85317

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY PROBATE COURT
Tamara C. Curry, Associate Probate Judge

Appellate Case No. 2017-002137
Probate Court Case No. 2013-ES-10-1054

IN RE: ESTATE OF PAUL J. STEIN

RICHARD STEIN, SARAH STEIN AND NICOLE STEIN JONES, *Respondents*,

versus

VICTORIA MARTINDALE STEIN, Personal Representative of the Estate of Paul J. Stein, *Appellant/Respondent*,

and

MARIAN STEIN-STEINFELD, *Intervenor, Respondent/Appellant*.

RESPONDENTS' MOTION TO DISMISS APPEAL AND FOR EXPEDITED DECISION ON MOTION

Respondents Richard Stein, Sarah Stein, and Nichole Stein Jones ("Respondents") respectfully move the Court to dismiss the appeal of Appellant Victoria Martindale Stein, as the Personal Representative of the Estate of Paul J. Stein ("Appellant"), on the grounds that it does not involve a final order of the Probate Court. The appeal involves an interlocutory order that is not immediately appealable.

Appellant improperly seeks to appeal from the Order of Probate Judge Tamara C. Curry entered on September 14, 2017. Following a three-day bench trial, Judge Curry entered an Order ruling (1) in favor of Respondents on their claim seeking a judicial determination that several e-

mails which the decedent, Paul J. Stein ("Paul"), transmitted to his sister and daughter in the months prior to his death satisfy the "separate writing" requirement of S.C. CODE ANN. § 62-2-512, which permits a testator to refer in his will to a separate document disposing of tangible personal property, and (2) in favor of Respondents involving Appellant's Counterclaims for "constructive trust" and "unjust enrichment/*quantum meruit*" in which Appellant asserted the Respondents must reimburse Paul's estate for various medical bills and income taxes he incurred prior to his death. See Order dated 9.14.17 (copy attached as "Exhibit A").

Judge Curry's Order also expressly held that Respondents are entitled to an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 62-1-111, but left the specific amount of fees and costs to be determined at a future hearing. Judge Curry subsequently scheduled a hearing for December 12, 2017, to determine the amount of attorneys' fees and costs to be awarded to Respondents. See Notice of Hearing (copy attached as "Exhibit B"). However, before the hearing could be conducted, Appellant filed her Notice of Appeal with this Court on October 18, 2017.

Under settled law, Judge Curry's Order is not immediately appealable because the Probate Court has not yet rendered a final judgment in this matter given that the amount of attorneys' fees and costs to be awarded to Respondents is unresolved. As such, this appeal is premature and should be dismissed. Respondents respectfully request and move the Court to issue an expedited decision on their Motion to Dismiss so that the matter can be remanded to Judge Curry to allow her to conduct a hearing as scheduled on December 12, 2017, and thereby issue a final judgment in this matter. The grounds for this motion are more fully set forth herein.

BACKGROUND

Paul died on July 2, 2013 at the age of 63 following a prolonged battle with leukemia. See Order dated 9.14.17 p. 2. At the time, he was an inpatient at the Medical University of South Carolina. His estate is being administered in the Charleston County Probate Court. Respondents are Paul's adult children from his first marriage and are his only children. Id. pp. 2-3. Paul subsequently married the Appellant on May 19, 2007. Id. p. 3. She was Paul's second wife. They had no children together.

Paul named the Appellant as Personal Representative in his Last Will & Testament dated November 24, 2008. Id. pp. 4-5. In Article II.1 of the Will, Paul stated as follows: "I may leave a written statement or list disposing of certain items of my tangible personal property, and I request that any such statement or list in existence at the time of my death shall be considered determinative with respect to all gifts made therein. . . . All bequests made pursuant to this specific paragraph to any of my children shall be outright and not to be held by any Trustee designated herein." Id.

On February 20, 2013, subsequent to the execution of his Will and in accordance with Article II.1 therein, Paul transmitted an sent to his sister (Marian Stein-Steinfeld) in Germany an e-mail explaining his intentions with regard to the disposition of certain personal property, including artwork known as the Hanna Bekker vom Rath art collection, that he owned or possessed at the time of his death. Id. pp. 12-13. The e-mail states in part as follows:

> We stayed at the same Hampton Inn that we stayed at for Barbara's 91st birthday. Sunday we departed for Charleston early morning arriving in Charleston before 6 PM. Sarah[1] was a tremendous help by driving both ways solo while I dozed waking up at key moments with directions. **In between my dozing we would**

[1] Paul's e-mail followed a trip to Largo, Florida that he made in February of 2013 with Sarah (his daughter) to visit with Paul's mother (Barbara Rawling).

> **talk through many topics; one topic of concern was how the remaining pieces from the HBvR estate would convey to them (my children).**
>
> So I explained to Sarah that my solicitor['s][2] suggestion was to catalog the art and itemize the furniture pieces to whom I want to be the recipient. The furniture was an easy task since there are only 4 major pieces. The art on the other hand has been daunting because he also wanted appraised values for each piece. What I did to simplify the issue was to list the art pieces that Tori and I have collected together and listed them, **all remaining art, sculptures (wood, stone & bronze) and the contents of the two grey cabinets will belong to the HBvR estate which is to be passed on to my three children. Should a question arise as to whether a certain piece is in fact part of the HBvR estate that you would be the mediator.**

Id.

On March 28, 2013, Paul also transmitted and sent two additional e-mails to his daughter (Nichole Stein Jones) attaching an Excel spreadsheet entitled "Art bought by Paul & Tori." Id. p. 14. Paul sent these two e-mails to Nichole within mere minutes of each other. The content of the two e-mails and the spreadsheet attached to them are identical. The spreadsheet lists pieces of artwork purchased by Paul and Appellant, lists Paul's life insurance policies, and includes a notation by Paul specifically stating:

> Collection of Art from Hanna Bekker vom Rath (HBvR) are to be divided between Richard, Nichole & Sarah[.] Heirlooms from HvBR such as Frankfurter Cabinet, 3 chairs, and chest are to be given to Richard, Nichole and Sarah[.] All stamp and coin collection to be given to Sarah[.]

Id.

After Paul died on July 2, 2013, Respondents' counsel presented the e-mails and spreadsheet to the Appellant and requested that she distribute the artwork and other personal property to them in accordance with their father's intentions. Id. p. 16. Appellant refused to comply with this demand even though she does not dispute the e-mails and spreadsheet accurately demonstrate Paul's testamentary intent. Id. pp. 17-18. Indeed, Appellant readily

[2] Judge Curry found that this reference to Paul's "solicitor" is most likely a reference to Steve Slotchiver, Esquire, who was Paul's estate-planning attorney at that time.

admitted at trial that Paul intended to leave the HBvR collection to Respondents at his death and he never wavered from this intent. Id. Paul's estate-planning lawyer (Slotchiver) also specifically documented in his file that it was Paul's intent "to leave all of his art work inherited/received from his family to go to his 3 children to be divided into equal shares as possible." Id.

As a result of Appellant's position, Respondents were required to commence a proceeding in the Probate Court seeking to enforce their father's intentions. In their Amended Petition filed on October 7, 2014, Respondents sought a judicial determination that the e-mails/spreadsheet that Paul sent to his sister and daughter constitute a written statement or list under § 62-2-512. Respondents' Amended Petition also specifically sought an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 62-1-111.

In her capacity as personal representative, Appellant filed an answer denying Respondents' claim. Although Appellant concedes that Paul always intended to leave the HBvR collection to Respondents upon his death, she maintains that none of Paul's e-mails are "in [his] handwriting" or "signed by" him, thus she claims the e-mails do not satisfy the technical requirements of § 62-2-512. Id. p. 17. Appellant argued that Paul's intent should be overridden or disregarded because his e-mails and spreadsheet purportedly fail to comply with § 62-2-512. Id. Appellant asked the Court to find that she is the sole beneficiary of Paul's probate estate, including the HBvR collection. Id.

In her Answer, Appellant also asserted counterclaims against Respondents for "constructive trust" and "unjust enrichment/*quantum meruit*" in which she asserted that Respondents must reimburse Paul's estate in the amount of $791,893.00. Id. Although Appellant conceded that Paul intended to leave the HBvR collection to Respondents in equal shares at his

death, she refused to release this property to Respondents unless they used monies they received from a Merrill Lynch investment account that Paul had left to them by virtue of a Transfer on Death Agreement to reimburse Paul's estate for various medical bills and income taxes that Paul incurred prior to his death. Id.

Judge Curry conducted a bench trial held over the course of three days from April 17-19, 2017. On September 14, 2017, Judge Curry issued a written Order setting out over 39 pages her detailed findings and conclusions. In her Order, Judge Curry ruled (1) in favor of Respondents on their petition seeking a judicial determination that Pauls' e-mails satisfy the requirements of S.C. CODE ANN. § 62-2-512, which permits a testator to refer in his will to a separate document disposing of tangible personal property, and (2) in favor of Respondents involving Appellant's Counterclaims for "constructive trust" and "unjust enrichment/*quantum meruit.*"

Judge Curry's Order also expressly ruled that Respondents are entitled to an award of attorneys' fees and costs pursuant to § 62-1-111, but left the specific amount of fees and costs to be decided at a future hearing. Id. pp. 38-39. Her Order states in pertinent part:

> [Respondents] seek an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 62-1-111, which provides that "[i]n a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy." Pursuant to § 62-1-111, the Court finds that justice and equity require that [Respondents] be awarded their reasonable attorneys' fees and costs incurred in prosecuting their claims and defending against [Appellant's] counterclaims. It will be necessary for the Court to determine the specific [amount] of fees and costs to be awarded based on the factors enumerated in Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989) and Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). Accordingly, [Respondents] are directed to file and serve a motion for attorneys' fees and costs with supporting affidavit(s) within ten days of notice of entry of this Order.

