
14 legislature. So I believe that's what
15 happens in this case, is because you
16 can't speak to every scenario under the
17 sun. And because we have a unique fact
18 pattern in this case -- unique scenario
19 in this case, that DRR should be
20 applied as opposed to the legislature
21 intent of an interested witness.

22 THE COURT:

23 Okay.

24 MR. PATTON:

25 Your Honor, I may reply, please?

1 THE COURT:

2 Yes, please.

3 MR. PATTON:

4 The curious thing about this case as I
5 recall my initial review of the file,
6 is that The Court has already been
7 impacted by the Statute of this case;
8 62-2-512, personal property memorandum.
9 This court is powerless to effectuate
10 the testator's intent. There's no
11 question she signed that personal
12 property memorandum, none at all.
13 There's no question that it is
14 reasonably certain what she wanted done
15 with that property. The problem is you
16 cannot use a personal property
17 memorandum to dispose of real estate.
18 So The Court has already recognized
19 that you cannot avoid the impact of the
20 Statute, despite how clear the
21 intentions of the testator may be.
22 That's a problem in this case. And as
23 I recall The Court even -- and I may be
24 wrong about this, so I apologize in
25 advance. But I think The Court asked

1 opposing counsel, as I remember in the
2 letter, to figure out who the intestate
3 Heirs were for purposes of addressing
4 what was to be done as a consequence of
5 that violation of 62-2-512. I
6 subsequently gave The Court a genealogy
7 after many, many hours of trying to
8 figure out who those Heirs might be,
9 which may ultimately prove helpful to
10 The Court. But don't lose sight of the
11 earlier point being that The Court has
12 already recognized that a Statute
13 trumps common law. A statute is going
14 to trump whether or not we simply look
15 at the testator's intentions, no matter
16 how clear they may be. The other thing
17 that I will say is the legislature, he
18 says cannot speak to every scenario,
19 they don't have to. They've spoken to
20 this scenario with absolute clarity.
21 So while there may be a hundred other
22 things they haven't addressed, they
23 have addressed this one.

24 THE COURT:

25 Okay. I'm going to quiz you a little

1 bit, Mr. Patton.

2 MR. PATTON:

3 Yes.

4 THE COURT:

5 As you said, I want to get this -- I
6 don't think, as you also pointed out,
7 Dependent Relative Revocation is not
8 clear as a bell. So we have to try --
9 and what I have tried to do is
10 understand the Charleston case, and the
11 cases that it quoted, and the cases
12 that you have presented in your Motion.
13 And I probably will -- since Probate
14 Judge's don't have law clerks,
15 I had to just sort of go through it on
16 my own and try to understand the
17 analysis that The Court used in the
18 Charleston case, and look at the facts
19 of the cases that it cited in that
20 decision. I think we all agree that
21 the Charleston Library case has not
22 been overruled. It's still good law in
23 South Carolina. Our question here is
24 does it apply in this case. In the
25 Charleston Library case there was a

1 woman there of some wealth who had
2 executed a Will back in 1892. And in
3 that Will she made various provisions,
4 and then she did a codicil. And in the
5 codicil she -- now the codicil was in
6 November of 1913. She did a -- she
7 instituted a clause which took some of
8 the real estate in her holdings, and
9 she wanted to create an endowment fund
10 and use that fund and even sell some of
11 her furniture, and so on and so forth,
12 to be able to create a fund, and create
13 the Ross Memorial Fund for the
14 Charleston Library Society. And that
15 there would be a tablet there with her
16 brothers' names affixed to the tablet,
17 so that would be a memorial to her
18 brothers and would also create some
19 public good there in Charleston for the
20 Library Society. She did another
21 codicil in October, '21, in which she
22 revoked that codicil regarding the
23 library, and she instead decides that
24 her collection of silver, and so on and
25 so forth, should be used as an exhibit.

1 And she went on to say that it also
2 would be of some public good. And she
3 directed her executors and trustees to
4 form a South Carolina corporation to be
5 known as the Trustees of the Ross
6 Memorial, and gave to this corporation
7 her property at 3 Meeting Street,
8 buildings, and the contents of the
9 buildings, and that it would be
10 preserved as a public museum to be
11 known as the Ross Memorial Property.
12 And it would be used as a public good,
13 and it would also have the tablet with
14 her brothers' names on it. And these
15 trustees would take all of her real
16 estate except some property on
17 Wentworth Street to collect rent and
18 income, and to maintain the support and
19 upkeep of the Ross Memorial and pay
20 over to any surplus to the Medical
21 Society of South Carolina for use at
22 Roper Hospital. So then the -- it went
23 up to the Supreme Court. And the
24 Supreme Court decided that the museum
25 provisions of that failed, and it came

1 back on remand, and the Presbyterian
2 Hospital then becomes involved because
3 they are residuary devisees. And they
4 said, "Okay. Since that failed, it's
5 going to go through the residuary."
6 And then The Court then takes the case
7 and starts going through the analysis
8 of, you know, does this go through the
9 residuary. What was Ms. Ross
10 attempting to do? And this is a very
11 poor -- but, trying to summarize this
12 case is extremely difficult. But they
13 found, however, that the concept of
14 Dependent Relative Revocation was
15 appropriate to use in this case. And
16 they described it as a formulation or
17 expression of the results of the
18 experience of courts in finding and
19 effectuating the intent of a testator,
20 and it's to be applied with caution,
21 but in furtherance of the intent of the
22 testator. And in that case they
23 started talking about -- or they refer
24 to a case -- and if any of these cases
25 have been reversed, you-all need to let

1 me know -- Pringle versus McPherson.
2 In that case a testator left 300 acres
3 of land to his daughter, Elizabeth, and
4 the rest of his land he left to his two
5 younger daughters, excepting of the 300
6 acres that he left to his oldest
7 daughter, Elizabeth. After he executed
8 the Will, the testator scratched out
9 the clause giving 300 acres to
10 Elizabeth, and the clause that excepted
11 the 300 acres. The Court held that the
12 testator must have intended to revoke
13 that 300 acre devise; however, it was
14 ineffective because what he was trying
15 to do amounted to another devise. And
16 the Will would have to be republished
17 under the law. And because it was not
18 republished, The Court found that the
19 revocation was ineffectual. And so
20 pretty much because the revocation was
21 ineffectual, The Court found that the
22 testator certainly did not intend to
23 revoke the gift to Elizabeth in order
24 for the 300 plus acres to pass to
25 intestate Heirs. So in that particular

1 case The Court engaged in this concept
2 because it found, I suppose, that under
3 the law at the time, because his
4 scratch outs was going to -- was really
5 amounting to another devise, meaning
6 I'm taking away the 300, but now I'm
7 going to give all of my land to my two
8 younger daughters, he would have had to
9 do another Will, or what they called in
10 the case, republished the Will. So
11 they found that the revocation that he
12 had done by the scratch outs was
13 ineffectual, such that the previous
14 Will prior to the scratch outs they
15 found was preferable, because they
16 didn't feel that he wanted his Estate
17 to go to intestate Heirs. So in that
18 case we have a situation where he
19 attempted to change his Will, however,
20 the change was not valid under the law,
21 because he would have had to republish
22 a Will. But The Court in fact still
23 said, "We don't care about that. We
24 don't think he wanted it to go
25 intestate to his intestate Heirs." So

1 they found that the revocation was
2 ineffectual. Then they talk about a
3 Johnson versus Bailsford case. In this
4 case the testator had torn off the
5 seals of a Will, interlined it and
6 appeared to intend to want to make
7 another Will. But he never executed
8 another Will whatsoever. And there
9 wasn't -- they said "This does not
10 reestablish the Will." And at this
11 point the revocation was absolute. He
12 had torn it up, I guess may have
13 obliterated it, but never executed a
14 second Will. Therefore, the revocation
15 at that point was absolute. Then there
16 was -- they quoted a case from Kennedy
17 versus Kennedy. I didn't go through
18 the facts of that case, but apparently
19 some of the holdings in that case was
20 that The Court will seize upon the
21 slightest indications of the intent to
22 determine the objects and subjects of
23 the testator's bounty. And intent can
24 be inferred from the provisions of the
25 Will, and its general scope and import.

1 And back in the Pringle case they
2 really relied on that quite a bit. And
3 in doing so they said, and I quote,
4 "And would Ms. Ross, if she had been
5 informed that the museum provisions
6 could not be given effect under the
7 law" -- and as you-all recall from the
8 case they could not be given effect
9 'cause it turns out that the art
10 collection that she had was worthless,
11 or could not be -- they even said that
12 it would detract from the City of
13 Charleston.

14 MR. PATTON:

15 That was bad.

16 THE COURT:

17 It must have been a velvet pre-Elvis or
18 something. Anyway, the museum if --
19 "And would Ms. Ross if she had been
20 informed that the museum provisions
21 could not be given effect under the law
22 have still desired a revocation of the
23 library provisions so that the
24 hospitals which would receive under
25 other provisions of her Will about

1 three-fourths of her Estate, would also
2 get this part of it, and thus
3 completely frustrate her expressed
4 intention to make a bequest of public
5 cultural value as a memorial to her
6 deceased brothers for whom no other
7 memorial is provided in the Will or
8 codicils." Because if that -- if she
9 had intended to do that, then these
10 hospitals would get it under the
11 residuary clause. Okay. "The latter
12 question states the proper criteria.
13 And the correct answers to both seem
14 obvious." After mature reflection and
15 prolong study of the entire Will and
16 codicils, and the light of the many
17 cases cited by counsel and disclosed by
18 my own investigation and conclusion, my
19 conclusion is that Ms. Ross would be --
20 the intention of Ms. Ross would be
21 disregarded and defeated if the rule of
22 conditional revocation above referred
23 to, not be applied. Indeed it seems to
24 me that this is a typical case for
25 application. And I'll endeavor to give

1 my reasons for so holding." And it
2 goes through a lengthy analysis. On
3 the case that I've talked about
4 previously in the -- what -- the case
5 about the Pringle case. They're
6 commenting on that Pringle case. "So
7 the testator certainly did not intend
8 to revoke the gift to Elizabeth in
9 order that the subject of it might pass
10 to his Heirs in general. In other
11 words, while he had decided to give the
12 whole of the land to Nancy and Susan,
13 his younger daughters, in preference to
14 Elizabeth, he preferred for Elizabeth
15 to have it rather than the rest of his
16 Heirs. A testator deliberately and
17 solemnly executes his Will. It at the
18 time contains the expression of his
19 entire wishes relative to his Estate.
20 Some event, unlooked for at the time
21 occurs, which renders a modification of
22 his arrangements desirable. To obtain
23 this object, and this alone, he is
24 disposed to revoke his first Will. He
25 performs the act deemed by himself

1 sufficient for this purpose, but which
2 from the operation of technical rules
3 of which he is ignorant fails to
4 produce the effect. Could it be said
5 that this Will was regarded in a rule
6 which declares this act of revocation
7 incompetent to accomplish the object
8 for which alone he was disposed to
9 change his first Will, and yet
10 competent to revoke his first Will all
11 together. Because he was -- has
12 unsuccessfully attempted to better the
13 arrangement of his Estate, he shall
14 state his arrangements -- he shall have
15 his arrangements set aside altogether.
16 Such a principle is equally
17 unreasonable and unlawful." So they go
18 through that analysis. So then I
19 looked to the Davis case that Mr.
20 Patton relies upon. And in the Davis
21 case it was one in which the -- no,
22 that was White. This case was one in
23 which a bachelor had property. He did
24 a Will. He left it to his four nephews
25 and a niece. A couple of the wives of

1 the nephews were two of the three
2 witnesses, which -- three witnesses
3 were required at the time. And at that
4 point then, as Mr. Patton argues, the
5 appellants -- and I think this was also
6 a fight over does it go through the
7 residuary, or does it go to intestate
8 Heirs. And they were saying it should
9 go through the residuary. But The
10 Court found, you know, as Mr. Patton
11 quoted, "To construe a Will in
12 conformity with the intention of the
13 testator's most favored by The Court,
14 but the intention cannot prevail when
15 in conflict with some Statute or rule
16 of law." Well, is Dependent Relative
17 Revocation a rule of law? Statute or
18 rule of law? We have this Charleston
19 case. It hasn't been overruled. The
20 Court found that it is an expression --
21 it is a formulated expression of the
22 results of the experience of courts in
23 finding and effectuating the intent of
24 the testator. So it seems to
25 distinguish -- or it seems to add in

