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

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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.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This matter comes before the Court of Appeals pursuant to SCACR 201 on appeal from the Greenville County Probate Court. This appeal follows an interim appeal to the Greenville County Circuit Court made pursuant to S.C. Code Ann. § 62-1-308. Notice of Appeal before this court was duly submitted in this matter on September 22, 2016 and received for filing September 23, 2016. (R. p. 60). The Notice of Appeal followed the Circuit Court's Order of September 14, 2016, which was received by Appellants' counsel electronically on the same day. The Circuit Court's Order was essentially a pro forma Order *affirming* the decision of the Probate Court below without any additional legal analysis. (R. p. 2). The appeal to the Circuit Court followed an Order dated March 18, 2016 denying Appellants' Motion for Reconsideration in the Probate Court. That Motion filed November 6, 2015 petitioned the Probate Court below for a reconsideration of its earlier Order dated October 26, 2015, ruling in favor of the Respondents. [1]

The facts of this case are not in dispute. What is at issue is the application of the law to those facts. Because the legal issues are complex, this Statement of the Case will be fairly comprehensive. Nell C. Donnan Gaines passed away on August 13, 2014 at the age of 96. She was a lifelong resident of Greenville

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[1] Appellants urged the Probate Court to reconsider its ruling in light of the clear mandate of S.C. Code Ann. § 62-2-504(a) dealing with interested witnesses in the execution of Wills. *See,* Motion for Reconsideration. (R. p. 43). *See also,* transcript of hearing on the Motion. (R. pp. 86-148). The same argument was presented to the Circuit Court on interim appeal. *See,* transcript of hearing before Circuit Court. (R. pp. 62-85).

County. She had no siblings and although she married twice, she had no children. Respondent John Head is the nephew of her second husband, Gerald Gaines. Mr. Head is only related to the decedent by marriage. John and his wife Debra Head are the natural parents of Alex Head.

Four and a half months prior to Ms. Gaines' death on August 13, 2014, Herman Tony Burrell passed away on March 26, 2014, leaving the principle portion of his estate to Nell Gaines. Ms. Gaines had been a lifelong friend of the Burrell family. The Burrell estate was pending in Greenville County Probate Court at the time of Ms. Gaines death. (R. p. 213).

Following the death of Nell Gaines, Respondents filed Ms. Gaines' Last Will & Testament dated May 7, 2014. That Will was drawn up 42 days after Tony Burrell passed away. (R. p. 202). The 2014 Will was duly admitted to informal probate in Greenville County, the same having been filed by Respondents on August 26, 2014. (R. p. 192). That Will made John Head and Alex Head the primary devisees. [2] (R. pp. 202-06). The 2014 Will contains the usual revocation clause for all prior Wills; however, it is witnessed by the wife and mother of the primary devisees, Debra Head.

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[2] The 2014 Will disposed of the testator's estate under the "ITEM THIRD" paragraph which stated any devise thereunder would be in accordance with a written memorandum prepared and signed by the testator. Such a memorandum appears at page 5 of the 2014 Will indicating that the primary devisees are John Head and Alex Head, and not just Alex Head as indicated in the Court's Order of October 26, 2015 (R. pp. 8-9). The only way in which Alex Head becomes the sole devisee is pursuant to the residuary clause found at the FOURTH paragraph of the 2014 Will. Because the "Personal Property Memorandum" (R. p. 206) includes a disposition of real property from the Estate of Herman Tony Burrell, the devise split 50/50 between John Head and Alex Head fails in part because of the application of S.C. Code Ann. § 62-2-512 (1986). Only tangible personal property can be devised by a personal property memorandum under that statute. That did not, however, invalidate the devise of tangible personal property coming to John & Alex Head from the Estate of Herman Tony Burrell.

Because of the family relationships in question, it is undisputed that Debra Head is an interested witness under the probate laws of this state. Pursuant to S.C. Code Ann. § 62-2-504(a), there must be at least two disinterested subscribing witnesses in order for any interested witness to take their devise under the Will. In the case at bar there is only one such disinterested witness. Again, these factual allegations are not in dispute. But it is here our case takes a turn.