Id.

On September 25, 2017, pursuant to Judge Curry's Order, Respondents filed a Motion for Award of Attorneys' Fees and Costs along with affidavits from their legal counsel addressing the factors enumerated in the cited case law and also attaching copies of detailed billing records. On that same date, Appellant filed a Motion to Alter or Amend the Judge's September 14, 2017 Order. Appellant's motion requested that Judge Curry alter or amend her Order to find that Paul's e-mails and spreadsheet did not satisfy the requirements of § 62-2-512 and to deny the Respondents' request for attorneys' fees and costs.

On October 4, 2017, Judge Curry issued an Order resolving Appellant's Motion to Alter or Amend. See Order dated 10.4.17 (copy attached as "Exhibit C"). Judge Curry denied Appellant's request that's she alter or amend her ruling with respect to whether Paul's e-mails and spreadsheet satisfy the requirements of § 62-2-512. Id. With respect to Respondents' request for an award of attorneys' fees and costs, her Order further states that "a hearing shall be held on the issue of attorneys' fee and costs with the date, time, and location to follow." Id.

On October 5, 2017, Judge Curry issued a Notice of Hearing that scheduled a hearing on Respondents' Motion for Award of Attorneys' Fees and Costs for December 12, 2017. See Notice of Hearing (copy attached as "Exhibit B"). However, before the hearing could be conducted, Appellant filed her Notice of Appeal with this Court on October 18, 2017.

LEGAL ANALYSIS

Judge Curry's Order is not appealable because it is not a final order or final judgment.

Appeals from the Probate Court are governed by S.C. CODE ANN. § 62-1-308.[3] That statute makes clear that "[a] person interested in a **final order, sentence, or decree of a probate court** may appeal to" the circuit court or appellate courts. S.C. CODE ANN. § 62-1-308(a), -308(*l*) (emphasis added). Thus, only "final" orders are appealable. Fulmer v. Cain, 380 S.C. 466, 468-69, 670 S.E.2d 652, 653 (2008) (Under predecessor version of § 62-1-308, which also allowed appeals from "a final order, sentence, or decree of a probate court," the supreme court held that an order refusing to allow removal of a probate court petition to the circuit court and denying a motion to dismiss the petition was not immediately appealable).

Section 62-1-308 further provides that "[t]he circuit court, court of appeals, or Supreme Court shall hear and determine the appeal according to the rules of law." S.C. CODE ANN. § 62-1-308(i). In numerous decisions, our appellate courts have held that "[a]s used in this statute, the phrase 'according to the rules of law' means according to the rules governing appeals." Univ. of S. California v. Moran, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005) (citation omitted); Matter of Howard, 315 S.C. 356, 434 S.E.2d 254, 257 (1993). Accordingly, "a circuit court hearing an appeal from the probate court must apply the same rules of law as an appellate court would apply on appeal." In re Estate of Pallister, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005); see also Howard, 315 S.C. at 361, 434 S.E.2d at 257 (the circuit court "must apply the same standard that [the South Carolina Supreme Court] or the Court of Appeals would apply were the appeal taken directly to either of them.").

---

[3] The opening paragraph of § 62-1-308 provides that "[e]xcept as provided in subsection (*l*), appeals from the probate court must be to the circuit court and are governed by the following rules . . . ." S.C. CODE ANN. § 62-1-308. By consent of the parties, this matter was appealed directly to this Court instead of to the Circuit Court in accordance with § 62-1-308(*l*).

The "rules of law" that our appellate courts must apply to determine whether a particular Probate Court order is appealable include the provisions of § 14-3-330. See S.C. CODE ANN. § 14–3–330. "[I]n addition to applying in appeals from circuit courts, section 14-3-330 also applies to other trial courts." JEAN H. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 141 (3rd ed. 2016). "For example, it applies to family court orders and judgments." Id. (citations omitted). Our appellate courts have also applied § 14-3-330 to appeals involving Probate Court orders. See, e.g., Ex parte McFarlin, 2007 WL 8326605, at *2 (S.C. Ct. App. Feb. 12, 2007); Dorn v. Cohen, 418 S.C. 126, 791 S.E.2d 313 (Ct. App. 2016). In McFarlin, an appeal was taken from the Probate Court's order freezing certain accounts "until a court may conduct a full hearing on the merits." 2007 WL 8326605, at *2. Because the order freezing the accounts was in the nature of an injunction, the Court held that the Probate Court's order was immediately appealable under § 14-3-330(4). Id. In Dorn, this Court applied § 14-3-330 to an appeal from a Probate Court's order which had the effect of granting a trust beneficiary's motion to intervene in an action seeking to remove the trustees of the trust created for her benefit. The Court applied § 14-3-330 to determine whether the Probate Court's order was appealable, although the Court held the order was not appealable in that particular case.

The right to appeal is a jurisdictional matter; therefore, if the trial court's order is not appealable, the appellate court lacks subject matter jurisdiction to decide the matter. Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 379-80, 762 S.E.2d 44, 47 (Ct. App. 2014), cert. denied (Jan. 15, 2015); see also N. Carolina Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986) ("The jurisdictional rights of appeal continue to be controlled by S.C. CODE § 14–3–330."); Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377,

378 (Ct. App. 2002) (dismissing appeal for lack of subject matter jurisdiction when trial court's order did not fall within requirements of S.C. CODE ANN. § 14–3–330).[4]

"[T]he question of whether an order is immediately appealable is determined on a case-by-case basis." Dorn, 418 S.C. at 138, 791 S.E.2d at 319 (citation omitted). "An order generally must fall into one of several categories set forth in [§ 14–3–330] in order to be immediately appealable." Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005); see also Edwards v. SunCom, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006); Levi, 409 S.C. at 379-80, 762 S.E.2d at 47; Tatnall, 350 S.C. at 137, 564 S.E.2d at 378. The types of orders that are appealable under § 14-3-330 include, *inter alia*, "final judgments." S.C. CODE ANN. § 14-3-330(1).

It is axiomatic that "[a]n appeal ordinarily may be pursued only after a party has obtained a final judgment." Neltec Enterprises, Inc. v. Long, 391 S.C. 177, 178, 705 S.E.2d 57, 57 (2011) (citing Hagood, 362 S.C. at 194, 607 S.E.2d at 708). "'Final judgment' is a term of art referring to the disposition of all the issues in the case." Link v. Sch. Dist. of Pickens County, 302 S.C. 1, n. 3, 393 S.E.2d 176, n. 3 (1990). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205, 208 (2005); Mid-State Distribs. Inc. v. Century

---

[4] In Levi, the Court explained:

> The right to appeal is a jurisdictional matter and, even if the parties do not raise the issue of appealability, we must dismiss the appeal on our own motion if we conclude we do not have jurisdiction. [W]hether a matter is appealable is a jurisdictional matter and may be raised by an appellate court even if not noted by the parties. Before an order can support an appeal, it must be a final judgment. The issue of whether a judgment is final is jurisdictional, which means that if the reviewing court determines that the judgment appealed from is not final, that court is obligated to dismiss the appeal on its own motion. Matters of jurisdiction are of such importance that a court may consider them *ex mero motu*.

409 S.C. at 379–80, 762 S.E.2d at 47 (internal citations and quotation marks omitted).

Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993). "An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 468 (2006). In order to be "final," a judgment must result in a binding adjudication of the rights of the parties. Keels v. Powell, 213 S. C. 570, 50 S. E. 2d 704 (1948); Good v. Hartford Accident & Indem. Co., 201 S. C. 32, 21 S. E. 2d 209 (1942).

Our state supreme court has observed that the final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment. Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 94, 529 S.E.2d 11, 13-14 (2000); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331, 331 (2000). Piecemeal appeals are disfavored, do not promote judicial economy, and are impermissible. Breland, 339 S.C. at 94, 529 S.E.2d at 13-14. In light of the policy underpinnings of the final judgment rule, exceptions are recognized cautiously. Doe v. Howe, 362 S.C. 212, 607 S.E.2d 354, 356 (Ct. App. 2004).

The partial adjudication of a case is not appealable. A finding as to one or more issues in the case, while leaving open other issues to be resolved, is not a final judgment. In a long line of clear decisions, our courts have held that a trial court decree is not immediately appealable when it resolves only some of the issues or claims raised in the pleadings, but leaves open other issues or claims. In Bolding v. Bolding, 283 S.C. 501, 323 S.E.2d 535 (Ct. App 1984), for example, this Court dismissed the appeal based on the following succinct analysis:

> Derrill Jake Bolding appeals an order of the family court granting his wife Debra Crumpton Bolding a divorce, custody of the parties' minor children, child support, attorney's fees, and equitable division of the parties' personal property. In its order, however, the family court reserved jurisdiction concerning the issue as to the equitable division of the parties' real property.

> Because the order appealed from is not final in that it does not "finally dispose of the whole subject matter in litigation", we dismiss the husband's appeal "for lack of appealability."

Id. at 501-02, 323 S.E.2d at 535-36 (citations omitted). Even though the Family Court's order made findings as to the issues of divorce, child custody, child support, attorney's fees, and equitable division of personal property, the Court nevertheless held the order was not final or appealable because it held open the issue of equitable division of the parties' real property.