1 addition to a Statute it can be or rule
2 of law. I think that case is a rule of
3 law. It's common law. And DRR wasn't
4 argued in the Davis case. So it didn't
5 really address the issue as directly as
6 the Charleston case, 'cause DRR was
7 front and center in that case, but not
8 in the Davis case. And then there's
9 the White case, which argued between
10 does the common law presumption that if
11 you destroy a second Will, the first
12 Will is automatically revived. It was
13 that presumption versus the presumption
14 set forth in the 1987 code, which was
15 applicable. It was, which is
16 applicable, which presumption. And it
17 came down on the side of the 1987 code,
18 which, again, doesn't address DRR. So
19 I think -- you know Dependent Relative
20 Revocation is I believe -- and both of
21 you have argued, and I believe you
22 understand it from my Order. I think
23 it's distinct and different that
24 revival. Dependent Relative Revocation
25 is was the revocation itself valid,

1 absolute, or conditional. Was it? So
2 in Ms. Gaines' case when she executed
3 the second Will, was her revocation in
4 that second Will, was it conditional or
5 absolute? And the cases also describe
6 conditional also as mistaken. So you
7 ask yourself, had Ms. Gaines known that
8 the revocation of her first Will by the
9 substitution of her later Will would
10 result in her intestate Heirs taking
11 that devise, because she either had an
12 unskilled lawyer, or she was in -- I
13 don't know what happened. But we don't
14 think -- I don't think Ms. Gaines had a
15 law degree. I don't know that she knew
16 that if the wife signed it, that all of
17 a sudden her Estate plan was out the
18 window. She had no reason to know
19 that. So it takes me back to the
20 Pringle case where The Court said
21 "Surely he had the 300 acres. He
22 thought that was going to be a
23 revocation, but he would have had to
24 republish and do a new Will for that to
25 happen. He had no way to know that."

1 The Court finds, "Okay. We're going to
2 say that the revocation was
3 ineffectual." So in this case it sort
4 of falls along that line. In
5 Charleston The Court also asked had Ms.
6 Ross known that her museum provisions,
7 if they had fallen -- 'cause The Court
8 found that her art collection was
9 worthless, so they set aside the museum
10 provisions. Had she known that, would
11 she have given all of this to the
12 hospitals, or would she have taken a
13 different route. And they found that
14 she would have wanted the library
15 provisions to be in there because the
16 two things that the museum provisions
17 and the library provisions had in
18 common was they provided, or she wanted
19 to provide a public benefit for her
20 property. So I find that the -- you
21 know, and those cases, they go through
22 that inquiry is -- so when I think
23 about the Statute -- statutory
24 argument that Mr. Patton makes, the
25 question is: Do we even get to the

1 point where the code determines where
2 the devise goes if we find first that
3 the revocation was conditional. Do you
4 follow me? If we have to address was
5 the revocation conditional, or was it
6 absolute. If the revocation was
7 absolute, then I think the Statute
8 applies. If it was mistaken or
9 conditional, that sets us up for DRR.
10 And we've got to first find out if she
11 would have revoked, or if the
12 revocation was mistaken, before we even
13 get to the point of where the devise
14 goes. And so that's kind of where I
15 am. And that's what I'm thinking
16 trying to analysis all of these cases,
17 and take into account, you know, the
18 very persuasive arguments of Mr.
19 Patton. So I want to hear from both of
20 you on that. And try to give me --
21 enlighten me a little bit, Mr. Patton.

22 MR. PATTON:

23 Thank you.

24 THE COURT:

25 Uh-huh.

1 MR. PATTON:

2 Your Honor, I agree with you that
3 there's no question that the intention
4 of Ms. Gaines is clear. There's no
5 argument here about that. To your
6 point about whether or not we even get
7 to the question of 62-2-504, you would
8 never even have DRR in question if it
9 weren't for the first application of
10 62-2-504. That's what raised the
11 question for the Respondent to do a one
12 eighty and ask The Court to disregard a
13 Will it filed. They filed at their own
14 accord that 2014 Will. They said that
15 it was valid. It was submitted for
16 Probate. Petitioners have not objected
17 to the validity of that Will.

18 THE COURT:

19 Uh-huh.

20 MR. PATTON:

21 They did a one eighty only because we
22 raised the Statute. So what came
23 first, the chicken or the egg? What
24 came first was the harsh imputation of
25 the Statute. And because The Court

1 then says, "We don't think the testator
2 would want to go for that, that
3 result." Only then did her intentions
4 even arise to be a question for The
5 Court. That's the problem. Because
6 the Statute says, "It's not concerned
7 with the testator's intentions." It
8 mandates a result regardless of her
9 intentions. And the Davis case said
10 "To construe a Will in conformity with
11 the intention of the testator is much
12 favored by The Courts." That's what
13 DRR is all about. "But such intention
14 cannot prevail at -- when in conflict
15 with some Statute, or rule of law."
16 Now, if you plug in DRR on the front
17 end of this, it's never going to be in
18 conflict with itself. So The Court's
19 reading of that language saying, "Well,
20 I've got to consider Charleston
21 Library. It's a rule of law." Is
22 their theory in conflict with that?
23 No, it is the rule of law they want The
24 Court to apply. So I would argue that
25 The Court's concern about whether it

1 conflicts with a rule of law is
2 misplaced in this case, because the
3 very rule of law that they want you to
4 apply, cannot be in conflict with
5 itself. But the case says "It cannot
6 prevail when in conflict with some
7 Statute, or" -- it's worded in the
8 disjunctive.

9 THE COURT:

10 Okay.

11 MR. PATTON:

12 Or rule of law. Either one. And I
13 think the logic behind that is readily
14 apparent to all of us as lawyers. When
15 the Statute -- when the legislature
16 speaks, that abrogates common law.
17 Now, if the legislature is unclear, if
18 they're ambiguous, we can add to what
19 they say. We can supplement what they
20 say with common law. But where they
21 are clear about their intentions, you
22 can't.

23 THE COURT:

24 Well, what about the Pringle case in
25 which the testator made the mark outs

1 on the Will with regard to the devises
2 to his daughter, and The Court found
3 that the failure or the ignorance on
4 behalf of the testator with regard to
5 the law's requirement that he republish
6 or do another Will, he was ignorant of
7 that. And so then The Court found that
8 his revocation strike outs were
9 ineffectual, such that The Court then
10 gave effect to the original writing,
11 absent all the mark outs. That then, I
12 assume, was a Statute in effect at the
13 time that said you have to republish or
14 make a new Will if you make new
15 devises. And in our case we have a
16 Statute as well. But they went and
17 looked at it initially and said, the
18 revocations were ineffectual.

19 MR. PATTON:

20 So they had to resort to common law.

21 THE COURT:

22 Right. And they said the revocations
23 were ineffectual. They had a law on
24 the books that said, "If you do that,
25 you strike all of that out and you

1 don't make a new Will, too bad." Well,
2 The Court said, "The revocation was
3 ineffectual, because surely the
4 testator did not mean for his statutory
5 Heirs to take all of his property."

6 MR. PATTON:

7 The difference between Pringle,
8 Charleston Library, Kennedy --

9 THE COURT:

10 Uh-huh.

11 MR. PATTON:

12 -- and every other case The Court has
13 addressed --

14 THE COURT:

15 Uh-huh.

16 MR. PATTON:

17 -- is that in those cases there was no
18 Statute like 62-2-504 that not only
19 addressed whether the devise is void,
20 but also the consequences of that.
21 That's the difference, Your Honor. In
22 1986 The Court spoke to our -- when The
23 Court is confronted with the question
24 of a gift that fails, for whatever
25 reason, what's to be done?

1 THE COURT:

2 Uh-huh.

3 MR. PATTON:

4 There are many common law rules that
5 come into play from the past. In 1986
6 the legislature took that away and
7 said, "Here is what's to be done."
8 Now, it's interesting that if you
9 compare the 1986 code with the 1942
10 code, that's the difference. They made
11 that change. And they also changed
12 whether the Personal Representative was
13 entitled to his statutory fee. Under
14 the 42 code he wasn't. Under the 86
15 code he is. So clearly the legislature
16 thought long and hard about the impact
17 of that Statute, and went beyond the
18 original intent of the legislature from
19 1942, and changed that intention and
20 specifically made not minor changes,
21 major changes to the Statute. The
22 problem is because it's the Statute in
23 this case that gives rise to whether or
24 not the testator's intentions have been
25 subverted.

1 THE COURT:

2 Uh-huh.

3 MR. PATTON:

4 Therein lies the problem. I don't
5 think you can get past the Statute,
6 because that's what caused the
7 consternation in the first place. And
8 their effort is to avoid those
9 unpleasant consequences. And the
10 Rosenbloom case says, "Look, however,
11 harsh they may be, we sit -- courts sit
12 not as a legislature, but judicial.
13 We've got to give effect to what the
14 legislature said."

15 THE COURT:

16 But what the legislature failed to do
17 in the 1987 code was to pass a Statute
18 on revocation specifically. There was
19 no codification of Charleston Library.

20 MR. PATTON:

21 Well, they didn't need to.

22 THE COURT:

23 But what I'm saying is the Statute that
24 they did pass with regard to what
25 happens to these devises, in my mind

1 that was step two. Step one was why
2 didn't they do a Statute that governs
3 when a revocation is effectual or
4 ineffectual?

5 MR. PATTON:

6 I would argue they did. I would argue
7 that's the whole point of the anti-
8 revival Statute, and whether or not
9 that expression of intention somehow
10 shaped whether we should or shouldn't
11 continue to use DRR. But for purposes
12 of this argument, I'm simply saying, It
13 doesn't matter."

14 THE COURT:

15 And then the anti-revival Statute, I
16 think 2-8 -- one of the exceptions you
17 quoted --

18 MR. PATTON:

19 50628 (Judge, not sure how to write
20 this.)

21 THE COURT:

22 That's all about obliterating and
23 tearing up. It wasn't about a
24 subsequent document..

25 MR. PATTON:

1 No, I'll grant you that the revocation
2 on this particular case is by a
3 subsequent document --

4 THE COURT:

5 Right.

6 MR. PATTON:

7 -- that intended to revoke an earlier
8 one. I will grant you that. But this
9 case isn't about the revocation. This
10 case --

11 THE COURT:

12 But DRR is about revocation. Was the
13 revocation --

14 MR. PATTON:

15 Whether the revocation was effective.

16 THE COURT:

17 Was it absolute, was it conditional.

18 MR. PATTON:

19 Was it effective?

20 THE COURT:

21 Right.

22 MR. PATTON:

23 I will grant you that is in --

24 THE COURT:

25 Uh-huh.

1 MR. PATTON:

2 -- fact what DRR is all about.

3 THE COURT:

4 Right.

5 MR. PATTON:

6 DRR, however, is a common law rule.

7 THE COURT:

8 Right.

9 MR. PATTON:

10 It cannot exist in conflict. That
11 brings us back to the point. Your
12 earlier question was an astute one,
13 when you asked us to brief this.

14 THE COURT:

15 Uh-huh.

16 MR. PATTON:

17 Can DRR exist harmoniously with 62-2-
18 504? And only because the legislature
19 was adamant, "Here's what shall
20 happen." They used the word "shall."

21 THE COURT:

22 Uh-huh.

23 MR. PATTON:

24 Because they were adamant, the rule of
25 DRR is in conflict with the Statute.

1 It clearly is. And because it's the
2 Statute itself that gives the
3 Respondents the basis on which to argue
4 DRR -- there's no other basis on which
5 they're arguing DRR. This doesn't
6 violate the rule against perpetuities.

7 THE COURT:

8 Uh-huh.

9 MR. PATTON:

10 That was the Charleston Library case.
11 It doesn't violate Trust law. It
12 wasn't a charitable Trust. So The
13 Court said, "Sorry. Rule against
14 perpetuities is going to hammer you
15 because it's not a charitable Trust.
16 You didn't set it up as a charitable
17 Trust, otherwise, you might have voided
18 that rule." There were rules of law
19 that came into play, none of which
20 directed the consequences of the
21 violation of that rule.