In the enactment of the above-referenced statute, our legislature not only set forth certain statutory requirements for subscribing witnesses to testamentary dispositions in this state, they set forth certain consequences for the violation of those requirements. S.C. Code Ann. § 62-2-504(a) provides in pertinent part that:

> If there are not two disinterested witnesses to a will in addition to an interested witness, then the devise is null and void to the extent the value of the excess property, estate, or interest so devised over the value of the property, estate or interest to which the witness, the witness's spouse, or the witness's issue would be entitled upon failure to establish the will. The voided portion of the devise shall pass by intestacy in accordance with S.C. Code Ann. § 62-2-101 et seq., provided the share of the interested witness, the witness's spouse, or the witness's issue shall not increase due to the devise passing by intestacy. (Emphasis added).

Appellants herein are the intestate heirs of Nell Gaines, related to her by blood and not marriage. On August 7, 2015, they filed an Amended Petition to Set Aside the Devise (R. p. 24) to the interested witness' son, Alex Head, all pursuant to S.C. Code Ann. § 62-2-504. Respondents Answered that Petition and Counterclaimed (R. p. 33) for the admission to probate of an earlier will dated January 9, 2008, under

the common law theory of "Dependent Relative Revocation." Up until that point, the only Will ever offered to probate for more than a year was the 2014 Will, which Respondents themselves submitted. Again, Appellants below only sought to set aside the devise to the interested devisee, not the entire 2014 Will. Respondents however, on their own initiative, sought to set aside the entirety of the 2014 Will in favor of the 2008 Will, under the common law theory of DRR.

Appellants consistently argued below that the 2014 Will remained a validly executed Will and should not be set aside. (*See,* Transcript of September 15, 2015 hearing at p. 29, (R. p. 177); *See also* Transcript of January 12, 2016 hearing at p. 40, (R. p. 125). *See also,* Transcript of August 30, 2016 hearing before the Circuit Court, at p. 9, (R. p. 70). Indeed, the language of S.C. Code Ann. § 62-2-504(a) specifically provides that "A subscribing witness to any will is not incompetent to attest or prove the same by reason of any devise therein in favor of the witness, the witness's spouse, or the witness's issue." (Emphasis added). According to the express language of S.C. Code Ann. § 62-2-504(a), the 2014 Will in question remains valid as a duly-witnessed testamentary disposition. The statute even permits the Personal Representative (herein John Head) to continue to serve in that capacity, being entitled to collect the statutory fee. Only the devise to an interested devisee is negatively affected.

In order to avoid the harsh impact of the statute, however, Respondents sought to set aside the 2014 Will in favor of the 2008 Will, which did not suffer from the same deficiency. The Probate Court below agreed with the Respondents' assertion of

DRR and admitted the 2008 Will into probate. (R. p. 13). The 2008 Will left the entirety of the estate to Alex Head apart from any residuary bequests. (R. pp. 208-11). It appears the only reason the testator redrew her 2008 Will in 2014 was to incorporate certain benefits and devises to John Head. In the 2014 Will, John Head is the sole Personal Representative. *See,* "ITEM SIXTH" in the 2014 Will, (R. p. 203). In the 2008 Will he is not. *See,* "ITEM IV" in the 2008 Will, (R. p. 209). In the 2014 Will, there was an attempt to include John Head in the disposition of the Gaines estate. *See,* 2014 Will at p. 5 "Personal Property Memorandum," (R. p. 206). In the 2008 Will there is not. (R. pp. 208-11). Curiously, the Probate Court found the two Wills to be essentially the same for purposes of DRR. (R. p. 12).

The Probate Court below emphasized in its Order of October 26, 2015 that "the intention of the testator is the law of wills." (R. p. 12). But what happens when the testator's intentions collide with the legislature's intentions? Can DRR avoid the intentions of the legislature? After two hearings before the Probate Court and one before the Circuit Court on appeal, the case now boils down to one single issue, which Appellants now bring before this court.

ARGUMENT

Did the lower court err in applying the common law doctrine of Dependent Relative Revocation to the facts of this case in light of S.C. Code Ann. § 62-2-504(a) (1986)?