Our appellate courts (including this Court) have adhered to the Bolding rationale in a long line of cases. See Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (while normally an order granting divorce would constitute a final judgment, where issue of sanctions was still pending against appellants, the rights of the parties had not been completely determined until the final sanctions order was issued); Wheatley v. Wheatley, 287 S.C. 446, 339 S.E.2d 149 (Ct. App. 1985) (finding order not appealable although the Court had issued a final ruling on practically all issues, because there was no final resolution of attorney's fees or a determination of the wife's interest in the husband's business); Sexton v. Sexton, 308 S.C. 37, 39-40, 416 S.E.2d 649, 651 (Ct. App. 1992), rev'd other grounds, 310 S.C. 501, 427 S.E.2d 665 (1993) (Order addressing some issues with finality not appealable because it either reserved for later determination or did not address several issues and did not dispose of the whole subject matter in litigation). Although Bolding and its progeny involve appeals from Family Court rulings, the reasoning of those decisions is equally applicable to appeals from other trial court decisions. This case is quite similar to Bolding and the other cases because the Probate Court expressly reserved jurisdiction over and still needs to resolve the important issue of the amount of attorneys' fees and costs to be awarded to Respondents under § 62-1-111.

The fact that Judge Curry's Order is not a final judgment is made evident by the provisions of S.C. R. CIV. PRO. 54, which states:

> **(a) Definition; Form.** "Judgment" as used in these rules includes any decree or order which dismisses the action as to any party **or finally determines the rights of any party**. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.
>
> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, **the court may direct the entry of a final judgment as to one or more but fewer than all of the claims** or parties **only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims** or the rights and liabilities of fewer than all the parties **shall not terminate the action as to any of the claims** or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

S.C. R. CIV. PRO. 54(b) (emphasis added). This rule is "virtually identical" to the federal rule. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 466, 570 S.E.2d 197, 200 (Ct. App. 2002).

"The process of directing entry of judgment on one or more but less than all claims under Rule 54(b) [is] referred to as certification." Link, 302 S.C. at 4, 393 S.E.2d at 177. "Rule 54(b) certification purports to alter the definition of 'final judgment' by allowing a final judgment to be entered on certain claims before disposition of the entire case." Id. at 5 n. 3, 393 S.E.2d at 178 n. 3. The rule "does not require certification and if the trial court chooses to certify the judgment, it must do so in a definite, unmistakable manner." Tommy L. Griffin, 351 S.C. at 466, 570 S.E.2d at 200. The trial court "must expressly determine there is no just reason for delay." Id. at 468, 570 S.E.2d at 201.

Rule 54 clearly states that in the absence of certification, "any order . . . however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . ." S.C. R. CIV. PRO. 54(b); see also Ashenfelder v. City of Georgetown, 389 S.C. 568, 577, 698 S.E.2d 856, 861 (Ct. App. 2010) ("Absent a certification under Rule 54(b) any order in a . . . multiple[] claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.").

In the present case, it is undisputed that the Judge Curry's Order makes findings only as to some (but not all) of Respondents' claims. It is undisputed that Judge Curry did not "certify" her order as a "final judgment" under Rule 54(b). In fact, her Order specifically states that it does **not** end the case because it expressly finds that it will be necessary for the Probate Court to determine the specific amount of fees and costs to be awarded to Respondents after another hearing on the matter. See Order dated 9.14.17 pp. 38-39. Judge Curry's Order ruling on Appellant's Motion to Alter or Amend likewise states that "a hearing shall be held on the issue of attorneys' fee and costs with the date, time, and location to follow." See Order dated 10.4.17 p. 2; see also Carpenter v. Measter, 2013-UP-066, 2013 WL 8482282, *2 (S.C. Ct. App. Feb. 6, 2013) (SCRCP Form 4 that checked the boxes next to the words "ACTION DISMISSED" and "Rule 41(a), SCRCP" did not qualify as a "judgment adjudicating all the claims" for purposes of Rule 54(b) because the Circuit Judge added language indicating the Order was "conditional" and it expressly contemplated further proceedings in the case).

In summary, although Judge Curry ruled that Respondents are entitled to an award of attorneys' fees and costs pursuant to § 62-1-111, she further ordered that she will need to determine the specific amount of fees and costs to be awarded following another hearing, which has not yet been held. See Order dated 9.14.17 pp. 38-39. Accordingly, a final judgment has not

been entered and Appellant's appeal must be dismissed because it is premature. Because Judge Curry has scheduled a hearing for December 12, 2017, Respondents respectfully that the Court enter a decision on this Motion to Dismiss on an expedited basis so that the matter can be remanded to Judge Curry to allow her to conduct a hearing on December 12, 2017 as presently scheduled, and thereby issue a final judgment in this matter.

CONCLUSION

For the above reasons, the Respondents respectfully move the Court to dismiss the appeal on the grounds the Probate Court's order is not immediately appealable and this Court lacks subject matter jurisdiction over this matter. Respondents further respectfully request that the Court enter a decision on this Motion to Dismiss on an expedited basis and remand this case to the Probate Court to conduct a hearing on December 12, 2017 as presently scheduled, and thereby issue a final judgment in this matter.

ROSEN, ROSEN & HAGOOD, LLC

By: 

Richard S. Rosen (SC Bar 04917)
Daniel F. Blanchard, III (SC Bar 65342)
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726

CORDRAY LAW FIRM
Jack Cordray, Esquire (SC Bar 01400)
40 Calhoun Street, Suite 420
P.O. Drawer 22857
Charleston, SC 29413-2857

ATTORNEYS FOR RESPONDENTS

Charleston, South Carolina
December 1, 2017.

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	Case No.: 2013-ES-10-1054
COUNTY OF CHARLESTON	)	
IN RE ESTATE OF: PAUL J. STEIN	)	
	)	
RICHARD STEIN, SARAH STEIN and NICHOLE STEIN JONES,	)	
Petitioners,	)	**ORDER**
	)	
	)	
VICTORIA MARTINDALE STEIN, Personal Representative of the Estate of PAUL J. STEIN,	)	
Respondent,	)	
	)	
MARIAN STEIN- STEINFELD, Intervening Respondent,	)	

Date of Trial:	**April 17-19, 2017**
Presiding Judge:	**Tamara C. Curry**
Attorneys for Petitioners:	**Richard S. Rosen, Esquire** **Daniel F. Blanchard, III, Esquire** **Jack Cordray, Esquire**
Attorneys for Respondent:	**John A. Massalon, Esquire** **Christy Ford Allen, Esquire**
Attorney for Intervening Respondent:	**G. Trenholm Walker, Esquire**
Court Reporter:	**Ruth L. Mott, Clark & Associates, Inc.**

1CC
39
8
11/14/17

This matter came before the Court for a bench trial involving (1) the Amended Petition filed on October 7, 2014, by Petitioners Nichole Stein Jones, Sarah Stein, and Richard Stein (hereinafter collectively referred to as "Petitioners") and (2) the Counterclaims asserted in the Answer to Amended Petition filed on October 27, 2014, by Respondent Victoria Martindale Stein, a/k/a Victoria Cumens Stein, as the Personal Representative of the Estate of Paul J. Stein (hereinafter "Respondent").

Counsel for the parties submitted testimony, exhibits, deposition excerpts, evidence, and arguments to the Court during the trial, which was held over the course of three days from April 17-

EXHIBIT
tabbies
A

19, 2017. Present during the trial were Petitioners Nichole Stein Jones, Sarah Stein, and Richard Stein, along with their legal counsel, Jack Cordray, Esquire; Richard S. Rosen, Esquire; and Daniel F. Blanchard, III, Esquire and Respondent Victoria Martindale Stein, along with her legal counsel, John A. Massalon, Esquire, and Christy F. Allen, Esquire. Intervening Respondent Marian Stein-Steinfeld, through her legal counsel, G. Trenholm Walker, Jr., advised the Court on the record that she would not be participating at the trial.

Witnesses who testified in person at the trial were Respondant, Nichole Stein Jones, Sarah Stein, William E. Capps, Jr., Costa T. Chakeris, Stephen M. Slotchiver, and Patrick Welch. Excerpts from the depositions of Marian Stein-Steinfeld and Natalie Ewert and portions of a sworn affidavit from Steve Abrams were also admitted into evidence. Petitioners and Respondent also admitted numerous documents into evidence as trial exhibits.

JCC 28939 1/14/17

Having carefully considered the pleadings, witness testimony, documentary exhibits, deposition excerpts, evidence of record, and arguments of counsel submitted during the trial; and having assessed the credibility of the witnesses providing testimony in this case, the Court hereby makes the following findings of fact and/or conclusions of law:

I. FINDINGS OF FACT

1. Paul J. Stein ("Decedent") was born in Germany on April 6, 1950. See Trial Trans. p. 164. On July 2, 2013, at the age of 63, Decedent died of complications related to leukemia while inpatient at the Medical University of South Carolina ("MUSC"). See Pet. Exh. 2; Trial Trans. p. 167.

2. Decedent was a resident of Charleston County, State of South Carolina, at the time of his death. His estate is being administered by this Court as Case No. 2013-ES-10-1054.

3. Petitioners are Decedent's adult children from his first marriage to Susan Stein and

are his only children. See Trial Trans. pp. 163-64, 167, 370. Decedent and Susan divorced in approximately 2007. Id. Decedent nevertheless maintained and had a very close relationship with Petitioners. See Trial Trans. p. 173.

4. Decedent subsequently married Respondent on May 19, 2007. See Trial Trans. p. 103. Respondent was Decedent's second wife and Decedent was Respondent's fourth husband. See Trial Trans. pp. 103, 168. They had no children together. See Trial Trans. p. 53. Respondent has an adult daughter, Alexandra, from a prior marriage. See Trial Trans. p. 169.