22 THE COURT:

23 So from your research are you telling
24 me that in states that recognize DRR,
25 they don't have Statutes like we do

1 with regard to what happens to these
2 devises?

3 MR. PATTON:

4 Yes, that is my research, that I have
5 not found a single state that has a
6 Statute on interested witnesses that
7 has codified the consequences.
8 Connecticut didn't do it.

9 THE COURT:

10 Uh-huh. And the case that I put in my
11 Order that you talked about, what was
12 that? That was Connecticut? Is that
13 Connecticut?

14 MR. PATTON:

15 LaCroix versus --

16 THE COURT:

17 LaCroix.

18 MR. PATTON:

19 -- Senecal.

20 THE COURT:

21 (I thought it was pretty much --

22 MR. PATTON:

23 Connecticut case.

24 THE COURT:

25 And so what you're saying is in those

1 states there is no similar Statute such
2 as we have here with regard to
3 interested witnesses and what happens
4 to that devise?

5 MR. PATTON:

6 Exactly. I handed up to The Court --

7 THE COURT:

8 Okay.

9 MR. PATTON:

10 -- the Connecticut Statute, and gave it
11 to opposing counsel. And it clearly
12 simply states the common law rule that
13 an interested witness cannot be a
14 legatee. It does not express the
15 consequences of that violation. South
16 Carolina is unique.

17 THE COURT:

18 Right.

19 MR. PATTON:

20 And as The Court knows we're unique on
21 a lot of things.

22 THE COURT:

23 Uh-huh.

24 MR. PATTON:

25 However, The Court sits as a judicial

1 branch --

2 THE COURT:

3 Right.

4 MR. PATTON:

5 -- not being able to contravene the
6 intention of the legislature.

7 THE COURT:

8 No, and that's certainly not my intent.
9 Of course the struggle that I'm having
10 is I -- and I think both of you fine
11 lawyers agree, Charleston Library is
12 still good law. Charleston Library has
13 not been repealed or codified
14 specifically. It's still good law. It
15 wasn't argued, so our Supreme Court
16 hasn't talked about it. It wasn't
17 argued in Davis. It wasn't argued in
18 White. As you have -- I can't find any
19 place where it was argued. It's been
20 referred to in several Law Review
21 articles that discuss DRR. But it
22 hasn't --

23 MR. PATTON:

24 The --

25 THE COURT:

1 -- had a judicial review in quite some
2 time.

3 MR. PATTON:

4 Yeah. We cannot assume that it
5 couldn't have been argued --

6 THE COURT:

7 Uh-huh.

8 MR. PATTON:

9 -- in Davis.

10 THE COURT:

11 Well, it wasn't in the --

12 MR. PATTON:

13 It wasn't.

14 THE COURT:

15 -- the decision.

16 MR. PATTON:

17 It wasn't, but we can't assume --

18 THE COURT:

19 I didn't get the briefs, so I don't
20 know.

21 MR. PATTON:

22 We don't know whether there was an
23 earlier Will to even consider.

24 THE COURT:

25 Uh-huh.

1 MR. PATTON:

2 So the question never came up. That
3 cuts both ways is my point. It cannot
4 be used as a source against my
5 argument, since it can cut both ways
6 there. It might have been argued, it
7 just may not have been applicable in
8 that case.

9 THE COURT:

10 I know what was focused on the
11 residuary clause versus whether the
12 devise goes to intestate Heirs.

13 MR. PATTON:

14 It is interesting, Your Honor, just as
15 a little aside. The Davis case was
16 decided four years after the Charleston
17 Library case. And Judge Stukes --

18 THE COURT:

19 Uh-huh.

20 MR. PATTON:

21 -- was on both opinions.

22 THE COURT:

23 Uh-huh.

24 MR. PATTON:

25 So I think --

1 THE COURT:

2 Right. But I guess --

3 MR. PATTON:

4 -- it is a clarification --

5 THE COURT:

6 Right.

7 MR. PATTON:

8 -- if you will.

9 THE COURT:

10 But in Davis, if they didn't bring it
11 up, he couldn't just, you know --

12 MR. PATTON:

13 No. He couldn't. But he did sit down
14 a bright-line rule.

15 THE COURT:

16 Right.

17 MR. PATTON:

18 Judge Stukes did set down a bright-line
19 rule.

20 THE COURT:

21 Which says that it cannot conflict with
22 a Statute or rule of law.

23 MR. PATTON:

24 I don't think any --

25 THE COURT:

1 Rule of law.

2 MR. PATTON:

3 It doesn't conflict with a rule of law.
4 It conflicts with a Statute. And it's
5 worded in the disjunctive.

6 THE COURT:

7 Right.

8 MR. PATTON:

9 So if it conflicts with either one, you
10 can't apply DRR.

11 THE COURT:

12 Mr. Meetze, help us.

13 MR. MEETZE:

14 Thank you, Your Honor. Conditional
15 revocation has never been addressed by
16 any Statute in the state of South
17 Carolina. But it has been addressed by
18 case law in South Carolina, and that's
19 the Charleston Library case, which is
20 still good law in the state of South
21 Carolina. What Your Honor correctly in
22 her Orders found that this condition --
23 that this revocation in this case was
24 conditional. It was conditional upon
25 the disposition of her Estate in

1 accordance with the provisions of her
2 2014 Will. So my argument is we don't
3 have to get the 62-2-504, because the
4 revocation was conditional, and
5 therefore was not effective because the
6 2014 Will was invalid due to the
7 disinterested witnesses Statute. So
8 because we're dealing with a
9 conditional revocation in this case,
10 the condition which was not met, we
11 don't have to get to the disinterested
12 witnesses Statute, because we're going
13 back to the 2008 Will. So because we
14 don't have to get to 62-2-504, we don't
15 need to address that issue. The only
16 issue we need to address is whether or
17 not DRR is still a viable theory of law
18 in South Carolina, and whether it's
19 applicable to the facts of this case.
20 And it's clearly still a viable theory
21 of law in South Carolina. It's a rule
22 of law. There's no Statute directly on
23 point. But that could be because we
24 have case law directly on point on this
25 issue, on conditional revocation, and

1 when it's applicable. And since we do
2 have that case law to guide us, and we
3 can apply it in this case, that's what
4 should be done in this case.

5 Therefore, we don't have to get to the
6 disinterested witness Statute that
7 conflicts with the 2014 Will, because
8 we find the revocation of 2008 Will was
9 conditional, and that condition wasn't
10 met. So, therefore, it's not valid.

11 If we don't have a valid revocation, we
12 go right back to the 2008 Will. That's
13 what I think needs to be done in this
14 case, Your Honor, is that we don't have
15 a valid revocation, because it was
16 conditional, it was conditional on that
17 fact -- as you state in your Order, you
18 know -- and I don't want to mince
19 words, but it was conditioned upon the
20 disposition of her Estate in accordance
21 with the provisions of her 2014 Will.
22 That condition was not met. The
23 revocation was not valid. Therefore,
24 we don't even have to get to the
25 disinterested witness Statute.

1 THE COURT:

2 And are you in agreement with Mr.
3 Patton that you don't know of a state,
4 that was based on your research, that
5 has DRR and a Statute similar to ours?

6 MR. MEETZE:

7 I'm not aware, but I know that there
8 are several states that have anti-
9 revival Statutes, and the theory of
10 DRR. I would like to look at their
11 Statutes; Nevada being one, Arkansas
12 being the other, District of Columbia
13 being another.

14 THE COURT:

15 I'm not worried so much about anti-
16 revival, because I think those are two
17 distinct theories. That and DRR are
18 two distinct theories. But if DRR
19 somehow in a state -- if there is a
20 state that has found because they have
21 a Statute similar to our interested
22 witness Statute, they have found that
23 then now DRR is no longer a viable or
24 good law in their state somehow. But
25 that Statute has taken the place of

1 DRR. Do you know of any case law or
2 state in which that has occurred?

3 MR. MEETZE:

4 I do not know of any case law or state.
5 My research hasn't gone that far, Your
6 Honor.

7 THE COURT:

8 Okay. All right. Any final remarks
9 before I go and cogitate further --

10 MR. PATTON:

11 I --

12 THE COURT:

13 -- over this?

14 MR. PATTON:

15 -- will only say that the condition
16 that wasn't met was a correct
17 understanding of the law, 62-2-504.
18 That was the condition that wasn't met.
19 You have to deal with the Statute
20 before you even give rise to the
21 question of DRR. That's the fatal flaw
22 here, is that without that violation of
23 the Statute, there is no basis for DRR
24 in this case.

25 MR. MEETZE:

1 And, again, Your Honor, you've already
2 stated Ms. Gaines was not an attorney,
3 and that was not something that was in
4 her knowledge at the time she executed
5 her 2014 Will.

6 THE COURT:

7 Very good. You-all have done most
8 excellent jobs, and now to plow through
9 this. Do either one of you want to
10 give me anything else to look at? Do
11 you need time to send me anything?
12 Otherwise I'll take what I've got and
13 then do a final review and let you
14 know.

15 MR. MEETZE:

16 I think you've got plenty.

17 THE COURT:

18 You both did excellent jobs. Thank
19 you.

20 MR. MEETZE:

21 Thank you, Your Honor.

22 (HEARING ADJOURNED)
23
24
25
26

1 STATE OF SOUTH CAROLINA)

2) CERTIFICATE

3 COUNTY OF GREENVILLE)

4 I, DONNA B. FRIDDLE, a Notary Public, duly
5 commissioned and qualified in and for the
6 State of South Carolina, do hereby certify
7 that the Probate Court hearing was taken
8 before me on January 12, 2016, commencing at
9 11:016 a.m., and concluding at 12:10 p.m.;
10 that said hearing was transcribed under my
11 direction; and that this transcript is a
12 true record of said proceedings. I further
13 certify that I am not of kin or counsel to
14 the parties in this case, am not in the
15 regular employ of counsel for any of said
16 parties, nor am I interested in the results
17 of this case.

18 IN WITNESS WHEREOF, I have hereunto set my
19 hand and affixed my official seal this
20 27th day of January, 2016.

21 _____
22 Notary Public for South Carolina

23 My Commission Expires: 11/24/25
24
25

1 STATE OF SOUTH CAROLINA)
2) IN THE PROBATE COURT
3 COUNTY OF GREENVILLE) **COPY**

4 IN THE MATTER OF:

5 NELL C. DONNAN GAINES, Deceased

6 CASE NUMBER:

7 2014ES2301777.

8 WILSON GARNER, JR., RUBY LEE DOUGLAS, AND HAZEL
9 L. HASTINGS,

10 Petitioners.

11 JONATHAN ALEXANDER HEAD, JOHN HEAD,

12 Respondents.

13

14 Probate hearing taken in the aforementioned
15 matter was heard before the Honorable Judge
16 Debra A. Faulkner taken before Donna B.
17 Friddle, Court Reporter and Notary Public,
18 at Probate Court, Greenville County Square,
19 301 University Ridge, Greenville, South
20 Carolina, on the 15th day of September,
21 2015, commencing at the hour of 10:23
22 o'clock, a.m.

23

24

25

26

1 APPEARANCES:

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6 Attorney for Petitioners.

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11 Simpsonville, South Carolina 29681

12 Attorney for Respondents.

13 - - - - -

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PETITIONER'S EXHIBIT NUMBER ONE 10

RESPONDENT'S EXHIBIT NUMBER ONE 17

(In the following transcript, a dash [---]
is used to indicate an unintentional or
purposeful interruption in a sentence, or to
indicate halting speech or an unfinished
sentence in dialogue.)

- - - - -

1 THE COURT: We are here today in
2 the matter of the Estate of Nell C.
3 Donnan Gaines. File number is
4 14-1777. The matter is before The
5 Court on a Petition filed on behalf
6 of Richard Patton, who represents
7 Wilson Garner, Jr., Ruby Lee
8 Douglas, and Hazel L. Hastings,
9 Statutory Heirs of the Estate of
10 Nell Gaines and on behalf of all
11 other named Statutory Heirs who may
12 be determined thereafter. The
13 Respondents in the matter of the
14 Estate of Nell Gaines represented
15 by Mr. Marcus Meetze, M-e-e-t-z-e.
16 The Petition has been filed,
17 properly served. Answer and
18 Counterclaim was filed. We have an
19 Amended Petition and also Answer to
20 the Amended Petition. Counsel, I
21 believe the issue for today
22 involves the Will of Ms. Gaines and
23 our Statute 62-2-504 with regard to
24 the witnessing of a Will by an
25 interested party as defined by that

1 Statute; is that correct? Is that
2 the issue?

3 MR. PATTON: That is correct, Your
4 Honor --

5 THE COURT: Okay.

6 MR. PATTON: -- stated in our
7 Petition.

8 THE COURT: Mr. Patton, before I
9 let you call your first witness.
10 Your caption says, "Any other
11 intestate Heirs." Do you think
12 there are others?