It appears that the advent of the theory known as "Dependent Relative Revocation" [*hereinafter,* "DRR"] arose in English jurisprudence in the 18th century. In the case of *Onions v. Tyrer*, 1 P. Wms. 345 (1716) [3], we find a similar set of facts as is presented to the court now. The subscribing witnesses did not properly attest to the Will. A copy of the prior Will presumed to be revoked was offered in place of the deficiently attested Will. Sitting in equity, the court found that the testator would have preferred testacy over intestacy and held that the revocation of the prior will was conditional. From that case arose the maxim: "the intent of the testator is the law of wills." What's different with our case is that in *Onions*, there was no statutory consequence for failing to meet the law's requirements for the proper witnessing of a Will. By enacting S.C. Code Ann. § 62-2-504, our legislature, however, went well beyond this common law rule and incorporated a statutory consequence with directions for failing to have the requisite number of disinterested witnesses. Because the legislature has spoken, Appellants respectfully contend that those consequences and directions cannot be ignored or avoided.

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[3] The *Onions* case is thoroughly reviewed in the case of *Charleston Library v. Citizens & Southern Nat. Bank,* 200 S.C. 96, ____, 20 S.E.2d 623, 629 (SC 1942).

In *Onions*, the court reinstated the prior Will. They did so holding that the revocation in the deficient Will was to be considered a "conditional revocation," which the testator would have never attempted had he correctly understood the law with respect to the proper attestation of a Will. The court in *Onions* received the prior Will in place of the deficiently-witnessed Will, holding that the revocation in the later Will was conditioned upon the revocation in the later Will being legally valid.

South Carolina first adopted the English common law theory of DRR in the case of *Pringle v. McPherson's Executors*, 2 Brev. 279, Am. Dec. 713 (S.C. 1809), setting forth again that "the intention of the testator is the law of wills." A review of the case law in South Carolina reveals that the last time the theory of DRR has been fully considered was the case of *Charleston Library v. Citizens & Southern Nat. Bank*, 200 S.C. 96, 20 S.E.2d 623 (S.C. 1942). That S.C. Supreme Court case has not been overturned since 1942, which appears to indicate that the common law theory of DRR is alive and well in South Carolina. [4]

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[4] Appellants initially challenged the viability of DRR under South Carolina law based on the language of S.C. Code Ann. § 62-2-508 (1986) dealing with the manner in which a revoked Will may be revived. The Probate Court below found that revival of a revoked Will and DRR were two distinct legal concepts that could harmoniously coexist. *See* Order dated October 26, 2015 at p. 5, (R. p. 11). Judge Faulkner held that DRR is concerned with whether the prior Will was ever properly or effectively revoked. Under DRR, the Probate Court below felt that the prior Will wasn't being "revived" such as the legislature contemplated by enacting S.C. Code Ann. § 62-2-508 & S.C. Code Ann. § 62-2-506. Judge Faulkner felt that DRR, if appropriate, establishes that the prior Will was never "put to death." Appellants have abandoned their earlier challenge to the viability of DRR in favor of their argument that DRR, even if viable, cannot avoid the statutory consequences and directives as mandated by S.C. Code Ann. § 62-2-504(a). That was the basis for the Motion to Reconsider, but for some reason the Probate Court never addressed that argument.

In the same year as the decision in *Charleston Library*, the South Carolina legislature enacted its first comprehensive probate code. Section 8919 S.C. Code of Laws 1942 was the predecessor statute to S.C. Code Ann. § 62-2-504. [5] Although the wording has been somewhat changed, the statute has always (and did then) have a penalty with directives for failing to meet the requirements for subscribing witnesses. That statutory penalty has always remained the same, i.e., that the devise to the interested devisee shall be null and void and that devise shall pass by intestacy. The 1976 revision of the code did not change that. In 1986, the SC legislature revised and amended the entire SC Probate Code again. That revision also did not affect the penalty provisions of S.C. Code Ann. § 62-2-504(a). At the time of the execution of both Gaines Wills, therefore, S.C. Code Ann. § 62-2-504(a) remained unchanged in that regard. The issue now before the court is whether the clearly delineated penalties and directives of S.C. Code Ann. § 62-2-504(a) can be avoided by the application of the common law rule of Dependent Relative Revocation.