5. Respondent was appointed as the Personal Representative of the Estate of Paul J. Stein by Order of this Court dated July 16, 2013. Her legal counsel for estate administration purposes is Decedent's estate-planning attorney, Stephen M. Slotchiver.[1]

6. At the time of his death, Decedent possessed a valuable collection of artwork, sculptures, and other tangible personal property previously owned by his now deceased grandmother, Hanna Bekker vom Rath. See Trial Trans. pp. 56, 71, 99, 164, 177, 179-80, 371; Pet. Exh. 28. Decedent's grandmother lived in Frankfurt, Germany, and had acquired the collection from various Jewish and "degenerate" artists whom she had housed and supported during their persecution by the Nazi regime during World War II. See Trial Trans. pp. 177-81, 371; Pet. Exh. 28. She died in 1983 just short of 90 years old. See Pet. Exh. 28.

7. Portions of this art collection had been passed down from Decedent's Grandmother to Decedent's mother, Barbara B. Rawling, and then from Rawling to Decedent and his sister, Natalie Ewert. See Stein-Steinfeld depo. pp. 12, 14, 16. The art and other pieces that Decedent had acquired

[1] Respondent retained Slotchiver to serve as counsel for the estate's administration on July 3 or 4, 2013—a day or two after Paul's death. See Trial Trans. pp. 553-54. Slotchiver also initially served as litigation co-counsel in representing Respondent and the estate in this lawsuit. By Order dated December 18, 2015, Slotchiver was later granted leave to withdraw as litigation counsel for Respondent and the estate, although he has remained as counsel for the estate's administration. See Trial Trans. pp. 463-64.

from his grandmother or mother were well-known in Decedent's family and by Respondent as the "Hanna Bekker vom Rath collection" or the "German art." See Trial Trans. pp. 178-80, 371. This property is hereinafter referred to collectively as the "HBvR collection" or "German art."

8. Decedent made it clear to Respondent, Petitioners, Intervening Respondent, and Slotchiver that he wanted the HBvR collection to stay in his family given its historical significance and he wanted the HBvR collection or German art to be divided equally among Petitioners at his death. See Trial Trans. pp. 57, 59-60, 65-66, 68-69, 71, 73, 81, 83, 85-86, 90, 185-99, 215-16, 230, 373-77, 382-83, 390-92, 491-92, 524-25; Stein-Steinfeld depo. pp. 53-54. Decedent never changed his mind and did not waver in his intent to leave the HBvR collection to Petitioners at his death. See Trial Trans. pp. 57, 65-66, 492-93.

9. Decedent was diagnosed with leukemia in 2008. See Trial Trans. p. 170. He underwent chemotherapy treatment and his leukemia went into remission for a time. See Trial Trans. pp. 53-54, 104-05, 170.

ACC 10/39 3/14/17

10. On November 24, 2008, Decedent executed his Last Will & Testament (hereinafter "the Will"). See Pet. Exh. 1, p.115; Trial Trans. p. 115. Slotchiver drafted the Will. See Trial Trans. p. 468. Slotchiver had previously performed estate-planning work for Decedent beginning in 2000 or 2001. See Trial Trans. pp. 466-68; Pet. Exh. 1. Neither Petitioners nor Respondent saw the Will before Decedent's death. See Trial Trans. pp. 115-16, 186, 219-20.

11. Decedent's Will names Respondent as Personal Representative. Article II.1 of the Will also states in part: "I may leave a written statement or list disposing of certain items of my tangible personal property, and I request that any such statement or list in existence at the time of my death shall be considered determinative with respect to all gifts made therein. . . . All bequests made pursuant to this specific paragraph to any of my children shall be outright and not to be held by any

Trustee designated herein." See Pet. Exh. 1, p.115.

12. Article II.1 of the Will allowed Decedent to dispose of his tangible personal property by a written statement or list and specifically contemplated that Decedent could dispose of personal property to Petitioners. See Trial Trans. pp. 468-69, 557. The written statement or list contemplated by this section does not need to comply with the formalities for a will. See Trial Trans. pp. 481-82. Instead, the purpose of this provision in the Will is to allow Decedent to dispose of his personal property in an informal manner and while avoiding the time and expense of having a lawyer redo his Will. See Trial Trans. p. 470. The types of personal property that Decedent could dispose of by written statement or list include artwork, coin collections, stamp collections, and furniture. See Trial Trans. p. 470.

13. Decedent's leukemia returned during the summer of 2012 and his leukemia had mutated so that traditional forms of treatment were no longer effective. See Trial Trans. p. 106, 1. In late 2012, Decedent was told that the chemotherapy treatment was not working. See Trial Trans. pp. 106-07. Thereafter, beginning in March of 2013, he underwent experimental treatments, including a bone marrow transplant, and was in and out of MUSC until his death on July 2, 2013. See Trial Trans. pp. 54-55, 107-09, 133-36, 168, 171-73, 214-15.

14. In early 2013, in preparation for his medical treatments, Decedent made arrangements to provide for Petitioners and Respondent should he not survive. On January 16, 2013, he opened an investment account with Merrill Lynch because he was going to receive funds from his sale of one piece of the HBvR collection—a painting by Alexej von Jawlensky—at an auction conducted by Sotheby's. See Pet. Exh. 11; Trial Trans. pp. 73-74, 92, 431-36. Costa Chakeris was Decedent's financial advisor at Merrill Lynch. See Trial Trans. pp. 204, 431.

15. On March 11, 2013, Decedent deposited into the Merrill Lynch account

approximately $2.2 million U.S. Dollars (1.421 million British Pounds) that he had received from the sale of the Jawlensky painting earlier that year. See Trial Trans. pp. 113-14, 440-41, 586; Pet. Exh. 14. Petitioners were unaware that Decedent had planned to sell the painting until after he had already sold it and they were unaware of the Merrill Lynch account until after it had been opened by Decedent. See Trial Trans. pp. 201-03, 378-82. Decedent had not told Petitioners that he was selling any of the HBvR art or depositing proceeds from the sale of art into the Merrill Lynch account until that had already happened. See Trial Trans. pp. 202-04, 378-82. Petitioners were not involved in the sale of the Jawlensky painting or opening the Merrill Lynch account. See Trial Trans. pp. 202, 204, 380-81.

16. Decedent told Respondent and Decedent's accountant (Patrick Welch) verbally in late 2012 or early 2013, prior to selling the Jawlensky painting, that he planned to use the proceeds received from the sale of the painting to pay his medical bills if they were not covered by insurance and to cover the income taxes resulting from the painting's sale. See Trial Trans. pp. 96, 571-78. Decedent made these statements when he was expecting to survive his leukemia—*i.e.*, he expressed his plans for using the proceeds while he was alive or living. See Trial Trans. pp. 126, 588-89.

17. Decedent told his daughter (Nichole) on March 28, 2013 that his bone marrow transplant that he was scheduled to undergo the following day at MUSC was covered by his insurance. See Trial Trans. p. 206. Decedent never told Petitioners that he planned to use proceeds from the sale of the Jawlensky to pay income taxes or medical bills, although he told Nichole on March 28, 2013 that the funds in the Merrill Lynch account would be available to him if he needed subsequent or additional bone marrow transplants after the procedure he was scheduled to undergo on March 29, 2013. See Trial Trans. pp. 206, 279-80. However, he never underwent any subsequent bone marrow transplants. Id.

18. On February 13, 2013, Decedent executed a written Transfer on Death Agreement ("TOD Agreement") with Merrill Lynch under which he expressly directed that Petitioners are the beneficiaries of the account upon his death and that any funds held in the account upon his death shall be paid over to Petitioners in equal shares. See Pet. Exh. 12; Trial Trans. pp. 74, 92-93, 438-39, 445-46, 456.

19. Decedent executed the TOD Agreement without any involvement by Petitioners. See Trial Trans. p. 207. Petitioners were unaware that Decedent had made them the beneficiaries of the Merrill Lynch account until after it had been done. See Trial Trans. pp. 202, 204, 378-82, 384.

20. Only Decedent, Respondent, and Chakeris were present during the meetings at which the TOD Agreement was discussed. See Trial Trans. pp. 77, 155, 207, 381-82, 436-37. Chakeris explained to Decedent how the TOD Agreement "worked"—*i.e.*, that at his death ownership of the account would be transferred to Decedent's named beneficiaries. See Trial Trans. pp. 445-46. Decedent understood the TOD Agreement. See Trial Trans. p. 155. Chakeris specifically recalled having a conversation with Decedent about the TOD Agreement in which Decedent stated that he wanted the money in the Merrill Lynch account to go to Petitioners at his death. See Trial Trans. p. 456.

21. The TOD Agreement expressly states that "[u]pon the Death of the Account Owner, all of the TOD Assets shall be transferred to the Beneficiaries." See Pet. Exh. 12 ¶ 1. The agreement also states: "I hereby designate the person(s) named below as Beneficiary(ies) to receive payment of the balance of the TOD Account upon my death pursuant to the terms of this Transfer on Death Agreement." Id. p. 3. Petitioners are clearly designated in the agreement as the beneficiaries of the account immediately after the above-quoted provision.

22. Decedent never asked Chakeris if the Merrill Lynch funds could be used to pay for

medical bills or taxes after he died. See Trial Trans. p. 458. Chakeris had no recollection of discussing with Decedent whether the proceeds in the Merrill Lynch account could be used by his estate or personal representative to pay his medical bills or taxes should he fail to survive his leukemia. See Trial Trans. p. 446.

23. The TOD Agreement further states that "[t]his Agreement revokes any prior agreement relating to the TOD Assets and may be revoked or changed by the Account Owner at any time prior to the Death of the Account Owner by executing a new Agreement or a written and notarized revocation of this Agreement, which shall be delivered to [Merrill Lynch]." Id. ¶ 6. The TOD Agreement also states that it "supersedes all Account Owners' wills, trusts and other instruments, regardless of the date of execution, which provide for the contrary disposition of the TOD Account or TOD Assets." Id. ¶ 8.