13 MR. PATTON: I know so, Your
14 Honor. In fact I have -- pardon
15 me. I have delivered to The Court
16 already a genealogy chart that has
17 identified approximately forty
18 Heirs. I'm trying to locate them.
19 Names I've been able to obtain
20 through library genealogies,
21 obituary records, courthouse
22 records. But finding these peoples
23 is a Herculean task, as you might
24 imagine.

25 THE COURT: Okay.

1 MR. PATTON: I have had the help
2 of several family members that I
3 have already located. But, again,
4 one side of the family was not
5 altogether that familiar with the
6 other side of the family. So it is
7 still something for sure.

8 THE COURT: Okay. The application
9 that I have in front of me then
10 probably needs at some point is, as
11 housekeeping, needs to be changed.
12 It has listed as Statutory Heirs
13 John Allen Head, nephew. Then it
14 lists her first -- second husband,
15 Gerald Gaines, predeceased. Her
16 first husband, Robert Donnan,
17 predeceased. Her mother and father
18 are both predeceased. And it says,
19 "No children were born into the
20 marriage. And all siblings
21 predeceased." That is what is
22 listed on the Court's Application
23 for the listing of intestate Heirs.
24 And what you're saying is that the
25 intestate Heirs are others that

1 were not listed; is that correct?

2 MR. PATTON: Yes, Your Honor. In
3 fact the obituary said there were
4 no living Heirs. And in fact there
5 are quite a few living Heirs.

6 THE COURT: And Mr. Head that is
7 listed as an intestate Heir here is
8 a nephew, but not -- but a nephew
9 by marriage; is that correct, and
10 not a blood nephew?

11 MR. PATTON: That is correct. And
12 I believe they've already admitted
13 in their Answer to the Petition
14 that they are not Statutory Heirs
15 under the laws of intestacy --

16 THE COURT: Okay.

17 MR. PATTON: -- in this state.

18 THE COURT: All right. Okay. Mr.
19 Meetze, is there anything you would
20 like to bring out before we call --
21 before I have Mr. Patton call his
22 first witness?

23 MR. MEETZE: Just one evidentiary
24 matter, Your Honor.

25 THE COURT: Okay.

1 MR. MEETZE: I had spoken to Mr.
2 Patton earlier. I have the
3 original copy of the 2008 Will here
4 in my possession. Mr. Patton said
5 he would stipulate to the
6 authenticity, and to Ms. Gaines'
7 capacity at the time to make the
8 Will. I just want to make sure
9 we're on the same page --

10 THE COURT: Okay.

11 MR. MEETZE: -- as far as that
12 goes.

13 THE COURT: Okay. Thank you.

14 MR. MEETZE: Thank you, Your
15 Honor.

16 THE COURT: All right. Mr.
17 Patton, you may call your first
18 witness.

19 MR. PATTON: Thank you, Your
20 Honor. Petitioners call John Head.

21 THE COURT: All right. Mr. Head.

22 **JOHN ALLEN HEAD,**

23 being first duly sworn/affirmed, was
24 examined and testified as follows:

25 THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. PATTON:

Q. Good morning, sir. Please state your name for the record.

A. John Allen Head.

Q. Where do you reside, sir?

A. 100 Barrell Way.

Q. Are you currently the Personal Representative for the Estate of Nell C. Donnan Gaines?

A. I am.

Q. Do you recall, sir, filing a Will to open that Estate that is dated May the 7th, 2014?

A. Yes, sir.

Q. All right.

MR. PATTON: Your Honor, I would like to submit this as the first exhibit.

THE COURT: Okay. And the court reporter will mark it as Petitioner's Number One without objection?

MR. MEETZE: No objection, Your Honor.

1 THE COURT: Okay.

2 (Thereupon the court reporter
3 marked the pertinent document as
4 PETITIONER'S EXHIBIT-NUMBER-ONE.)

5 Q. Mr. Head, let me show you what's been
6 marked as Petitioner's Exhibit Number
7 One. Do you recognize that document?

8 A. (Witness reviews exhibit.) Yes, I do.

9 Q. And we flip --

10 A. Yes.

11 Q. Thank you, sir. May I see that? Thank
12 you. The original of this Will is in
13 The Court's file. I believe we can
14 stipulate to that. So my first
15 question to you, Mr. Head, is when you
16 submitted the Will that we have here
17 marked as Plaintiff's Exhibit-Number-
18 One, was it torn in any fashion?

19 A. No.

20 Q. Was it obliterated in any --

21 A. No.

22 Q. -- fashion? Was it burned in any
23 fashion?

24 A. No.

25 Q. Was it cancelled in any fashion?

1 A. No.

2 Q. You believe at the time submitting this
3 Will, marked as Exhibit One, you
4 believe at the time you submitted it
5 that it was the last valid Will of Nell
6 C. Donnan Gaines, did you not?

7 A. There was a Will before that one in
8 2005. And because of Tony Burrell's
9 Estate had denied and left everything
10 to Nell Gaines, then that's when that
11 Will was done.

12 Q. Let me call your attention to Exhibit
13 Number One. There is at the end of
14 this document a Personal Property
15 Memorandum. Do you see that?

16 A. Yes.

17 Q. Is this is the part of the Will that
18 you just alluded to as being something
19 that prompted this new Will dated May
20 the 7th, 2014?

21 A. Yes.

22 Q. Because the Personal Property
23 Memorandum references an inheritance
24 from the Estate of Herman Tony Burrell?

25 A. Yes.

1 Q. And I believe that it says, sir, in
2 parenthesis ("Money is real property or
3 personal property")?

4 A. Yes.

5 Q. And it goes on further to say "To be
6 split between" yourself, "John Head and
7 Alex Head"; correct?

8 A. Yes.

9 Q. Alex Head is your son; is that correct?

10 A. Yes.

11 Q. Your natural son?

12 A. Yes.

13 Q. And this particular document, sir, has
14 witnesses who have signed their names.
15 Let me call your attention to the very
16 last page of Exhibit Number One. There
17 are two witnesses named. The first of
18 them is Debra Head. Do you see that?

19 A. Yes.

20 Q. Debra Head is your wife; is she not?

21 A. Yes.

22 Q. And the second witness is a young lady
23 by the name of Debbie Bowles; is that
24 correct?

25 A. Yes.

1 Q. She's not related to you; is she?

2 A. No.

3 Q. All right. Is Debra Head the natural
4 mother of Alex Head?

5 A. Yes.

6 Q. You'll notice, sir, there is a second
7 signature page on Exhibit Number One, a
8 little further in towards the middle.
9 It actually is the witness page for the
10 main body of the Will. Do you see
11 that?

12 A. Yes.

13 Q. And once again do you see two
14 witnesses' names?

15 A. Yes.

16 Q. The first is your wife, Debra Head;
17 correct?

18 A. Yes.

19 Q. Who is the mother of Alex Head?

20 A. Yes.

21 Q. Mr. Head, you're familiar with the
22 terms of this Will, generally speaking,
23 aren't you?

24 A. Yes.

25 Q. You know that the primary devisee - do

1 you understand what a "devisee" is?

2 A. No, explain it to me.

3 Q. Very good. A "devisee" is someone who
4 is named in the Will who is supposed to
5 take something from the Estate.

6 They're the Heirs, if you will, of the
7 Estate.

8 A. Okay.

9 Q. You understand that the primary
10 devisee, or Heir, of Nell Gaines'
11 Estate pursuant to this Will, marked as
12 Petitioner's Exhibit Number One, was
13 your son Jonathan Alexander Head?

14 A. Yes.

15 Q. The only exception to that as a devisee
16 would have been yourself, vis-a-vis
17 this Personal Property Memorandum
18 attached to this same Will, which
19 splits the inheritance from the Estate
20 of Tony Burrell between yourself and
21 your son, Alex?

22 A. Yes.

23 Q. Are you aware of Ms. Gaines -- any
24 intention on her part -- let me
25 rephrase my question. Are you aware of

1 any intention on Ms. Gaines' part,
2 prior to her death, to revoke what we
3 have here marked as Exhibit Number One?

4 A. No.

5 Q. Let me call your attention to the
6 beginning of this document. You'll
7 notice at the very head of the document
8 it states, "I, Nell C. Donnan Gaines, a
9 resident of and domiciled in the state
10 of South Carolina, make, publish, and
11 declare this to be my Last Will and
12 Testament revoking all Wills and
13 codicils at any time heretofore made by
14 me." Do you see that?

15 A. Uh-huh (Affirmative).

16 Q. That's a "yes"?

17 A. Yes.

18 Q. Do you not understand that that means
19 she was revoking any previous Wills
20 that she had?

21 A. Well, her intent has been known for 20
22 something years that Alex Head was her
23 life. And that --

24 Q. That wasn't my question. My question
25 was are you not -- as you read that

1 paragraph do you not understand it to
2 say that all previous Wills are being
3 revoked by this Will, marked as Exhibit
4 Number One?

5 A. Yes.

6 Q. That's different than my earlier
7 question that I asked, are you aware of
8 any efforts or intentions on Nell
9 Gaines' part to revoke that Will after
10 May 7th of 2014. Are you aware of any
11 such intentions on her part to revoke
12 that Will?

13 A. No.

14 Q. Thank you.

15 MR. PATTON: No other questions.

16 THE COURT: Thank you. Mr.
17 Meetze.

18 MR. MEETZE: Thank you, Your
19 Honor. May it please The Court.

20 **CROSS-EXAMINATION**

21 **BY MR. MEETZE:**

22 Q. Mr. Head, we've established that you're
23 the Personal Representative of Ms. --
24 the Estate of Nell Gaines; correct?

25 A. Yes..

1 Q. And, Mr. Head, at any time while you
2 were serving as the Personal
3 Representative for the Estate of Nell
4 Gaines did you come into possession of
5 another Will outside of this May 7th,
6 2014 Will?

7 A. Yes.

8 Q. I'm going to show you -- is that the
9 copy of the Will that you came into
10 possession of?

11 A. (Witness reviews document.) Yes.

12 MR. MEETZE: Your Honor, at this
13 time I would ask that to be entered
14 as Defendant's Number One.

15 THE COURT: All right. I believe
16 that's been agreed up; is that
17 correct?

18 MR. PATTON: Yes, no objection.

19 THE COURT: Respondent's Number
20 One without objection.

21 (Thereupon the court reporter
22 marked the pertinent document as
23 RESPONDENT'S EXHIBIT-NUMBER-ONE.)

24 Q. Now, Mr. Head, what is it -- what was
25 your understanding of that Will -- that

1 2008 Will? How did Ms. Gaines want to
2 dispose of her property pursuant to
3 that Will?

4 A. Everything was to go to Alex Head.

5 Q. Now, at a later point were you present
6 when -- well, did you have discussions
7 with Ms. Gaines regarding her intent to
8 dispose of her property, as she had
9 appointed you as the Personal
10 Representative?

11 A. None of those.

12 MR. PATTON: Your Honor, I'm going
13 to object to any forensic evidence
14 that might be offered on the
15 testator's intent under a case this
16 court is well familiar with, the
17 Bob Jones Strandell case. Such
18 extrinsic evidence is not
19 admissible.

20 THE COURT: All right. Mr. ,
21 Meetze, would you like to respond
22 to that?

23 MR. MEETZE: Your Honor, I believe
24 that the law of testate is that we
25 look to the intent of the testator.

1 And any evidence relevant to the
2 intent of the testator I believe is
3 relevant to this court in
4 determining disposition of this
5 property.

6 THE COURT: Well, we don't go
7 outside of the four corner of the
8 Will unless there's an ambiguity.
9 And if there's an ambiguity on its
10 face, then we can look at extrinsic
11 evidence. Otherwise we run into
12 the four corners of the Will under
13 that case.