One of the great ironies of this case has been that the Probate Court's application of the common law doctrine of Dependent Relative Revocation (hereinafter "DRR") to the facts of this case has actually resulted in defeating the intentions of the testator in a significant way. On May 7, 2014, barely three months prior to her death at the age of 96, the testator executed a new Will and revoked her prior Will dated January

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[5] One of the unanswered questions in this case was whether the decision in *Charleston Library* came before or after the effective date of the 1942 probate code.

9, 2008.[6] (R. p. 202). Under her new estate plan, the testator added John Head as an additional beneficiary of her estate. (R. p. 206). John Head was not a beneficiary at all under the 2008 Will. (R. pp. 208-11).

Before DRR may even be considered, it must first be established that the provisions of the later Will affected by the interested witness are not materially different from the prior Will. Early on in the application of DRR, American courts have held that a proper application of the doctrine depends upon a sufficient showing that the two Wills are essentially the same. 57 Am. Jur., *Wills,* §§ 514, 515 (1936); *See, e.g., Stewart v. Johnson,* 142 Fla. 425, 194 So. 869 (1940). The two Wills before the court, however are materially different. One has John Head as a devisee sharing with his son. In the other, he is not a devisee at all.

Because of the Probate Court's ruling below, John Head is now removed altogether from the testator's estate plan. He has no entitlement whatsoever under the 2008 Will. He will lose his gift to any and all personal property coming into the testator's estate from the Burrell estate under the separate "Personal Property Memorandum" the Respondents filed with 2014 Will (R. p. 206). There is no argument in this case that it was the testator's intent that John Head share the gift outlined in that "Personal

[6] On May 7, 2014, the testator also changed the designation of her Personal Representative to John Head acting alone in that capacity. The 2008 Will had Mr. Head serving as Co-Personal Representative with his wife, Debra Head. (R. p. 209).

Property Memorandum" [7] (R. p. 206). The personal property of the Burrell estate coming into the Gaines estate included three automobiles, two motorcycles, a garage full of automotive tools and equipment, and a house full of furnishings. While it is apparent from her ruling that the Probate Judge found that John Head would prefer the disposition of the 2008 Will to the claims of the Appellants, his intentions are not and should not be controlling. They are not even relevant to a determination of this case. As a general rule of probate law, the law of Wills is the intention of the testator, not the beneficiaries. Therein lies the irony of this case. In order to effectuate the intention of the testator in one regard, the Probate Court resorted to defeating the intentions of the testator in another. The lower court below erred in applying the doctrine of DRR in reaching such a result. Appellants respectfully contend that DRR should not have been applied at all. But without question, the Probate Court's ruling below is squarely premised on the theory of DRR as found in the *Charleston Library* case. [8] (R. pp. 10-12).

Although the *Charleston Library* case reviews the historical development of DRR, a more in-depth history of the evolution of DRR and interested witness statutes

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[7] Under S.C. Code Ann. § 62-2-512 (1986), a "Separate writing identifying bequest of tangible property" is recognized as a valid disposition of estate property even though separately drawn from the Will, and regardless of whether it is drawn before or after the Will. According to that statute, such a writing does not have to be witnessed, but rather only signed by the testator. So then, the bequest therein to Alex Head and John Head would not be impacted by his wife's signature on that separate writing. Her signature as a witness thereupon was wholly unnecessary and superfluous. It is of no consequence.

[8] One of the unfortunate circumstances of this case is that the appellate courts of this state have not further expounded upon the doctrine of DRR in a subsequent case since the *Charleston Library* case was decided in 1942. Whatever ruling this court makes will be a welcome and much needed addition to the law.

may be helpful. It was because of the Statute of Frauds that English courts held a Will was completely invalid if one or more witnesses were beneficially interested under the Will. Even a small legacy to a witness, perhaps a sentimental gift to a faithful servant who happened to be called upon to witness the Will, would invalidate the entire instrument. To avoid that harsh rule, the court in *Onions* found that the testator would have preferred testacy over intestacy, and concluded that the revocation of the former Will was conditioned upon effectuating the testator's intentions in the new Will. That case gave birth to the doctrine of DRR as a rule founded in equity to avoid the harsh results of intestacy, at least when there is a pre-existing Will.