24. Decedent never executed a new TOD Agreement and he never revoked the agreement that he signed on February 13, 2013. See Trial Trans. p. 457. He never agreed to modify the terms of the TOD Agreement. See Trial Trans. p. 458. Decedent never asked Chakeris to modify the TOD Agreement so that any funds in the account would be used to pay for Decedent's medical expenses or taxes should he not survive his leukemia. See Trial Trans. pp. 78, 80, 457.

25. Respondent and Petitioners never had any discussions prior to Decedent's death about using funds in the Merrill Lynch account to pay his medical bills or taxes should he die. See Trial Trans. pp. 217-18, 387. Petitioners never made any promises to Respondent involving use of the funds in the Merrill Lynch account. Id.

26. There is no evidence that Decedent ever expressed or discussed any plan or intention contrary to the express terms of the written TOD Agreement that he signed on February 13, 2013. There is no evidence that he ever discussed any plan for the Merrill Lynch account to be used to pay

any medical bills or taxes that he owed at or after his death. There is no evidence that he ever told Petitioners that he wanted the funds in the Merrill Lynch account to be used to pay any medical bills or taxes that he owed at his death.

27. In addition to executing the TOD Agreement, which provides that Petitioners are the beneficiaries of the Merrill Lynch account upon his death, Decedent also made it clear that he wanted the HBvR collection to go to Petitioners in equal shares at his death. See Trial Trans. pp. 57, 59-60, 65-66, 68-69, 71, 73, 81, 83, 85-86, 90, 185-99, 215-16, 230, 373-77, 382-83, 390-92, 491-92, 524-25.

28. Decedent told Petitioners that Respondent was aware of his wishes for the HBvR collection. See Trial Trans. pp. 235, 374-75. Respondent herself repeatedly conceded at trial that the Decedent told her he intended to leave the HBvR collection to Petitioners in equal shares upon his death and he never changed his mind or wavered from that intent. See Trial Trans. pp. 57, 59-60, 65-66, 68-69, 71, 73, 81, 83, 85-86, 90.

29. On March 12, 2013, Decedent also met with Slotchiver, his estate-planning attorney, at Slotchiver's office to discuss changes to his estate plan because he was undergoing or about to undergo medical treatments for his leukemia. See Pet Exh. 1 p.145; Trial Trans. pp. 474, 476-88.[2] During the meeting, he told Slotchiver that he had received the German artwork (the HBvR collection) from his mother and/or grandmother. See Trial Trans. pp. 491-92. He also specifically told Slotchiver that "he wants to leave all of his art work inherited/received from his family to go to his three children to be divided into equal shares as possible." See Trial Trans. pp. 478-81. He told Slotchiver that his intention was for the German artwork, the HBvR collection, to be passed to Petitioners in equal shares at his death. Id.

30. Slotchiver told Decedent that he could transfer the HBvR collection to Petitioners either by a formal codicil to his Will or informally by a separate writing pursuant to Article II.1 of his Will. See Trial Trans. pp. 480-82, 499-500. Slotchiver conceded it was unnecessary for Decedent to return the writing to him in order to dispose of his personal property by a written statement or list because Decedent could create such a document on his own without a lawyer. See Trial Trans. pp. 499-500, 510.[3]

31. Decedent further told Slotchiver during the March 12, 2013 meeting that he had about $2.5 million in the Merrill Lynch account. See Trial Trans. p. 489. He told Slotchiver that the account had a TOD Agreement and that under its terms the account was going to Petitioners at his death. See Trial Trans. pp. 489-91, 560-61. Decedent understood that Petitioners would receive the funds in the Merrill Lynch account if he died. See Trial Trans. p. 490. He never told Slotchiver that he intended to modify or revoke the TOD Agreement. See Trial Trans. pp. 490-91, 561. He never told Slotchiver about any plan to use the Merrill Lynch account to pay any medical bills or any income taxes resulting from his sale of any art. See Trial Trans. pp. 491, 561-62.

32. Immediately following his meeting with Decedent on March 12, 2013, Slotchiver dictated a memorandum to his file entitled "Paul Stein Estate Planning." See Trial Trans. pp. 476-77; Pet. Exh. 1 p.145. The memorandum states in part as follows:

> On March 12, 2013 I met with Paul in order to review his estate planning. He told me he had been diagnosed with leukemia and is currently undergoing treatments. . . .

---

[2] Slotchiver recalled having a telephone conversation with Paul in advance of this meeting, but could not recall the substance of their conversation other than a brief conversation to set up the meeting. See Trial Trans. pp. 475-76, 495.

[3] Either before or after his meeting with Slotchiver, Paul told Respondent that his Will allowed him to dispose of personal property by a list and that he planned to prepare a list of artwork which they had acquired together—that Respondent would receive or keep at Paul's death—and the rest of his art (the HBvR collection) would be divided among Petitioners in equal shares at his death. See Trial Trans. pp. 68, 82-83.

His assets currently consist of approximately $2.5 million in cash located at Merrill Lynch (which Costa Chakeris handles); approximately $2.5 - $3 million in art work; and approximately $24,000 (sic)[4] in real estate.

The majority of his art work has been inherited or passed down to him from his grandmother and/or his mother which is what he refers to as his [German] art work collection. Separately, he and his wife have collected some art work, as well as his wife had art work prior to their marriage.

In lieu of the significant volume of art work that he has inherited/received from his family, he is going to present me with a list of the art work that was purchased by him and his wife, as well as her art work she had separately, to attempt to delineate the same. He plans on leaving all of his art work that he has inherited/received from his family to his children.

He would like to do a Codicil to his Will wherein: . . . .

(2) He wants to leave all of his art work inherited/received from his family to go to his 3 children to be divided into equal shares as possible. He will provide me with a list of the art work that is not part of this collection;

(3) Need to add a provision indicating that he is designating his estate as the beneficiary of all of his life insurance policies wherein he would like the cash received from the life insurance policies to be distributed to his wife as soon as practical. . . .

ACC Tg 39 7/14/17

See Pet Exh. 1 p.145. The memorandum confirms and makes clear that it was Decedent's intention for Petitioners to receive the HBvR collection at his death.

33. Slotchiver explained that Decedent told him he had in excess of $1 million in life insurance and the purpose of having Decedent change his life insurance designations to name his estate as the beneficiary was to ensure that the insurance proceeds would be included in Decedent's probate estate for purposes of calculating any elective share claim filed by Respondent. See Trial Trans. pp. 482-87. Slotchiver testified that he made this change because he wanted to ensure that the HBvR collection would go to Petitioners at his death and that it would be protected from any elective

[4] Slotchiver explained at trial that his memorandum misstated the value of Paul's real estate. Paul told him the value was $400,000, not $24,000. See Trial Trans. p. 478.

share claim that Respondent could make following his death. See Trial Trans. pp. 487, 501-07, 550-52, 559-60.

34. Decedent died without executing a codicil to his Will. However, Decedent sent e-mails or written statements to his sister, Intervening Respondent, and daughter, Petitioner Nichole Stein Jones, in the months before his death expressly stating his intentions with regard to the disposition of his personal property, including the HBvR collection.

35. On February 20, 2013, Decedent transmitted and sent to his sister in Germany, Intervening Respondent, a personal e-mail stating his intention with regard to the disposition of the remaining HBvR collection at his death. See Pet. Exh. 20; M. Stein-Steinfeld depo. pp. 34-37; Trial Trans. pp. 150-54. The e-mail states in part as follows:

> We stayed at the same Hampton Inn that we stayed at for Barbara's 91st birthday. Sunday we departed for Charleston early morning arriving in Charleston before 6 PM. Sarah[5] was a tremendous help by driving both ways solo while I dozed waking up at key moments with directions. In between my dozing we would talk through many topics; one topic of concern was how the remaining pieces from the HBvR estate would convey to them (my children).
>
> So I explained to Sarah that my solicitor['s][6] suggestion was to catalog the art and itemize the furniture pieces to whom I want to be the recipient. The furniture was an easy task since there are only 4 major pieces. The art on the other hand has been daunting because he also wanted appraised values for each piece. What I did to simplify the issue was to list the art pieces that Tori and I have collected together and listed them, all remaining art, sculptures (wood, stone & bronze) and the contents of

[5] Decedent's e-mail followed a trip to Largo, Florida that he made in February of 2013 with his daughter, Petitioner Sarah Stein, to visit with Decedent's mother, Barbara Rawling. See Trial Trans. pp. 374-77, 390-92. During the trip, Decedent told Sarah that he was leaving the HBvR collection to Petitioners in equal shares should he die and that Respondent was aware of his intentions. Id.

[6] Although Decedent's e-mail does not identify his "solicitor" by name and Slotchiver could not recall having a conversation with Decedent prior to their meeting on March 12, 2013 other than a brief telephone conversation to set up the meeting, Decedent told Sarah during their trip to Florida in February of 2013 that he had talked with his estate-planning attorney to discuss his intent for the HBvR collection upon his death. See Trial Trans. p. 376, 424-25. Sarah remembered Decedent later mentioning the name "Slotchiver." See Trial Trans. pp. 376, 396-97. During Nichole's visit with Decedent at MUSC on March 28, 2013, Decedent told her he had discussed his plans for the HBvR collection with Slotchiver. See Trial Trans. pp. 200, 210-11. Slotchiver is the only estate-planning attorney Decedent is known to have used. See Trial Trans. pp. 70-71, 228, 424-25, 530-31.

> the two grey cabinets will belong to the HBvR estate which is to be passed on to my three children. Should a question arise as to whether a certain piece is in fact part of the HBvR estate that you would be the mediator.