14 MR. MEETZE: Thank you, Your
15 Honor.

16 THE COURT: Okay.

17 Q. And I believe there is an ambiguity.
18 We're not going to delve into that, Mr.
19 Head. There was a notation on that
20 Will. A devise is marked out on that
21 Will; is that correct?

22 A. Yes.

23 Q. Can you read on that Will what was
24 marked out?

25 A. It was the '93 Cadillac Coupe Deville.

1 Q. All right. And who was that devised to
2 go to?

3 A. Tony Burrell.

4 Q. Tony Burrell. That devise is not
5 contained in the 2014 Will; correct?

6 A. No.

7 Q. All right. And I'm going to hand you
8 what -- you've already seen a copy of
9 the 2014 Will. How does the 2014 Will
10 dispose of Ms. Head -- of Ms. Gaines'
11 property outside of the personal
12 property that was to be inherited from
13 Tony Burrell?

14 A. Everything went to Alex.

15 Q. So in the 2008 Will everything went to
16 Alex. And then again in the 2014 Will
17 everything went to Alex?

18 A. Yes.

19 MR. MEETZE: No further questions
20 at this time.

21 THE COURT: Okay. Any redirect?

22 MR. PATTON: Briefly.

23 DIRECT EXAMINATION

24 BY MR. PATTON:

25 Q. We have now, Mr. Head, two Wills. One

1 marked as Plaintiff's -- I'm sorry.
2 Petitioner's Exhibit Number One and the
3 one you hold in your hand, which is
4 Respondent's Exhibit Number One. Are
5 you aware of a third Will?

6 A. No.

7 Q. To your knowledge there is no third
8 Will --

9 A. No.

10 Q. -- is there?

11 A. No.

12 Q. The Will you hold in your hands is not
13 exactly like the Will signed on May the
14 7th, 2014, is it, in the sense that the
15 newer Will, the one I have marked here
16 as Petitioner's Exhibit Number One,
17 leaves you 50 percent of whatever comes
18 in from the Estate of Tony Burrell;
19 correct?

20 A. Yes.

21 Q. And you read earlier for me the
22 handwriting on that Personal Property
23 Memorandum to the effect that it
24 included the real estate, did you not?

25 A. On Tony Burrell's --

1 Q. Yeah.

2 A. -- yes.

3 Q. So, you stood to inherit whatever came
4 in from Tony Burrell's Estate, not just
5 personal property, but real estate as
6 well?

7 A. Yes.

8 MR. PATTON: Thank you. No
9 further questions.

10 THE COURT: Anything in cross?

11 MR. MEETZE: Nothing.

12 THE COURT: Thank you, Mr. Head.
13 You may step down. Your next
14 witness, Mr. Patton?

15 MR. PATTON: Your Honor, I have no
16 other witnesses.

17 THE COURT: Okay.

18 MR. PATTON: Petitioner's case.

19 THE COURT: Okay. Thank you very
20 much. Mr. Meetze?

21 MR. MEETZE: Your Honor,
22 defendants will call Debbie Head.

23 THE COURT: Okay. Ms. Head.

24 DEBRA LYNN HEAD,

25 being first duly sworn/affirmed, was

1 examined and testified as follows:

2 THE COURT: Thank you. Please
3 have a seat. You may proceed, Mr.
4 Meetze.

5 MR. MEETZE: Thank you, Your
6 Honor.

7 DIRECT EXAMINATION

8 BY MR. MEETZE:

9 Q. Ms. Head, could you state your name for
10 the record.

11 A. Debra Lynn Head.

12 Q. Ms. Head, did you serve as the witness
13 to the Will that's already been
14 premarked as Plaintiff's Exhibit Number
15 One? Let me show you a copy of that.

16 A. (Witness reviews exhibit.) I did.

17 Q. And at the time that you witnessed that
18 Will did it appear to you that Ms.
19 Gaines had all of her mental
20 capabilities? Understood the extent of
21 her bounty and how she wanted to devise
22 that property?

23 A. Yes.

24 Q. And she did execute that Will freely
25 and voluntarily as you witnessed on

1 that document?

2 A. Yes.

3 Q. And do you believe that Will contains
4 how she wishes her property to be
5 disposed of?

6 A. Yes.

7 MR. MEETZE: No further questions
8 at this time, Your Honor.

9 THE COURT: Mr. Patton?

10 MR. PATTON: Yes. Thank you.

11 **CROSS-EXAMINATION**

12 **BY MR. PATTON:**

13 Q. Ms. Head, you are the mother of Alex
14 Head?

15 A. I am.

16 Q. And the wife of John Head?

17 A. Yes.

18 Q. Thank you. Let me show you
19 Petitioner's Exhibit Number One which
20 is the first exhibit I introduced
21 through your husband.

22 A. If I need to read I may need my reading
23 glasses.

24 Q. Would you like to get them?

25 A. Please. All right. Thank you (witness

1 gets her glasses).

2 Q. Very good. Ms. Head, you just
3 testified that to your recollection
4 Nell Gaines was in her right mind, had
5 sufficient capacity to execute the Will
6 you now hold in front of you?

7 A. Yes.

8 Q. All right. The first paragraph of that
9 Will says that Ms. Gaines revoked all
10 prior Wills. Do you see that
11 paragraph?

12 A. I do.

13 Q. I had your husband read it. Are you
14 reading it now?

15 A. Yes.

16 Q. Based on that paragraph, Ms. Head,
17 would you agree that it was Ms. Gaines'
18 intention to revoke the prior Will that
19 we now have as Respondent's Exhibit
20 Number One dated January the 9th, 2008?

21 A. That's what it says.

22 Q. Are you aware of any other Will besides
23 the one marked as Petitioner's Exhibit
24 Number One and Respondent's Exhibit
25 Number One? Are you aware of any other

1 Wills?

2 A. I'm not.

3 Q. Are you aware of any intention or
4 effort on the part of Nell Gaines to
5 burn the Will you now hold in front of
6 you, Petitioner's Exhibit Number One?

7 A. No.

8 Q. Are you aware of any effort on her part
9 to tear it up?

10 A. No.

11 Q. To obliterate it?

12 A. No.

13 Q. To cancel it in any way?

14 A. No.

15 MR. PATTON: No other questions.
16 Thank you.

17 THE COURT: Mr. Meetze?

18 MR. MEETZE: Nothing further, Your
19 Honor.

20 THE COURT: Thank you, Ms. Head.
21 You may step down. Next witness?

22 MR. MEETZE: No, that's
23 defendant's case, Your Honor.

24 THE COURT: All right. Anything
25 in reply, Mr. Patton?

1 MR. PATTON: Your Honor, I think
2 we're at the point now where The
3 Court just needs to apply the law.

4 THE COURT: All right. All right.
5 Any argument you want to make?

6 MR. PATTON: Yes, Your Honor. We
7 have asserted in this case that the
8 subscribing witness pursuant to the
9 South Carolina Statute 62-2-504
10 results in a failure of the devise
11 under the May 7, 2014 Will,
12 because Debra Head is the spouse of
13 John Head, one devisee, and the
14 mother of Alex Head, the second
15 devisee. That Statute clearly says
16 that the devise under those
17 circumstances will fail unless
18 there are two disinterested
19 witnesses. So she might have
20 signed as a third witness, and this
21 would not be a problem for today's
22 resolution. But it is because
23 there are only two witnesses to
24 this Will. The Statute then is
25 clear that the devise will fail.

1 What the Respondents are asking The
2 Court to do is to revive the
3 January 9, the 2008 Will, under the
4 common law doctrine of Dependent
5 Relative Revocation. As Your Honor
6 knows South Carolina has a Statute
7 on how to revive a Will, and that
8 appears at code section 62-2-508.
9 There are three ways in this state
10 to revive a previously revoked
11 Will. I carefully went through
12 both witnesses on direct and cross
13 examination whether they were aware
14 of any effort on the part of the
15 testator, Nell Gaines, to revoke
16 the May 7, 2014 Will, whether she
17 made an effort to tear it, burn it,
18 cancel it. The Court's well aware
19 of the Statute that under the first
20 of three ways to revive a revoked
21 Will there must be a showing of an
22 intent as laid out in section
23 62-2-506(a)(2). That Statute clearly
24 says that a Will, any part thereof is
25 revoked by being burned, torn,

1 cancelled, obliterated, destroyed.
2 That's why I asked those questions.
3 So the first of the two ways cannot
4 apply to this case, because there's no
5 showing -- in fact there's an
6 admission that there was no effort on
7 the part of Nell Gaines to revoke the
8 May 7, 2014 Will. That leaves them
9 only the third option. Option "C."
10 Option "C" speaks of three Wills, not
11 two. There is a subsequent Will,
12 there is a prior Will, and then there
13 is a latter Will under subsection "C."
14 There would have to be a third Will
15 then, Your Honor, that would revoke
16 the subsequent Will, the middle Will,
17 if you will, with an intention to
18 revive the first Will. That's what
19 subsection "C" contemplates. We don't
20 have that in this case. There is no
21 third Will. What we have is a valid
22 Will executed May the 7th, 2014.
23 There's no contest that Ms. Gaines was
24 of sound mind when she signed that
25 Will. There's no contest that she

1 revoked the January 8, 2008 -- or
2 January 9th, 2008 Will. She
3 accomplished her purpose. It is
4 expressly revoked then under code
5 section 62-2-506(a)(1) because she
6 executed a subsequent Will that
7 revokes the previous Will. She
8 accomplished that revocation. What
9 they want you to do now is to revive
10 that revoked Will. They want to
11 employ a common law remedy when South
12 Carolina has a Statutory remedy. And
13 as The Court knows you cannot apply a
14 common law remedy when we have a
15 Statutory remedy. We have a code
16 section in this state that
17 specifically says so. Title 14-1-50
18 all applies to the common law were not
19 altered by the code remain in effect.
20 Here we have a code section that
21 speaks to how a Will may be revived.
22 There's no other option, Your Honor.
23 So unless and until they can show an
24 intention on her part to revoke the
25 May Will, which they've admitted they

1 can't, or unless and until they can
2 show there is a third Will that was
3 intended to accomplish the same
4 effect, which doesn't exist, they have
5 no remedy under South Carolina law.
6 They cannot revive this Will. The
7 case of Davis versus Davis is dead on
8 point. And I have prepared a trial
9 brief, which I'll submit to The Court
10 and opposing counsel for The Court's
11 review. The Davis case says, "To
12 construe a Will in conformity with the
13 intention of the testator is much
14 favored by The Courts. But such
15 intention cannot prevail when in
16 conflict with some Statute or rule of
17 law. That case is at 180 -- or
18 208SC18237S.E.2nd531. And the quotes
19 at page five -- the beginning of the
20 case is 530. The quote's at page 531.
21 So, Your Honor, here's where we are.
22 There is no remedy to revive this
23 Will. The common law doctrine of
24 Dependent Relative Revocation does not
25 apply in the state of South Carolina.

1 There is no such rule in this state.
2 We have a Statute. The legislature
3 has spoken. Thank you.

4 THE COURT: Thank you, Mr. Patton.
5 Mr. Meetze.

6 MR. MEETZE: Your Honor, for over
7 200 years South Carolina courts has
8 recognized the doctrine of
9 Dependent Relative Revocation. I
10 would submit for The Court's review
11 the case of Charleston Library
12 Society where Citizens and Southern
13 National Bank 20S.E.2nd623 the
14 Court does a great job analyzing
15 the doctrine of Dependent Relative
16 Revocation.