It is noteworthy that thirty six years after *Onions,* the English Parliament in the year 1752 enacted 25 George 2, c. 6 making any such interested witness competent to attest to the execution of the Will, although continuing to invalidate any bequest to him. For a succinct history of how English law developed, *see, Estate of Lubbe v. Kamoraski,* 142 So. 2d 130, 133 (Fla. 2d DCA 1962). As spelled out in *Estate of Lubbe,* a testator's Will will no longer be rendered invalid in Florida because of an interested witness under the Statute of Frauds, all as a matter of legislative enactment. 142 So. 2d at 133-34. Although Florida law is only persuasive authority, it does provide some clarification of the issues at hand. Their interested witness statute is virtually identical to ours, at least in principle. Their courts have concluded that such statutes save the Will from being declared invalid in circumstances where interested witnesses are involved. 142 So. 2d at 134-35. Such statutes essentially incorporate the equitable rule laid down in 25 George 2, c. 6.

Going back to Parliament's enactment of its statute in 1752, that was how the common law stood in England on July 4, 1776, which thereafter, by adoption under our state's Constitution, became the common law of South Carolina. *See,* S.C. Code Ann. § 14-1-50 (1976). Many years later, our legislature in S.C. Code of Laws of 1942, Section 8919, actually codified and incorporated the rule laid down in England's 25 George II, c. 6. Our legislature has since expanded upon that codification in S.C. Code Ann. § 62-2-504(a) (1986), including additional provisions that go well beyond the common law rule: [9]

> A subscribing witness to any will is not incompetent to attest or prove the same by reason of any devise therein in favor of the witness, the witness's spouse, or the witness's issue. If there are two disinterested witnesses to a will in addition to the interested witness, then the devise is valid and effectual, if otherwise effective. If there are not two disinterested witnesses to a will in addition to an interested witness, then the devise is null and void to the extent of the value of the excess property, estate, or interest so devised over the value of the property, estate or interest to which the witness, the witness's spouse, or the witness's issue would be entitled upon the failure to establish the will. The voided portion of the devise shall pass by intestacy in accordance with Section 62-2-101 et seq., provided the share of the interested witness, the witness's spouse, or the witness's issue shall not increase due to the devise passing by intestacy. (emphasis added).

Because of our statutory law, even an interested witness is now competent to witness the execution of a Will in this state. What was once a disqualifying infraction under the

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[9] At common law, only the devise to the interested witness was affected. After 1986, our legislature has included the interested witness' spouse and children, thereby expanding the reach of the statute. Under the common law, the spouses and children could have taken their gift under the Will. Under the current statute in effect at the time of this case, the interested witness' spouse, and their children can only take their intestate share, not to exceed the gift contained in the Will. Clearly, our legislature has considered the public policy of such scenarios in a comprehensive fashion.

Statute of Frauds will no longer invalidate a Will in South Carolina. In light of the fact that our legislature has enacted such a comprehensive statute on how to deal with the issue of an interested witness, Appellants contend that the Probate Court's application of DRR was misplaced and inappropriate. John Head's interest in the personal property coming into the testator's estate from the Burrell estate should not have been defeated. This is not a case where the 2014 Will was in jeopardy of being invalidated by the statute. To the contrary, the statute saves the 2014 Will.

Alex Head's entitlement to tangible property under the separate writing filed with the 2014 Will is similarly unaffected by S.C. Code Ann. § 62-2-504(a). Again, that's because a separate writing disposing of tangible property requires no witnesses at all. But there is no argument that the statute's application to the facts of this case may very well impact the entitlement of Alex Head under the provisions of the 2014 Will itself. Alex Head may be limited to his intestate share under the 2014 Will because of the statute. [10] But that is a function of legislative intent and nothing more. What the Probate Court did, however, was to circumvent the will of the legislature altogether by resorting to DRR in order to save the entitlement going to Alex Head under the 2008 Will, rather than limiting him to his intestate share under the 2014 Will. The Probate Judge did so, presumably, because of the perceived harshness of the statute. That cannot serve as a legitimate basis upon which to decide this case, especially in view of the statute. "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy," *South*

[10] Under the Application for Informal Probate (Form 300ES 1/2014), John Head identifies himself as an intestate heir, and if he is, so potentially is his son Alex. R. at 193.

Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

While a greater devise to Alex may have been intended in both Wills as a reflection of the testator's affection, the testator's intent is subordinate to the intent of the legislature. It was error on the part of the Probate Court to resort to S.C. Code Ann. § 62-2-504(a) to initially find that the testator's intentions were being subverted because of the interested witness who signed the 2014 Will, and then ignore the legislature's mandated remedy under such circumstances. Judge Faulkner's Order dated October 26, 2015 clearly states that S.C. Code Ann. § 62-2-504(a) was the precipitating basis for even questioning the validity of the revocation clause in the 2014 Will.

> Although having sought and relied upon professional legal advice, an interested person was permitted to witness [the testator's] 2014 will 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 her mistake upon her estate plan, she would not have revoked her 2008 will. In view of the foregoing, I find DRR is applicable. (Emphasis added) (R. p. 12).

Thereafter, having concluded that S.C. Code Ann. § 62-2-504(a) creates all the havoc, the Probate Judge then Orders at the very end:

> The testator intended her revocation to be conditional; conditioned 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 nullified by the interested witness statute, the condition of her revocation was not fulfilled such that the 2008 will was not effectively revoked. (Emphasis added) (R. p. 13).

Clearly, the Probate Judge recognized the conflict the statute had upon honoring the intentions of the testator. In one breath she recognizes that the statute "governs the distribution of [the testator's] estate," but then in the next concludes that DRR can trump the statute. Such an end-run around the legislature should not be allowed.

As previously stated herein, the 2014 Will, was submitted to probate by the Respondents, not Appellants, and it was certified by John Head as the Last valid Will & Testament of the testator. (R. pp. 192-201). It was Respondents who submitted the "Personal Property Memorandum" with the 2014 Will. Only after the challenge brought by Appellants under S.C. Code Ann. § 62-2-504(a) did Respondents come up with the 2008 Will by way of their Counterclaim. (R. p. 36). Literally everyone in this case has acknowledged that S.C. Code. Ann.62-2-504(a) has created the chaos that now calls into question the intentions of the testator.

There are no other defects in the execution of the 2014 Will that even remotely raise the question of whether the revocation clause is valid. But it should be kept in mind, the statute doesn't invalidate the 2014 Will, it saves it. Because the statute saves the 2014 Will from the vagaries of the Statute of Frauds, the revocation clause in the 2014 Will should be held to be valid and effective, foreclosing any resort to the 2008 Will. Again, Appellants respectfully submit it was error on the part of the Probate Court to rely upon the statute regarding interested witnesses to find a basis to

challenge the revocation clause in the 2014 Will, but then dismiss the legislature's clear and unambiguous directives on how to dispose of the devise under such circumstances. That does not mean DRR and *Charleston Library* have been overruled. DRR might very well arise as a consequence of many other defects in the retention or execution (or lack thereof) of a Will, but when the defect creating the challenge to the revocation clause concerns interested witnesses to the Will, our legislature has spoken. Resort to the common law rule of DRR, therefore, was inappropriate in this case.

When Respondents submitted the 2014 Will to probate, and they did so knowing the problem they had with the interested witness statute. They properly identified that the Will had been witnessed by an interested witness. (R. p. 194). There is little doubt that if no one had noticed, the 2014 Will would have been accepted for informal probate and administered according to the terms of the 2014 Will. But Appellants, who by the way were never properly identified as intestate heirs in Respondents' Application for Informal Probate, (*See*, R. p. 193) luckily did notice. From the earliest days of this case, Appellants have consistently urged the court below to follow the directives of the legislature as found in S.C. Code Ann. § 62-2-504(a), while insisting at the same time that DRR was irrelevant to a determination of this case. (R. pp. 24-32; pp. 43-55; pp. 62-85; pp. 86-148).