See Pet. Exh. 20; Trial Trans. p. 82. The e-mail contains Decedent's typed name and e-mail address in the header or "From:" field at the top of the e-mail. See Trial Trans. pp. 322-23. The body of the e-mail also includes the following closing: "Love, Paul." See Trial Trans. pp. 324-25.

36. Bills Capps, a forensic computer expert, verified that the February 20, 2013 e-mail was sent from Decedent's laptop computer and was sent from Decedent's e-mail account to Marian's e-mail address. See Trial Trans. pp. 322-23. Capps also established that his computer was not set up so that he had a "default" signature block that would be automatically attached to or included in any e-mail that he sent. See Trial Trans. pp. 309-12, 335. Instead, Decedent had to affirmatively select a signature block to be added to or included in the particular e-mail that he was sending. Id. Capps established that the "Love, Paul" signature included in the March 20, 2013 e-mail that Decedent sent to Intervening Respondent was affirmatively chosen to be included in that particular e-mail—*i.e.*, the signature block was not automatically included in the e-mail. See Trial Trans. pp. 324-25.

37. In late March of 2013, Decedent entered MUSC to begin his experimental treatment for his leukemia. See Trial Trans. pp. 126, 133-36, 171-73. He underwent a bone marrow transplant at MUSC on March 29, 2013. See Trial Trans. p. 171.

38. On March 28, 2013, while Decedent's daughter, Petitioner Nichole Stein Jones, was visiting with him in the hospital at MUSC and the day before Decedent was to undergo the bone marrow transplant, Decedent transmitted and sent eight separate personal e-mails to Nichole in approximately a thirty-minute period spanning from 3:43pm to 4:10pm. See Pet. Exhs. 3-10; Trial Trans. pp. 185-99, 240-48, 283. In these e-mails and attachments, he forwarded or sent to Nichole various information about his life insurance, the HBvR collection, his recent sale of the Jawlensky

painting through Sotheby's, the Merrill Lynch account, and a copy of his mother's (Barbara Rawling) Last Will and Testament. Id.

39. Decedent sent all of these e-mails to Nichole from his laptop computer while he was a patient at MUSC and while Nichole was visiting and talking with him. Id. Nichole was present with him when he sent the e-mails to her and she personally observed Decedent send the e-mails to her using his laptop. See Trial Trans. pp. 185-92, 240, 246, 283, 288. Nichole discussed Decedent's March 28, 2013 e-mails and his wishes with his other daughter (Sarah) later that same day. See Trial Trans. pp. 267-69.

40. The eight e-mails that Decedent sent to Nichole on March 28, 2013 include two e-mails with a subject line entitled "Art bought by Paul & Tori" and which attached an Excel spreadsheet also entitled "Art bought by Paul & Tori." See Pet. Exhs. 3 & 4; Trial Trans. pp. 191-99, 240, 338-40, 357. Decedent created the spreadsheet. See Trial Trans. p. 193. He sent these two e-mails to Nichole within mere minutes of each other. The content of the two e-mails and the spreadsheet attached to them are identical. The spreadsheet lists pieces of artwork purchased by Decedent and Respondent, lists Decedent's life insurance policies, and includes a notation by Decedent specifically stating:

> Collection of Art from Hanna Bekker vom Rath (HBvR) are to be divided between Richard, Nichole & Sarah[.] Heirlooms from HvBR such as Frankfurter Cabinet, 3 chairs, and chest are to be given to Richard, Nichole and Sarah[.] All stamp and coin collection to be given to Sarah[.]

See Pet. Exhs. 3 & 4. These e-mails contain his typed name and e-mail address in the header or "From:" field at the top of the e-mails. See Trial Trans. p. 313.[7]

[7] Although these particular e-mails sent on March 28, 2013 did not include text in the body of the e-mails or a signature block at the end of the e-mails, Capps explained that by "right-clicking" on the attachment, the attachment could be sent or forwarded to the recipient using simply the sender's e-mail header (*i.e.*, the "From:" field) without including any text or a signature block in the body of the e-mail. See Trial Trans. pp. 358-60.

41. Capps also verified that the eight March 28, 2013 e-mails were sent from Decedent's laptop computer while it was located at MUSC and the e-mails were sent from Decedent's e-mail account to Nichole's e-mail account. See Trial Trans. pp. 299, 313-17.

42. Capps further established that the spreadsheet entitled "Art bought by Paul & Tori," which was attached to two of the e-mails that Decedent sent to Nichole on March 28, 2013, was created using Microsoft Excel software on February 20, 2013; that the Excel program used to create the document was registered to "Paul;" that metadata embedded in the document identified its author as being "Paul;" and that the spreadsheet had been saved on the hard drive on Decedent's laptop computer on March 11, 2013. See Trial Trans. pp. 318-22, 329-30, 362-64. Therefore, the Excel spreadsheet containing the notation about Decedent's intentions involving the disposition of the HBvR collection was created several weeks prior to his admission to the hospital in late March of 2013 and was created on the same day that he sent an e-mail to his sister (Marian) on February 20, 2013 discussing his recent conversations with his "solicitor" about his plans for his estate, including the HBvR collection. The spreadsheet also had been saved on Decedent's laptop the very day before he met with Slotchiver in person on March 12, 2013 to discuss changes to his estate plan.[8] The Court finds that these facts and the others stated herein prove that Decedent created the Excel spreadsheet.

43. Consistent with Decedent's February 20, 2013 e-mail to his sister, Intervening Respondent, and his March 12, 2013 meeting with Slotchiver, the e-mails and spreadsheet that Decedent sent to his daughter Nichole on March 28, 2013 express his intention that Petitioners are to receive the HBvR collection upon his death.

---

[8] Capps was prevented from examining or analyzing Paul's computer server because Respondent had destroyed it after Paul's death. See Trial Trans. pp. 326-30, 363, 366; Pet. Exhs. 31-33.

44. In the weeks following Decedent's meeting with Slotchiver on March 12, 2013, Decedent also executed forms changing the beneficiary designations on several life insurance policies that he had purchased so as to name his estate as his beneficiary. See Trial Exh. 1 p. 116; Trial Exhs. 22-26; Trial Trans. p. 94. After this change was made, Respondent remained as the ultimate recipient of the insurance proceeds because she is the sole beneficiary of Decedent's residuary estate under the terms of his Will. See Trial Trans. p. 473.

45. In addition to the probate assets that Respondent received under Decedent's will, which include a house and real estate valued at approximately $400,000.00, Respondent received more than $1.75 million from these life insurance policies following his death. See Trial Trans. pp. 51-53, 80, 84, 93-96; Pet. Exh. 27. Shortly before his death, Decedent used the proceeds from the Merrill Lynch account to pay off the mortgage debt on the house where he and Respondent lived, to pay medical bills, life insurance premiums, and other expenses, and to make contributions to an Individual Retirement Account (IRA) that Respondent received. See Trial Trans. pp. 127-28, 284-85, 449, 455.

ACC 6839 1/14/17

46. Following Decedent's death on July 2, 2013, Petitioners provided his e-mails and spreadsheet to Respondent and Slotchiver and requested that Respondent distribute the HBvR collection to Petitioners in accordance with their father's intentions and wishes. See Pet. Exh. 18; Trial Trans. pp. 146-47, 156, 220-25, 384-86, 521; see also Letter from J. Cordray dated 12.19.13 (filed with Probate Court on 12.20.13). Respondent has refused this request. As a result, Petitioners filed this action on February 10, 2014, seeking to enforce their father's intentions.

47. In their Amended Petition filed on October 7, 2014, Petitioners seek a judicial determination that the e-mails/spreadsheet that Decedent sent to his sister and daughter constitute a written statement or list under Section 62-2-512 of the South Carolina Probate Code (SCPC), which

authorizes and validates the process of referring in a will to an informal list or written statement to dispose of tangible personal property. Petitioners also seek an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 62-1-111.

48. In her capacity as personal representative, Respondent filed her Answer denying Petitioners' claim. Although Respondent concedes that Decedent always intended to leave the HBvR collection to Petitioners upon his death, she maintains that none of Decedent's e-mails are "in [his] handwriting" or "signed by" him, thus she claims the e-mails do not satisfy the technical requirements of § 62-2-512. Respondent asks the Court to find that she is the sole beneficiary of Decedant's probate estate, including the HBvR collection.

49. In her Answer filed on October 27, 2014, Respondent also asserts counterclaims against Petitioners for "constructive trust" and "unjust enrichment/*quantum meruit*" in which she asserts Petitioners must reimburse the estate in the amount of $791,893.00. See Trial Trans. pp. 60-65, 79. Although Respondent concedes that Decedent intended to leave the HBvR collection to Petitioners in equal shares at his death, she refuses to release this property to Petitioners unless they use the monies they received from Merrill Lynch under the TOD Agreement to reimburse Decedent's estate for various medical bills and income taxes that Decedent incurred prior to his death. Id.

II. CONCLUSIONS OF LAW

A. Children's Claims Involving Decedent's Tangible Personal Property.

The Court finds and concludes that Petitioners are entitled to judgment in their favor and against Respondent as to the claims asserted in Petitioners' Amended Petition.

1. Decedent's E-mails Satisfy the "Separate Writing" Requirement of § 62-2-512.

The Court finds compelling Petitioners' position that Decedent's e-mails and spreadsheet

show his intent to have the HBvR collection conveyed to them and constitute a "separate writing" to his Will pursuant to S.C. CODE ANN. § 62-2-512. Respondent does not dispute the e-mails and spreadsheet accurately demonstrate Decedant's testamentary intent. Indeed, Respondent readily admits that Decedent intended to leave the HBvR collection to Petitioners at his death and he never wavered from this intent. Decedent's estate-planning lawyer (Slotchiver) also specifically documented that it was his intent "to leave all of his art work inherited/received from his family to go to his 3 children to be divided into equal shares as possible." See Pet. Exh. 1, p.145. Nevertheless, Respondent argues that Decedent's intent should be overridden or disregarded because his e-mails and spreadsheet purportedly fail to comply with the technical or literal requirements of § 62-2-512. The Court rejects Respondent's arguments.