17 THE COURT: What year was that
18 case, please?

19 MR. MEETZE: 1492, Your Honor.

20 THE COURT: Okay.

21 MR. MEETZE: And what The Court
22 says is "The phrase "Dependent
23 Relative Revocation," if the words
24 are analyzed technically and
25 accurately indicates the scope of

1 the rule. But perhaps a similar
2 descriptive phrase would be
3 Conditional Revocation." The rule
4 is I think correctly stated in the
5 following quotation from
6 68(c)(j)799. "While the intention
7 to revoke may be conditional if the
8 revocation is subject to a
9 condition which is not fulfilled,
10 the revocation does not take
11 effect. The doctrine is known as
12 that of Dependent Relative
13 Revocation is usually applied when
14 the testator cancels, or destroys,
15 or executes an instrument intending
16 to revoke a Will with a present
17 intention to make a new
18 testamentary disposition as a
19 substitute for the old, and the new
20 disposition is not made, or if made
21 fails of effect for some reason."
22 Well, that's precisely what we have
23 in this case here, Your Honor. The
24 law of testate is clear. And it's
25 also set forth in this case. But

1 we've looked for the intent of the
2 testator. We have two separate
3 documents that express the intent
4 of Ms. Gaines. And that is to
5 leave her property to Alex Head.
6 There is no one else in the Will
7 that is named as a devisee. If in
8 fact if Alex predeceases her
9 everything was to go to the Estate
10 of Alex Head. So we believe that
11 when read -- when these rules read
12 together clearly express the intent
13 of Ms. Gaines, and that is that her
14 property flow to Alex, not to
15 Statutory Heirs, but to the person
16 that she named in 2008, and the
17 person she named again in 2014 that
18 she wanted her property to pass to.
19 And that's what we're asking The
20 Court to do, to apply the law of
21 testate to honor the intent of the
22 testator, and that was for the
23 property to pass to Alex Head. And
24 if The Court finds that the devise
25 in the 2014 Will is invalid, to

1 apply the doctrine of Dependent
2 Relative Revocation to revive that
3 2008 Will, and honor the intentions
4 of Ms. Gaines. And that's to allow
5 her property to flow to Alex Head.

6 THE COURT: So if I understand
7 your argument correctly, Mr.
8 Meetze, what you are saying is a --
9 and if you've got an extra copy of
10 that case I wouldn't mind having
11 it. You're saying that that case
12 stands for the proposition that a
13 testator having executed a Will and
14 revoking all prior Wills, if shown
15 by the evidence, that that
16 revocation was contingent upon this
17 devisee named in the Will receiving
18 the property. And then it turns
19 out that that person for some
20 reason doesn't, then that Will then
21 becomes basically void, and the
22 prior Will takes over. Is that
23 your --

24 MR. MEETZE: Correct, Your Honor.

25 THE COURT: -- is that what I'm

1 understanding you to say?

2 MR. MEETZE: Correct.

3 THE COURT: Is that what this case
4 says?

5 MR. MEETZE: And I've highlighted
6 some of the language in that case
7 as expressed. And if a testator
8 executes a document and the state
9 can believe that it's going to be
10 valid, and then for some reason
11 it's not valid, then we look to the
12 properly executed document. And
13 then that's what I think we have in
14 this case. I think there was a
15 mistaken belief that if Ms. Head
16 had witnessed the document, that
17 property would still flow to Alex.
18 I don't believe Ms. Gaines thought
19 that if Ms. Head had executed that
20 Will that it would not flow to Alex
21 Head. And I think what she would
22 rather have -- her intentions would
23 be rather -- it would be more
24 clearly expressed in 2008 Will
25 where we don't have that issue,

1 where there is no issue with
2 regards to the devise going to
3 Alex. I think there was a mistake
4 regarding the execution of the
5 second Will, which invalid -- and
6 we've admitted that in our Answer
7 that Ms. Head is the father -- or
8 is the mother of Alex Head. The
9 Statute clearly says that she's an
10 interested witness. But we believe
11 that Ms. Gaines would rather have
12 her 2008 Will revived based on that
13 mistaken belief that her 2014 Will
14 was going to be valid.

15 THE COURT: Now, this Statute was
16 reenacted and amended in 2014, or
17 2013. This is a 1942 case. This
18 Statute speaks certainly more
19 recently than this case.

20 MR. MEETZE: And, Your Honor, it's
21 -- and my response is I could find
22 no case that overturned that case,
23 and that said, that South Carolina
24 no longer recognizes the doctrine
25 of Dependent Relative Revocation,

1 even after the Statute was
2 reenacted.

3 THE COURT: So in cases like yours
4 that come in front of me in which
5 the witnesses are considered under
6 the Statute incompetent because of
7 their interest, in each of those
8 cases they could present evidence,
9 "Yes, I know, but this is really
10 what she wanted," and then this
11 Statute would not govern those
12 cases. Is that what you're saying
13 that this Statute would really have
14 no effect? And it really is there
15 in cases in which there wasn't a
16 prior Will, and people can't come
17 in and show -- I'm just wondering
18 how -- the Legislature has spoken
19 and said in as recent as 2013 or
20 2014, they amended this to include
21 issue was just wife, and they have
22 done that to avoid having a
23 devisee, you know, basically
24 purging a conflict of interest, to
25 make sure that the execution of a

1 Will is done in such a way that
2 nobody there who might be called as
3 a witness stands to gain.

4 MR. MEETZE: Correct.

5 THE COURT: And that's an
6 important purpose, because we want
7 to be able to rely on these Wills.
8 This Will, of course, clearly has
9 an interested witness, 'cause she's
10 the spouse and the mother of people
11 who are going to take under this
12 Will.

13 MR. MEETZE: Yes, Your Honor.

14 THE COURT: I assume a lawyer
15 didn't do this Will?

16 MR. MEETZE: A page of -- the
17 front page of the Will says --

18 THE COURT: Or at least didn't
19 supervise the execution.

20 MR. MEETZE: Exactly --

21 THE COURT: Okay.

22 MR. MEETZE: -- Your Honor. Yeah.
23 And I would say that the front page
24 of the Will says it was prepared by
25 The Welch Law Firm on Pelham Road,

1 Suite 100.

2 THE COURT: Okay. I will take
3 time to read this case, just
4 because I find this is kind of
5 interesting. But, you know, I've
6 got a Statute directly on point.
7 And this is going to be -- have to
8 be mighty persuasive, you know, for
9 me to -- not to comply with the
10 Statute that directly speaks to
11 this case. But I will read it. I
12 want to read it to see if it
13 changes my mind any. Mr. Patton,
14 any final words?

15 MR. PATTON: Only to point out
16 that I'm looking at the effective
17 date for the amendment. January
18 the 1st, 2014 --

19 THE COURT: Okay.

20 MR. PATTON: -- was the effective
21 date.

22 THE COURT: Okay.

23 MR. PATTON: And I will also point
24 out that the decision of Davis
25 versus Davis was decided by the

1 Supreme Court four years after that
2 case. And I believe --

3 THE COURT: Have you got a copy of
4 that too?

5 MR. PATTON: I will give you this
6 trial brief, Your Honor, as well as
7 opposing counsel.

8 THE COURT: Okay.

9 MR. PATTON: And it's cited in the
10 trial brief.

11 THE COURT: Thank you.

12 MR. PATTON: And I will mention
13 that in that case the operation of
14 the Statute in question
15 specifically resulted in the
16 devisees being disallowed under the
17 Statute, and being told they could
18 only recover their intestate
19 shares. So they applied the
20 Statute under consideration at the
21 time, so.

22 THE COURT: Okay. Well, let me
23 read these cases. I'll let you
24 know something later today or in
25 the morning.

1 MR. MEETZE: Thank you, Your
2 Honor.

3 THE COURT: Mr. Meetze, I'm going
4 to have to make a decision now, of
5 course. But your client can
6 continue on as Personal
7 Representative. The Statute
8 doesn't require him to resign that
9 post. He can stay on. Depending
10 on which way he goes, he might want
11 to stay on, or he might not
12 depending on -- you know I've got
13 to study the cases. But that might
14 be something to discuss with him in
15 case he -- and he's entitled to
16 take a commission. All of those
17 things. The Statute doesn't
18 disqualify him from that. But in
19 any event I will study this, and
20 let you know something at least by
21 the morning. Okay?

22 MR. MEETZE: Thank you, Your
23 Honor.

24 THE COURT: All right. Thanks.

25 (HEARING ADJOURNED)
26

1 STATE OF SOUTH CAROLINA)
2) CERTIFICATE
3 COUNTY OF GREENVILLE)

4 I, DONNA B. FRIDDLE, a Notary Public, duly
5 commissioned and qualified in and for the
6 State of South Carolina, do hereby certify
7 that the Probate Court hearing was taken
8 before me on September 15, 2015; commencing
9 at 10:23 a.m., and concluding at 11:01 a.m.,
10 that said Witnesses were duly sworn; that
11 their testimonies were transcribed under my
12 direction; and that this transcript is a
13 true record of said proceedings. I further
14 certify that I am not of kin or counsel to
15 the parties in this case, am not in the
16 regular employ of counsel for any of said
17 parties, nor am I interested in the results
18 of this case.

19 IN WITNESS WHEREOF, I have hereunto set my
20 hand and affixed my official seal this
21 30th day of March, 2016.

22

23 Notary Public for South Carolina

24 My Commission Expires: 11/24/25

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

IN THE MATTER OF:

CASE NUMBER: 2014ES230

NELL C. DONNAN GAINES

(Decedent)

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

* _____
Petitioner(s)

vs.

* _____
Respondent(s)

FILED**AUG 26 2014****GREENVILLE COUNTY
PROBATE COURT****APPLICATION FOR INFORMAL**

(check any that apply)

- ☒ PROBATE OF WILL
☒ APPOINTMENT

***PETITION FOR FORMAL**

- ☐ TESTACY
☐ APPOINTMENT

I. ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.

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

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

If not a formal filing, please indicate N/A. N/A

2. Decedent Information:

Full Legal Name
(including all known names): Nell C. Donnan Gaines

Date of Birth: December 7, 1917

Date of Death: August 13, 2014

Age at date of death: 96

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

- ☒ Decedent was domiciled in this County at date of death:
Address: 221 Donnan Rd., Taylors, SC 29687; County: Greenville; State: South Carolina.
- ☐ Decedent was **not** domiciled in **South Carolina**, but property of Decedent was located in this County at date of death:
Address: _____; County: Greenville; State: South Carolina
- ☐ Decedent has a right to take legal action in this County because: _____

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

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

Full Legal Name (including all known names)	Year of Birth	Full Address	Relationship to Decedent
JOHNATHAN ALEXANDER HEAD	1991	601 N MAIN STREET COLUMBIA SC 29201	GREAT NEPHEW

☐ See attached for additional devisees (check if applicable))

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

Full Legal Name (including all known names)	Year of Birth	Full Address	Relationship to Decedent
JOHN ALLEN HEAD	1959	100 BERROW WAY TAYLORS SC 29687	NEPHEW
GERALD GAINES		PREDECEASED	2 ND HUSBAND
ROBERT DONNAN		PREDECEASED	1 ST HUSBAND
LUTHER CRAINE		PREDECEASED	FATHER
LILLIE CRAINE		PREDECEASED	MOTHER
NO CHILDREN BORN TO EITHER MARRIAGE		ALL SIBLINGS PREDECEASED	

☐ See attached for additional heirs (check if applicable)

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT A**Application for Informal Probate of Will and Appointment
Nell C. Donnan Gaines, Decedent****Explanation for response to Section II.5.**

A witness to decedent's will, Debra A. Head, is the wife of John A. Head. Mr. Head is named in decedent's will as primary Personal Representative of the estate and is a beneficiary to tangible personal property in a Memorandum to decedent's will.

10. Have more than ten (10) years passed since the Decedent's death?

☒ NO ☐ YES If yes, please state circumstances authorizing tardy probate on page 3.

11. The Decedent died with probate personal property having an approximate value of \$ 45,000.00 and/or probate real estate having an approximate value of \$ 150,000.00. (Note: A complete inventory of probate assets with fair market values to be filed after Personal Representative is appointed.)

12. After the exercise of reasonable diligence, are you aware of any unrevoked Will and/or Codicil(s), other than the one(s) attached hereto, relating to property in this State?

☒ NO ☐ YES If yes, please explain on page 3 and then proceed to Section II.

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

☐ No Will

1. Regarding the Decedent's Will:

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

2. The execution date of the Will was: May 7, 2014

Codicil(s): _____

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

☐ NO ☒ YES

If yes, does such a Memorandum exist?

☐ NO ☒ YES; if yes, attach hereto.

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

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

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

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

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

See Exhibit A attached hereto and incorporated herein.