As mentioned previously, DRR has not been revisited in South Carolina since the *Charleston Library* case was decided in 1942. Furthermore, there has never been a case in South Carolina addressing the impact of our interested witness statute

(now found at S.C. Code Ann. § 62-2-504) upon the common law of DRR. So, in that sense, this is a case of first impressions. But the Florida case cited *supra* did indeed review the impact of Florida's interested witness statute on the common law of DRR. In *Estate of Lubbe*, the court was faced with an interested witness statute that (just like our own statute) provides a remedy for its violation, even though worded less forcefully. DRR was asserted in *Estate of Lubbe* to avoid the statute.

In *Estate of Lubbe*, the Florida court specifically declined to follow DRR to circumvent the clear intentions of the legislature. In so holding, the court in *Estate of Lubbe* said: "It is evident that the statute here involved is not a flexible rule of procedure but a stern and mandatory rule of substantive law. The courts cannot rightly pervert such rules to accommodate the occasional hardship. In this case to hold with the appellants would defeat the implicit purpose of Fla. Stat. 731.07(5) F.S.A. [11] It is axiomatic that judicial decision prompted by temporary expediency tends to make bad law." 142 So. 2d at 137. Appellants submit that the Florida case makes sense and is persuasive authority on the issue herein. [12] Appellants recognize that *Lubbe* was overruled by the Florida Supreme Court, *on other grounds*, in the case of *Estate of*

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[11] Fla. Stat. Ann. § 731.07(5) reads as follows: "All devises and bequests to subscribing witnesses are void unless there are at least two other disinterested subscribing witnesses to the will. If the subscribing witness would be entitled to any share of the estate of the testator in case the will were not established, he shall take such portion of the devise or bequest made to him in the will as does not exceed the share of the estate which would be distributed to him if the will were not established." The statute was repealed in 1976.

[12] In her Order dated October 26, 2015, the Probate Judge relies upon the case of *LaCroix v. Senecal,* 140 Conn. 311, 99 A.2d 115 (1953) in which the court applied DRR in the face of an interested witness statute. *LaCroix,* however, is readily distinguishable because the Connecticut statute did not include a remedy for a violation of the statute. All the Connecticut statute did was codify the common law that legatees can't be witnesses. Our legislature, however, has laid down a clear remedy for a violation of the statute. As in *Estate of Lubbe,* it ought to be followed.

Johnson v. Morris, 359 So. 2d 425 (1978). In *Johnson,* the Florida Supreme Court held that the DCA in *Lubbe* applied too restrictive a definition of "distribution" as found in the saving clause of the Florida interested witness statute. 359 So. 2d at 426-27. The Florida Supreme Court did not overrule the rationale behind declining to follow the common law of DRR. [13] *Johnson* certainly did not hold that DRR trumped the statute. Instead, they applied the saving clause of their interested witness statute. (It is also important to note that *Johnson* acknowledged it was being decided after Florida had already repealed its interested witness statute in 1976. 359 So. 2d at 425-26).

In our case, the interested witness statute is far more forceful and direct, and it has not been repealed. It says that "[t]he voided portion of the devise shall pass by intestacy in accordance with Section 62-2-101 et. seq ..." (emphasis added). The Florida statute never had such mandatory language. Because we do, the clear language of our statute should be applied as a substantive rule of law to be enforced by the courts of this state.

Although DRR has not been addressed at all in any case in South Carolina since 1942, there is a case that has addressed the application of our statute on interested witnesses in the execution of Wills. In the case of *Davis v. Davis,* 208 S.C. 182, 37 S.E.2d 530 (S.C. 1946), the South Carolina Supreme Court evaluated the impact of the predecessor statute, then known as "Section 8919 S.C. Code of Laws 1942." This former version of the interested witness statute outlined the very same

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[13] The *Lubbe* case was cited with approval for this same proposition six years after *Johnson,* in the case of *Estate of Barker v. Broughton,* 448 So. 2d 28, 32 (Fla. 1st DCA 1984)

mandate. Under the 1942 statute, the gift or devise affected by the interested witness's relationship "shall pass by intestacy" in the absence of two disinterested witnesses. The *Davis* case cites the 1942 statute to further provide that the interested witness shall be considered competent for purposes of saving the Will. 37 S.E.2d at 531.