The South Carolina Probate Code ("SCPC") mandates in its introductory sections that "[t]his Code shall be liberally construed and applied to promote its underlying purposes and policies" including "to discover and *make effective the intent of a decedent* in the distribution of his property." S.C. CODE ANN. § 62-1-102(b)(2) (emphasis added). As expressly codified in the SCPC, a primary or paramount goal of this Court should be to ascertain and make effective the decedent's intent regarding the disposition of his estate. See also Holcombe-Burdette v. Bank of Am., 371 S.C. 648, 655, 640 S.E.2d 480, 483 (Ct. App. 2006).

Section 62-2-512, which is entitled "Separate writing identifying bequest of tangible property," states in its entirety as follows:

> A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the

will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect upon the dispositions made by the will.

S.C. CODE ANN. § 62-2-512.

This section is derived from the pre-1990 version of Uniform Probate Code (UPC) § 2-513. The UPC's comments explain that "[a]s part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution, this section permits a testator to refer in his or her will to a separate document disposing of certain tangible personalty." UNIF. PROBATE CODE § 2-513 cmt. (pre-1990 version); see also S. Alan Medlin, Selected Substantive Provisions of the South Carolina Probate Code: A Comparison with Previous South Carolina Law, 38 S.C. L. REV. 611, 650-51 (1987) ("[SCPC § 62-2-512] allows the will to refer to a written list or statement to dispose of certain tangible personal property, regardless of when the list is prepared or amended and even if the list is not executed in compliance with the requisite will formalities."); In re Last Will and Testament and Trust Agreement of Moor, 879 A.2d 648, 654 (Del. Ch. 2005) (observing that UPC § 2-513 relaxes the more rigorous formalities required for a will).

The intent of § 62-2-512 is to allow the disposition of tangible personal property in an informal and uncomplicated manner. The statute's purpose is to relax the formalities relating to the execution of wills by allowing a testator to refer in his will to a separate *non-testamentary* document disposing of tangible personal property. The "separate writing" authorized by § 62-2-512 is *not* a will, codicil, or testamentary trust and does not have to satisfy the formalities governing the execution of a testamentary instrument. See Wilkins v. Wilkins, 48 P.3d 644, 647 (Idaho 2002) ("As a separate writing under [Idaho's version of UPC § 2-513], the Gift By Memorandum is not a testamentary disposition or instrument. It has no effect standing alone; rather, its effectiveness relies on the existence of a validly executed will."); In re Last Will and Testament of Palecki, 920 A.2d

413, 418-19 (Del. Ch. 2007) (separate writings intended to supplement a valid will generally must be executed with full testamentary formalities, except written statements or lists incorporated in a valid will that dispose of tangible personal property not otherwise covered by the will's terms).

Respondent argues Decedent's e-mails and spreadsheet cannot satisfy the requirements of § 62-2-512 because they purportedly are not in Decedent's "handwriting" or "signed by" him. This Court is unaware of any precedent analyzing whether an e-mail may satisfy these requirements. However, case law involving analogous contexts provide persuasive support for the conclusion that an e-mail is sufficient to satisfy these requirements.

As a threshold observation, § 62-2-512 nowhere defines a signature as being limited to a *handwritten* (pen and ink) signature. South Carolina case law has long held that a "signature" is not confined to a handwritten signature; instead, other methods of signing an instrument are effectual. See Smith v. Greenville Cty., 188 S.C. 349, 199 S.E. 416, 418 (1938) (observing that the "general rule as to the mode that one may adopt in affixing his signature" is as follows: "The signature may be written by hand, or printed, or stamped, or typewritten, or engraved, or photographed, or cut from one instrument and attached to another. A signature lithographed on an instrument by a party is sufficient for the purpose of signing it, and it has been held that it is immaterial with what kind of instrument a signature is made.").[9] Numerous other jurisdictions have adopted the rule in Smith. See 80 C.J.S. Signatures § 15 (2016) ("In the absence of a statute prescribing the method of affixing a signature, it may be affixed in many different ways. It may be written by hand, printed, stamped,

[9] "Where the legislature elects not to define [a] term in the statute, courts will interpret the term in accord with its usual and customary meaning." Adoptive Parents v. Biological Parents, 315 S.C. 535, 446 S.E.2d 404, 409 (1994). Additionally, "[w]here the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." City of Camden v. Brassell, 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997). Given this state's long history of allowing a signature to be affixed to a document by some manner other than in handwriting, it is presumed the legislature was familiar with this usual and customary meaning of the term "signed" or "signature" when it enacted § 62-2-512, thus this Court cannot rewrite the statute to inject into it a requirement that the signature contemplated by the statute must be handwritten rather than another method.

typewritten, engraved, photographed, or cut from one instrument and attached to another. A signature lithographed on an instrument by a party may be sufficient for the purpose of signing it, and it is immaterial with what kind of an instrument a signature is made." (citing Smith)); State v. Obrigewitch, 356 N.W.2d 105, 108 (N.D. 1984) ("Generally, in the absence of a statute providing otherwise, a signature may be affixed to a document by writing by hand, by printing, by stamping, or by other means." (citing Smith)); State v. Watts, 222 S.E.2d 389, 391 (N.C. 1976) (citing Smith); Phillips v. Najar, 901 S.W.2d 561 (Tex. Ct. App. 1995) (use of rubber stamp by third person to affix testatrix's signature, in accordance with her instructions, did not render will invalid).[10]

Earlier in this same case, this Court entered an Order denying Respondent's motion for judgment on the pleadings. In rejecting Respondent's claim that Decedent's e-mails cannot satisfy the "separate writing" requirement of § 62-2-512, the Order observed that "probate courts across the country are moving away from strict compliance to statutory formalities and [are] admitting to probate non-traditional documents which represent the intent of the testator." See Order dated 1.6.15 p.2. The Order cited to an Ohio court's decision finding that a document prepared on a Samsung Galaxy tablet computer constituted a "writing" and that it was "signed" by the testator. Id. (citing In re Estate of Javier Castro, Deceased, Ohio Comm. Pleas (Probate Div., Lorain County), Slip Op., Journal 331, No. 3871 (June 19, 2013)). The Tennessee Court of Appeals has also issued a similar decision. See Taylor v. Holt, 134 S.W.3d 830, 833 (Tenn. Ct. App. 2003) (computer-generated signature on testator's will under which testator "simply used a computer rather than an ink pen as

[10] Even our state statutes which define the term "signature" have not limited it to handwritten signatures. For example, the South Carolina Uniform Commercial Code states that "[a] signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing." S.C. CODE ANN. § 36-3-401(b). The official comment explains: "A signature may be handwritten, typed, printed or made in any other manner. It need not be subscribed, and may appear in the body of the instrument, as in the case of 'I, John Doe, promise to pay . . . ' without any other signature. It may be made by mark, or even by thumbprint." Id. official cmt.

the tool to make his signature" was a sufficient "signature" to validate the will's execution).

Considerable case law also holds that an e-mail bearing the sender's name—such as the sender's name in the header or "From:" field at the top of the e-mail or the sender's typed name or signature block in the body of the e-mail—constitutes a "signed" writing sufficient to satisfy the Statute of Frauds.[11] See Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 296 (7th Cir. 2002) (holding that "the sender's name on an e-mail satisfies the signature requirement of the statute of frauds," and observing that "[n]either the common law nor the UCC requires a *handwritten* signature"); Int'l Casings Grp., Inc. v. Premium Standard Farms, Inc., 358 F. Supp. 2d 863, 873 (W.D. Mo. 2005) (e-mails satisfied signature requirement of statute of frauds when they contained header displaying the sender's name); Khoury v. Tomlinson, 2016 WL 7671376, *4 (Tex. Ct. App. 2016) (e-mail from company's president in which his name and e-mail address appeared in the e-mail's "from" field satisfied the signature requirement of Texas's statute of frauds); Kluver v. PPL Mont., LLC, 293 P.3d 817, 822–23 (Mont. 2012) ("from" field in e-mail containing sender's name typed out in front of his e-mail address established e-mail was signed for purposes of Montana's statute of frauds); Dalos v. Novaheadinc, 2008 WL 4182996 at *3 (Ariz. Ct. Ap. 2008) (e-mail header containing sender's name acted as signature even though e-mail contained no handwritten signature); Lamle v. Mattel, Inc., 394 F.3d 1355 (Fed. Cir. 2005) (employee's name on e-mail was valid signature sufficient to satisfy statute of frauds); Roger Edwards, LLC. v. Fiddes & Son, Ltd., 245 F. Supp. 2d 251, 261 (D. Me. 2003), aff'd in part, dismissed in part as moot, 387 F.3d 90 (1st Cir. 2004) (agent's e-mails satisfied requirement of statute of frauds that agreement be "in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized," even though e-