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

1. If the Applicant/Petitioner is not the proposed Personal Representative, list name and address of the person you are proposing be appointed as the fiduciary:

2. Priority for appointment of the proposed Personal Representative (whether applicant or nominee) is:

- ☒ named as Primary Personal Representative in Will
☐ named as Alternate Personal Representative in Will
☐ nominee of Primary Personal Representative named in Will
☐ nominee of Alternate Personal Representative named in Will
☐ surviving spouse of Decedent who is devisee of Decedent or nominee of said spouse
☐ other devisee of Decedent (describe): _____ or nominee of said devisee
☐ surviving spouse of Decedent or nominee of said spouse
☐ other heir of Decedent (describe): _____ or nominee of said heir
☐ creditor (Forty-five (45) days after death must have passed) or nominee of creditor; written statement of claim, FORM 371ES, is attached
☐ other (describe): _____

3. List below the name(s) of any other person(s), if any, having an equal or higher priority of appointment than the proposed Personal Representative:

IV. ALL APPLICANTS/PETITIONERS MUST COMPLETE VERIFICATION.

VERIFICATION

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

SWORN to before me this 26th day
of AUGUST 20 14

Notary Public for South Carolina
My Commission Expires: 1/20/20

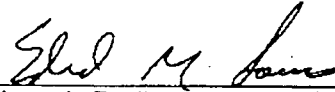
Signature of _____
Applicant/Petitioner:
Print Full Name: John A. Head
Address: 100 Berrow Way
Taylors, SC 29687
Telephone (Work) 864-288-8088
(Home): _____
(Cell): 864-483-4077
Email: _____
Relationship to Decedent/Estate: Nephew/proposed Personal Representative

ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a Will executed MAY 7, 2014

be informally ☒ GRANTED ☐ DENIED.

Executed this the 17th day of September, 2014.



- ☐ Debora A. Faulkner, Probate Court Judge
☒ Edward M. Sauvain, Associate Probate Court Judge
☐ Tracy Sharp Robertson, Deputy Probate Court Judge

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

ORDER OF INFORMAL APPOINTMENT

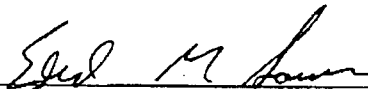
IT IS HEREBY ORDERED that the above Application for Appointment be granted upon the filing of an appropriate bond, if applicable, and upon the signing of the Qualification and Statement of Acceptance of appointment.

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

Notice to Creditors

- ☒ Required
☐ Not Required

Executed this the 17th day of September, 2014.

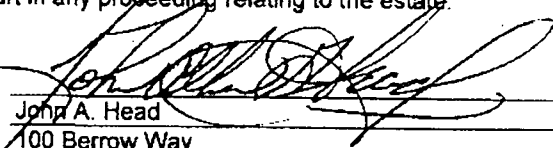


- ☐ Debora A. Faulkner, Probate Court Judge
☒ Edward M. Sauvain, Associate Probate Court Judge
☐ Tracy Sharp Robertson, Deputy Probate Court Judge

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

QUALIFICATION AND STATEMENT OF ACCEPTANCE

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

Signature: 

Print Name: John A. Head

Address: 100 Berrow Way

Taylors, SC 29687

Telephone (Work): 864-288-8088

(Home):

(Cell): 864-483-4077

Email:

Attorney:

Address:

Telephone:

Email:

STATE OF SOUTH CAROLINA)

IN THE PROBATE COURT

COUNTY OF GREENVILLE)

FIDUCIARY LETTERS

IN THE MATTER OF:)

NELL C DONNAN GAINES)

CASE NUMBER: 2014ES2301777

(Decedent))

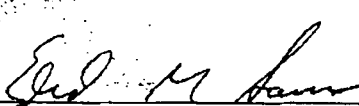
- ☒ **PERSONAL REPRESENTATIVE**
☐ **SUCCESSOR PERSONAL REPRESENTATIVE**
☐ **SPECIAL ADMINISTRATOR**

On the 17th day of September 2014, JOHN ALLEN HEAD was appointed and qualified as Fiduciary of the above matter by this Court, with all the authority granted to a fiduciary by law.

NOW, THEREFORE, LETTERS are issued as evidence of such appointment, qualification, and authority of the above fiduciary to do and to perform all acts, which may be authorized by law.

RESTRICTIONS:

Executed the 17th day of September 2014

- 
☐ Debora A. Faulkner, Probate Court Judge
☒ Edward M. Sauvain, Associate Probate Court Judge
☐ Tracy Sharp-Robertson, Deputy Probate Court Judge

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

IN THE MATTER OF:

NELL C DONNAN GAINES

(Decedent)

INFORMATION TO HEIRS AND DEVISEES

CASE NUMBER: 2014ES2301777

On September 17, 2014, Application/Petition was made to the *Probate Court of Greenville County at 1200 Greenville County Square, 301 University Ridge, Greenville, SC 29601* for the (check all that apply):

INFORMAL

☒ PROBATE OF WILL
☒ APPOINTMENT

FORMAL

☐ TESTACY
☐ APPOINTMENT

in the above matter.

(Complete if applicable) The Decedent's Will dated MAY 7, 2014, Codicil(s) dated NA, and Memorandum(s) dated NA, was/were presented.

Bond HAS ☐ HAS NOT ☒ been filed.

This notice is being sent to persons who have or may have some interest in this estate.

Please note: This form is required to be sent to all potential devisees and heirs of the Decedent. Receipt of this form does not mean that you will inherit from the Decedent. You may review the file in the Probate Court or see an attorney if you desire further information.

My application/petition was granted within the past thirty days on **September 17, 2014.**

Applicant/Personal Representative Name: JOHN ALLEN HEAD
Address: 100 BERROW WAY
TAYLORS SC 29687
Telephone (Work): (864) 288-8088
(Home): NA
(Cell): (864) 483-4077
Email: NA

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

PROOF OF DELIVERY

IN THE MATTER OF:

NELL C DONNAN GAINES

CASE NUMBER: 2014ES2301777

(Decedent)

On the 7 day of OCT, 2014, I mailed or delivered a copy of Information to Heirs and Devisees (FORM 305ES), the original of which is on file with the Probate Court, by the following method (check appropriate box):

- ☐ personal delivery
☒ certified mail
☐ commercial delivery

- ☐ ordinary first-class mail
☐ registered mail

to each of the following persons at the address shown:

NAME
JONATHAN ALEXANDER HEAD

ADDRESS
601 N MAIN STREET COLUMBIA SC 29201

SWORN to before me this 7 day of OCT, 2014

Signature:

Print Name: JOHN ALLEN HEAD

Address: 100 BERROW WAY

TAYLORS, SC 29687

Notary Public for South Carolina

Telephone (Work): (864) 288-8088

My commission expires: OCT. 5, 2015

(Home): NA

(Cell): (864) 483-4077

Email: NA

Relationship to Decedent/Estate: NEPHEW/PR

2011 AUG 26 PM 11:54

LAST WILL AND TESTAMENT

OF

14-2301777

NELL C. DONNAN GAINES

I, NELL C. DONNAN GAINES, a resident of and domiciled in the State of South Carolina, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by me.

FIRST: I direct that the expenses of my last illness and funeral, the expenses of the administration of my estate, and all estate, inheritance and similar taxes payable with respect to property included in my estate, whether or not passing under this will, and any interest or penalties thereon, shall be paid out of my residuary estate, without apportionment and with no right of reimbursement from any recipient of any such property.

SECOND: Funeral arrangements have been made with Thomas McAfee. Burial arrangements have been made at Woodlawn Cemetery where I am to be buried beside my first husband, Robert Donnan.

THIRD: I give all tangible personal property owned by me at the time of my death, including without limitation personal effects, clothing, jewelry, furniture, furnishings, household goods, automobiles and other vehicles, and all rights that I have under any related insurance policies, in accordance with a written memorandum which I intend to prepare and sign, disposing of such property or any part thereof, as permitted by South Carolina law. If I sign more than one such memorandum, the memorandum which bears a date later than that of any other such memorandum shall govern. In the absence of such a memorandum, or to the extent that such memorandum fails to effectively dispose of any such property for any reason, including the death of any beneficiary, I give such property or the portion not effectively disposed of as hereafter provided with respect to my residuary estate.

FOURTH: I give all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

(a) If JONATHAN ALEXANDER HEAD survives me, to JONATHAN ALEXANDER HEAD.

(b) If JONATHAN ALEXANDER HEAD does not survive me, my residuary estate shall be paid and distributed to any then living issue of JONATHAN ALEXANDER HEAD, by representation.

IMAGED
0202

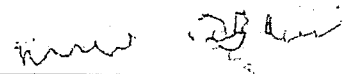
FIFTH: If any property of my estate vests in absolute ownership in a minor or incompetent, my personal representative, at any time and without court authorization, may: distribute the whole or any part of such property to the beneficiary; or use the whole or any part for the health, education, maintenance and support of the beneficiary; or distribute the whole or any part to a guardian, committee or other legal representative of the beneficiary, or to a custodian for the beneficiary under any gifts to minors or transfers to minors act, or to the person or persons with whom the beneficiary resides. Evidence of any such distribution or the receipt therefor executed by the person to whom the distribution is made shall be a full discharge of my personal representative from any liability with respect thereto, even though my personal representative may be such person. If such beneficiary is a minor, my personal representative may defer the distribution of the whole or any part of such property until the beneficiary attains the age of twenty-one (21) years, and may hold the same as a separate fund for the beneficiary with all of the powers described in Article SEVENTH hereof. If the beneficiary dies before attaining said age, any balance shall be paid and distributed to the estate of the beneficiary.

SIXTH: I appoint JOHN HEAD to be my personal representative. If JOHN HEAD shall fail to qualify for any reason as my personal representative, or having qualified shall die, resign or cease to act for any reason as my personal representative, I appoint DEBBIE HEAD as my personal representative. I direct that no personal representative shall be required to file or furnish any bond, surety or other security in any jurisdiction.

SEVENTH: I grant to my personal representative all powers conferred on personal representatives and executors under the South Carolina Probate Code, as amended, or any successor thereto, and all powers conferred upon personal representatives and executors wherever my personal representative may act. I also grant to my personal representative power to retain, sell at public or private sale, exchange, grant options on, invest and reinvest, and otherwise deal with any kind of property, real or personal, for cash or on credit; to borrow money and encumber or pledge any property to secure loans; to exercise all powers of an absolute owner of property; to compromise and release claims with or without consideration; and to employ attorneys, accountants and other persons for services or advice. The term "personal representative" wherever used herein shall mean the personal representatives, executors, executor, executrix or administrator in office from time to time.

EIGHTH: If any beneficiary under this will and I die in a common accident or under circumstances in which it is difficult or impractical to determine who survived the other, such beneficiary shall be deemed to have predeceased me.

IN WITNESS WHEREOF, I, NELL C. DONNAN GAINES, sign, seal, publish and declare this instrument as my last will and testament this 7 day of May, 2014.



 NELL C. DONNAN GAINES

14-2301777

The foregoing instrument was signed, sealed, published and declared by NELL C. DONNAN GAINES, the above-named Testatrix, to be her last will and testament in our presence, all being present at the same time, and we, at her request and in her presence and in the presence of each other, have subscribed our names as witnesses on the date above written.

x Debra A. Head
Witness #1

residing at

100 Berrow Way
Taylor, SC 29687

x Debbie Boles
Witness #2/Notary
2017 EXP

residing at

214 Duffell Dr
Greenville, SC 29607

14-2301777

AFFIDAVIT

STATE OF SOUTH CAROLINA, COUNTY OF GREENVILLE

We, NELL C. DONNAN GAINES and Debbie Bales, the Testatrix and the witnesses respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testatrix, NELL C. DONNAN GAINES, signed and executed said instrument as her last will and testament in the presence and hearing of the witnesses, and that she stated that said instrument was her last will and testament, and that she had signed willingly; and that she executed it as her free and voluntary act and deed for the purposes therein expressed, and that each of the witnesses at the request of the Testatrix, in the presence and hearing of the Testatrix and each other, signed the will as witness, and that to the best of his or her knowledge the Testatrix was at the time at least eighteen years of age, of sound mind and under no constraint, duress, fraud or undue influence.

Nell C. Gaines
NELL C. DONNAN GAINES
Testatrix

Debbie Bales
Witness #1

Debbie Bales 2017
Witness #2/Notary

Subscribed, sworn to and acknowledged before me by the said NELL C. DONNAN GAINES, Testatrix, and subscribed and sworn to before me by the said Debbie Bales and Debbie Bales as witnesses, this 7 day of May, 2014.