In *Davis,* the stated beneficiaries were nephews of the decedent. But their wives executed their Uncle's Will as witnesses. The facts of *Davis,* then, are very similar to the case at hand. In light of the statute to be considered in 1946, the Supreme Court said that the nephews were limited to their intestate share. The court initially acknowledged the common law rule deferring to the intention of the testator, but then very clearly found that it was powerless to follow that maxim of probate law. "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." 37 S.E.2d at 531. Because of the clear and unambiguous language of the statute, the court in *Davis* held "It is clear that the beneficiaries, B.L. Davis and W.K. Davis, can take no more than they would have gotten had the testator died intestate." *Id.* In light of our Supreme Court's ruling in *Davis,* it cannot be said that the provisions of the statute or its intended application are uncertain or ambiguous in the least. "If a statute is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning." *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken,* 354 S.C. 18, 24, 579 S.E.2d 334, 339 (Ct. App. 2003); *Cowan v. Allstate Ins. Co.,* 351 S.C. 626, 631, 571 S.E.2d 715, 717 (Ct. App. 2002).

Appellants argued below that the *Davis* case was controlling law. (R. pp. 73-74; pp. 95-100). The Probate Judge below disagreed, apparently concluding that the doctrine of DRR somehow avoids any conflict with the statute. (R. p. 13). Appellants respectfully submit that it was error for the Probate Court to hold that there was no conflict with the statute. Furthermore, the Probate Judge apparently concluded that because DRR was not raised in the *Davis* case, there is still an unanswered question about whether DRR can be asserted to avoid the consequences of the statute. By her ruling, the Probate Judge implicitly held that DRR trumps the statute. (R. p. 13). Once again, it was error for the Probate Court to hold that S.C. Code Ann. § 62-2-504(a) serves as the basis to challenge the validity of the revocation clause in the 2014 Will, and yet conclude that it was somehow permissible to ignore and dismiss the directives of the legislature, once an interested witness has been identified. [14] With respect, the error made by the Probate Court was to apparently premise its decision upon some independently existing common law violation of the law of Wills as it pertains to who may witness a Will. After S.C. Code Ann. § 62-2-504 and its predecessor, however, there is no longer a common law violation when an interested witness signs. It is now a statutory violation with a clear and unambiguous statutory remedy.

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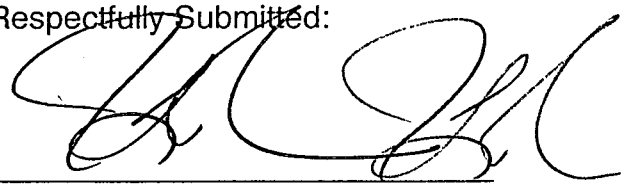
[14] Because of the codification of the common law regarding interested persons who witness the execution of Wills, there can be no other parallel common law regarding interested witnesses that might independently give rise to a challenge to the revocation clause of a Will. The Probate Court below did not cite any such parallel common law either. The sole basis of the Probate Court to question the 2014 Will's validity was the statute. (R. p. 152, ll 20-25, p. 153, ll 1-5).

CONCLUSION

Appellants ask this court to REVERSE the decisions of the Circuit Court and Probate Court below, and in so doing hold that the doctrine of Dependent Relative Revocation may not trump the language of S.C. Code Ann. § 62-2-504(a); and to find further that the 2014 Will of the testator is the proper Will to be probated in this case. Appellants ask that the Probate Court be instructed hereafter to follow the mandate of the statute as set forth therein, in the administration of the 2014 Will.

Respectfully Submitted:



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Greenville, SC
April 21, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Greenville County Circuit Court & Probate Court

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

RECEIVED
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SC Court of Appeals

Case No. 2016-002015

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

v.

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

SCACR 211(b) Certification

The undersigned certifies that the within BRIEF OF APPELLANTS is identical to Appellants' Initial Brief filed pursuant to SCACR 208, except as permitted under SCACR 211 (b)(1) & (2)

THIS 31 day of APRIL, 2017

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