Debbie Bales
Notary Public
My commission expires on 2014

IMAGED

0205

MB

14-2301777

PERSONAL PROPERTY MEMORANDUM

THE SEPARATE WRITING REGARDING TANGIBLE PERSONAL PROPERTY
REFERRED TO IN MY LAST WILL AND TESTAMENT

I, NELL C. DONNAN GAINES, hereby provide that the following items of
tangible personal property shall be given to the beneficiaries identified below upon my death:

Items of Property

Names and Addresses of Beneficiaries

Anything that I
inherit from the Estate
of Herman Tony Burrell
(monies, real property or
personal property)

Split 50/50
Between:
John Head and
Alex Head

Dated: May 7, 2014

Nell C. Donnan Gaines

NELL C. DONNAN GAINES

In the presence of:

Delma A. Head
Witness #1

residing at

100 Berrard Way

Jaylco, SC 29687

AC

IMAGED

0206

14-2301777

Debbie Baker 2017 EUP
Witness #2/Notary residing at

214 Duval Drive

Greenville, SC 29607

PLEASE NOTE: You should clearly describe each item of personal property. You may not use this instrument to dispose of property used in a trade or business or cash, evidence of debt, documents of title, securities or other intangible personal property. To avoid being lost or misplaced, this instrument should be kept with the original of your Will.

IMAGED

0207

126

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, NELL C. DONNAN GAINES, a resident and domiciliary of the State and County aforesaid, 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.

Unless otherwise expressly provided in this Will to the contrary, I direct that all my just debts, secured and unsecured, be paid as soon as practicable after my death.

ITEM II.

(1) I bequeath to JOHNATHAN ALEXANDER HEAD ("ALEX") my engagement ring, princess ring and diamond bracelet. I devise to ALEX all interests owned by me in my real property and residence located at 221 Donnan Road, Taylors, South Carolina. If ALEX predeceases me, this bequest and devise shall lapse.

(2) I bequeath to TONY BURRELL ~~my 1999 Cadillac Coupe DeVille, if he survives me.~~

If TONY BURRELL predeceases me, this bequest shall lapse.

(3) I bequeath all my personal and household effects, including, but not limited to, furniture, appliances, furnishings, objects of art, silver, silverware, china, crystal, books, photographs, jewelry and clothing not otherwise distributed in accordance with paragraphs (1), (2) and (4) of this Item, to ALEX, if he survives me.

(4) On a separate memorandum or letter which I shall either attach to this Will or keep with my personal papers, I have noted or may subsequently note my direction that certain individuals receive certain described items of my personal property. I hereby direct that the items described in said memorandum or letter be distributed as designated in said memorandum or letter.

ITEM III.

(1) I give, devise, bequeath and convey all the rest, residue and remainder of my property of every kind and description, including lapsed legacies and devises, wherever situated and whether acquired before or after the execution of this Will, if any, to ALEX, if he survives me.

(2) Whenever my Personal Representative is directed under any provision of paragraph (1) of Item II or this Item to distribute any part of my estate to ALEX, if he has not attained the age of twenty-one years, such property shall not be distributed directly to ALEX at such time. Rather, my Personal Representative shall transfer such share to JOHN and DEBBIE HEAD or the one of them remaining, to act as custodians for ALEX under the South Carolina gifts to minors act.

ITEM IV.

(1) I appoint JOHN and DEBBIE HEAD as Co-Personal Representatives of this Will. If for any reason either of them is unable or unwilling to serve or continue serving as a Co-Personal Representative of this Will, the one of them remaining shall serve as sole Personal Representative of this Will. No Personal Representative named or described herein shall be required to post a bond.

(2) I hereby grant unto my Personal Representative and Trustee herein named, and any successor Personal Representative or Trustee, in respect of any and all of my estate or any trust, the powers conferred upon fiduciaries by South Carolina law and, in addition, the power to sell upon such terms and conditions as my fiduciary in my fiduciary's sole discretion may determine, including

AC 8-2-8

but not limited to the power to sell at public or private sale with or without advertisement for cash or on credit.

ITEM V.

(1) Unless otherwise provided herein, the term "Personal Representative" shall include all persons and/or institutions, whether singular or plural, masculine or feminine, then acting as Co-Personal Representatives or as sole Personal Representative.. Unless otherwise provided herein, the term "Trustee" shall include all persons and/or institutions, whether singular or plural, masculine or feminine, then acting as Co-Trustees or as sole Trustee.

(2) Unless otherwise expressly provided herein to the contrary, all references to an "Item" or to "Items" shall refer to Item(s) of this Will.

I, NELL C. DONNAN GAINES, the Testatrix, sign my name to this instrument this 9th day of Jan, 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.

Nell C. D. Gaines
NELL C. DONNAN GAINES, Testatrix

We, Lesley R. Moore and Corajane Melton, the 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 Testatrix signs and executes this instrument as her Last Will and Testament and that she signs it willingly (or willingly directs another to sign for her), and that each of us, in the presence and hearing of the Testatrix, hereby signs this Will as witness to the Testatrix's signing, and that to the best of our knowledge the Testatrix is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Lesley R. Moore
Witness

Corajane J Melton
Witness

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

Subscribed, sworn to, and acknowledged before me by NELL C. DONNAN GAINES, the
Testatrix, and subscribed and sworn to before me by Lesley R Moore and
Corajane J Melton, witnesses, this 9th day of JAN, 2008.

Lesley R Moore (SEAL)
Notary Public for South Carolina
My Commission Expires: 1-19-09

Tony Burrell
Tony Burrell

Taylors

Herman Tony Burrell, 60, passed away March 26, 2014. He was a son of the late Henry Herman Burrell and Elizabeth Simpson Burrell. Mr. Burrell was a 1971 graduate of Wade Hampton High School, and worked at Bradshaw Cadillac for many years. He had a deep love for muscle cars and motorcycles, having served as president of the Carolina Corvette Club. Services will be Tues., Apr. 8 at Westville Funerals. Visitation will be from 2 - 3 PM, with the funeral at 3 PM. Interment will follow at Woodlawn Memorial Park.

Published in The Greenville News on Apr. 6, 2014

0212

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF GREENVILLE

IN THE MATTER OF:
HERMAN TONY BURRELL

CASE NUMBER: 2014ES2300666

(Decedent)

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

APR 03 2014

GREENVILLE COUNTY
PROBATE COURT

APPLICATION FOR INFORMAL

(check any that apply)

☒ PROBATE OF WILL
☒ APPOINTMENT

*PETITION FOR FORMAL

☐ TESTACY
☐ APPOINTMENT

I. ALL APPLICANTS/PETITIONERS MUST COMPLETE THIS SECTION.

1. If this is a formal filing, please explain below or attach pleadings pursuant to SC Rules of Civil Procedure.

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

If not a formal filing, please indicate N/A.

N/A

2. Decedent Information:

Full Legal Name HERMAN TONY BURRELL
(including all known names):

Date of Birth: 4/18/1953

Date of Death: 3/28/2014

Age at date of death: 60

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

☒ Decedent was domiciled in this County at date of death.

Address: 225 Donnan Rd Taylors, SC 29687; County: Greenville; State: South Carolina.

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

Address: _____, County: Greenville; State: South Carolina

☐ Decedent has a right to take legal action in this County because: _____If the above address is the address of a nursing home, a prison, or other residential facility, please give the last address
of the Decedent prior to entering the facility: _____

FORM #001ES (1/2014)

62-2-404, 62-3-102, 62-3-203, 62-3-301, 62-3-302, 62-3-303, 62-3-306, 62-3-311, 62-3-401, 62-3-402,
62-3-404, 62-3-409, 62-3-414, 62-3-501, 62-3-502, 62-3-704, 62-3-804, 44-23-103C, 44-23-112D

Page 1 of 1

0213

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

Full Legal Name (including all known names)	Year of Birth	Full Address	Relationship to Decedent
Nell Gaines	1917	221 Donnan Road, Taylors, SC 29687	sister
James Cassell aka James Castle	1951	150 Keowee Lane, Pickens, SC 29671	friend
G.S. Club of Carolinas		228 Dunlap Gate Rd., Statesville, NC 28625	Organization/club
Elizabeth Burrell	predeceased		mother

(use additional sheet if necessary)

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

Full Legal Name (including all known names)	Year of Birth	Full Address	Relationship to Decedent

(use additional sheet if necessary)

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

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

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

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

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

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

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

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

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

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

9. Have you received or are you aware of any Demands for Notice (FORM 114ES) of any probate or appointment proceeding concerning the Decedent that may have been filed in this state or elsewhere?

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

10. Have more than ten (10) years passed since the Decedent's death?
- ☒ NO ☐ YES If yes, please state circumstances authorizing tardy probate on page 3.
11. The Decedent died with probate personal property having an approximate value of \$50,000.00 and/or probate real estate having an approximate value of \$124,380.00. (Note: A complete inventory of probate assets with fair market values to be filed after Personal Representative is appointed.)
12. After the exercise of reasonable diligence, are you aware of any unrevoked Will and/or Codicil(s), other than the one(s) attached hereto, relating to property in this State?
- ☒ NO ☐ YES If yes, please explain on page 3 and then proceed to Section II.

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

1. Regarding the Decedent's Will:

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

2. The execution date of the Will was: 12-4-2003
Codicil(s): N/A

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

☒ NO ☐ YES If yes, attach hereto.

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

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

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

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

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

14 - 2300666

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

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

IV. ALL APPLICANTS/PETITIONERS MUST COMPLETE VERIFICATION.

VERIFICATION

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

SWORN before me this 20 day
April 20 14
K. S. G.
 Notary Public for South Carolina
 My Commission Expires: 5-30-14

Signature of Applicant/Petitioner: [Signature]
 Print Full Name: Richard L. Patton
 Address: 819 E. North St
Greenville SC 29601
 Telephone (work): 864-233-9797
 (Home): n/a
 (Cell): n/a
 Email: RPattersonlawfirm@hotmail.com
 Relationship to Decedent/Estate: Attorney; PR named in the Will

0216

ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a Will executed 12-4-2003

to informally ☒ GRANTED ☐ DENIED

Executed this 3rd day of April, 2014.



Tracy Sharp-Robertson, Deputy Probate Court Judge

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

ORDER OF INFORMAL APPOINTMENT

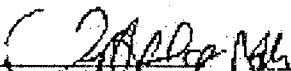
IT IS HEREBY ORDERED that the above Application for Appointment be granted upon the filing of an appropriate bond, if applicable, and upon the signing of the Qualification and Statement of Acceptance of appointment

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

Notice to Creditors

- ☒ Required
☐ Not Required

Executed this 3rd day of April, 2014.



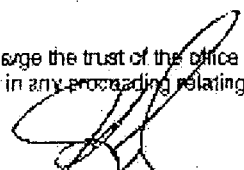
Tracy Sharp-Robertson, Deputy Probate Court Judge

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

14 - 2300666

QUALIFICATION AND STATEMENT OF ACCEPTANCE

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

Signature: 
Print Full Name: Raymond L. Patton
Address: 819 E. North St
Greenville SC 29601
Telephone (Work): 864-233-9797
(Home): n/a
(Cell): n/a
Email: pattonlawfirm@hotmail.com

Attorney: Richard L. Patton
Address: 819 E. North St
Greenville SC 29601
Telephone: 864-233-9797
Email: PattonLawFirm@Hotmail.com

0218

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY CIRCUIT COURT AND PROBATE COURT

Letitia H. Verdin, Circuit Court Judge
Debora A. Faulkner, Probate Judge

Case No. 2016-CP-23-02045

Wilson Garner, Jr., et. al.

Appellants,

v.

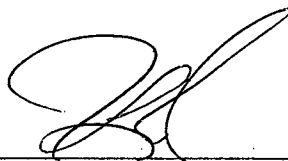
The Estate of Nell Gaines, et. al.,

Respondents.

RULE 210(g) CERTIFICATION

Appellants' counsel hereby certifies that the Record on Appeal contains all material proposed to be included by the parties hereto and not any other material.

THIS 4 day of April, 2017.



Richard L. Patton
Patton Law Firm
819 East North Street
Greenville, South Carolina 29601
864-233-9797
864-233-9790 (fax)
Attorney for Appellants

RECEIVED

MAY 08 2017

SC Court of Appeals