[11] To satisfy the Statute of Frauds, a writing must identify the parties, describe the subject matter, state all of the material or essential terms or conditions of an agreement, *and be signed by the party to be charged.* See 72 AM. JUR. 2D Statute of

mails contained no electronic copy of a handwritten signature); Copeland Corp. v. Choice Fabricators Inc., 345 F. App'x 74, 77 (6th Cir. 2009) (e-mail that identified the sender by name was a signed writing under Ohio's statute of frauds); Gillis v. Wells Fargo Bank, N.A., 875 F.Supp.2d 728, 735 (E.D. Mich. 2012) (discussing cases holding that e-mails containing only the typed name of the sender are sufficient to constitute a signature for purposes of the statute of frauds); Waddle v. Elrod, 367 S.W.3d 217, 229 (Tenn. 2012) (attorney's typed name at the end of e-mail constituted a sufficient signature to satisfy the signature requirement of the statute of frauds); Feldberg v. Coxall, 2012 WL 3854947, *6 (Mass. Super. Ct. 2012) (noting that signature requirement of statute of frauds may be satisfied by a party's email "signature block" or the "from" portion of the email); Tolle v. Lev, 804 N.W.2d 440, 444-45 & n.5 (S.D. 2011) (statute of frauds satisfied when party sent e-mail with typewritten "P" or his first initial at end of the e-mail); McClare v. Rocha, 86 A.3d 22, 27 (Me. 2014) (observing that an e-mail or other electronic record can constitute a signed writing sufficient to satisfy the statute of frauds); Rosenfeld v. Zerneck, 776 N.Y.S.2d 458 (N.Y. Sup. Ct. 2004) (typed name manifests sender's intent to authenticate the transmission); In re Hurtado, 2015 WL 2399665, at *9 (Bankr. E.D. Cal. May 18, 2015) (person's typewritten name appearing at the bottom of e-mail was sufficient to constitute a signature); United Propane Gas Inc. v. Pincelli & Associates Inc., 2014 WL 496932, at *3 (W.D. Ky. Feb. 6, 2014) (e-mails satisfied statute of frauds when the signature line of the e-mails contained the person's name).

1 CC
23 of 39
1/14/17

The court in Khoury explained that "[t]he 'from' field functions to identify the sender of the email and authenticate the email as his act." Khoury, 2016 WL 7671376 at *4. Courts have held that an e-mail bearing the sender's name was sufficient to satisfy the Statute of Fraud's signature requirement even when it was shown that the header or "From:" field for the e-mail was set up in

---

Frauds § 199 (2014); see also Fici v. Koon, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007) ("To satisfy the Statute of

advance of sending the e-mail in question or when the sender's signature block was generated automatically by his or her e-mail program. Id. (holding that "[t]he fact that the name or email address to appear in a 'from' field was set up in advance of sending the email in question" did not preclude the email from satisfying Statute of Fraud's signature requirement); Princeton Industrial, Products, Inc. v. Precision Metals Corp., 120 F. Supp. 3d 812, 820 (N.D. Ill. 2015) ("The signature block at the end of an email, whether typed by [the sender] or generated automatically by her email program" satisfied signature requirement of Illinois Statute of Frauds.); Williamson v. Bank of New York Mellon, 947 F.Supp.2d 704, 709-11 (N.D. Tex. 2013) (Court held that e-mails from parties' attorneys satisfied rule requiring that settlement agreements be in writing and signed "[r]egardless of whether the [attorneys'] names and signature blocks were manually typed or automatically attached" to their e-mails; court said: "There is no fundamental difference between, on one hand, manually typing a signature block into a series of emails and, on the other, typing the block once and instructing a computer program to append it to future messages."). In Khoury and Williamson, the courts specifically rejected the holding in Cunningham v. Zurich American Insurance Co., 352 S.W.3d 519 (Tex. Ct. App. 2011), which is one of the primary cases upon which Respondent relies.

Although South Carolina's courts have not yet specifically analyzed when an e-mail satisfies the signature requirement of the Statute of Frauds, a South Carolina federal district court has held that an e-mail may satisfy this requirement. Ellsworth v. Infor Glob. Sols. (Michigan), Inc., 2012 WL 6641648, at *3 (D.S.C. Dec. 20, 2012); see also Mathis v. Brown & Brown of S. Carolina, Inc., 389 S.C. 299, 698 S.E.2d 773, 778 (2010) (finding that e-mail exchange with employer was sufficient to create an enforceable employment contract).

Respondent argues that case law holding that an e-mail may satisfy the Statute of Frauds are

---

Frauds, every essential element of the contract must be expressed in a writing signed by the party to be compelled.").

not germane to § 62-2-512 because those cases primarily dealt with commercial transactions while the present case involves an estate. However, this argument is not persuasive for at least two reasons. First, the Statute of Frauds applies not only to commercial transactions, but also to actions against a decedent's estate. See S.C. CODE ANN. § 32-3-10(1) (No action shall be brought whereby: (1) To charge any executor or administrator upon any special promise to answer damages out of his own estate . . . [u]nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith . . . ."). For example, the Statute of Frauds applies to contracts made with a decedent for the devise of real estate. Wright v. Trask, 329 S.C. 170, 495 S.E.2d 222, 229 (Ct. App. 1997). It would be incongruent to hold that one form of signature is sufficient under the Statute of Frauds to prove a contract with a decedent for the devise of real estate while holding the same signature is insufficient under § 62-2-512 for a decedent to dispose of personal property.

Second, "the law of wills traces its earliest origins back to the English Statute of Frauds of 1677." See Joseph Karl Grant, Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will, 42 U. Mich. J.L. Reform 105, 117 (2008). With respect to wills, the English Statute of Frauds provides that "all devises and bequests of any lands . . . shall be in writing and signed by the party so devising the same or by some other person in his presence and by his express directions and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses or else they shall be utterly void and of none effect." Id. (citation omitted). "Eventually, most early American jurisdictions codified, in some form or another, the requirements of the Statute of Frauds to govern the execution and validity of wills." Id. Because the laws applicable to wills were derived from the Statute of Frauds, there is no good reason to hold that a particular form of signature is sufficient under the Statute of Frauds, but not under § 62-2-512.

This Court finds and concludes that the February 20, 2013 e-mail Decedent sent to his sister and the March 28, 2013 e-mails and spreadsheet he sent to his daughter each independently—or in the aggregate—satisfy the "separate writing" requirement of § 62-2-512, including the signature requirement. First, the e-mail that Decedent sent to his sister on February 20, 2013—explaining his intentions with regard to the disposition of his personal property including the HBvR collection—contains Decedent's typed name and e-mail address in the header or "From:" field at the top of the e-mail. The body of the e-mail also includes the following closing: "Love, Paul." Second, the e-mails that he sent to his daughter on March 28, 2013—attaching an Excel spreadsheet entitled "Art bought by Paul & Tori" that he created and which includes a notation by Decedent specifically stating that the HBvR collection is to be divided among his children—contain Decedent's typed name and e-mail address in the header or "From:" field at the top of the e-mail. All of these e-mails contain information sufficient to identify Decedent as the sender and were "signed" by him within the meaning of § 62-2-512.

This Court further finds and concludes that, by hitting the send button with his name in the "From:" field of the e-mail or his typed name in the body of the e-mail, Decedent intended to authenticate and adopt the content of the e-mails as his own writings. See Dalos, 2008 WL 4182996 at *3 ("By sending the e-mail with the heading 'From Tom Sweeney,' Sweeney impressed his name on the message with the intent of identifying and authenticating it."); Nicholson v. Thrifty Payless, Inc., 2014 WL 618775, *7 (W.D. Wash. 2014) ("[I]n the chosen medium of communication, handwritten signatures, whether original or digital, are rarely used. By affixing a typed name on the cover email, defendant announced its adoptions of the contents of the T–Rex report and authenticated the attached writing."); Stevens v. Publicis, S.A., 50 A.D.3d 253, 254-55 (N.Y. App. Div. 2008) ("The e-mails from plaintiff constitute 'signed writings' within the meaning of the statute

of frauds, since plaintiff's name at the end of his e-mail signified his intent to authenticate the contents.").

In summary, the Court concludes that Decedent's e-mails/spreadsheet satisfy the "separate writing" requirement of § 62-2-512, they constitute separate writings referred to in Article II.1 of Paul's Will under § 62-2-512, and they describe the items of personal property and devisees with reasonable certainty. As a result, Decedent conveyed whatever rights and interest that he owned or held in the tangible personal property known as the HBvR collection or German art to Petitioners.

2. *The Uniform Electronic Transaction Act (UETA).*

South Carolina's adoption of the Uniform Electronic Transaction Act of 2004 (UETA), S.C. CODE ANN. § 26-6-10 *et seq.*, buttresses this decision. The UETA's purposes are to validate and authorize the use of electronic records and electronic signatures as the equivalent of writings and to ensure that an electronic record is not denied legal effect solely because there is not a pen and ink writing or signature. Section 26-6-70 states:

> (A) A record or signature must not be denied legal effect or enforceability solely because it is in electronic form.
> (B) A contract must not be denied legal effect or enforceability solely because an electronic record is used in its formation.
> (C) An electronic record satisfies a law requiring a record to be in writing.
> (D) An electronic signature satisfies a law requiring a signature.

S.C. CODE ANN. § 26-6-70. As used in the statute, an "electronic record" means "a record created, generated, sent, communicated, received, or stored by electronic means." Id. § 26-6-20(7). An "electronic signature" means "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Id. § 26-6-20(8). Accordingly, this statute means that a signature must not be denied legal effect solely because it is in electronic form and an electronic signature satisfies a law requiring a signature.

Respondent relies upon a "carve out" clause in the UETA to argue that an e-mail cannot satisfy the requirements of S.C. Code Ann. § 62-2-512. Specifically, § 26-6-30(B)(2)(a) states that the UETA "do[es] not apply to a transaction . . . to the extent the transaction is governed by . . . a law governing the creation and execution of wills, codicils, or testamentary trusts." Id. § 26-6-30(B)(2)(a). However, Respondent's argument is misplaced because Petitioners are not relying upon an e-mail as a substitute for a will, codicil, or testamentary trust. As discussed above, the purpose of S.C. Code Ann. § 62-2-512 is to relax the formalities relating to the execution of wills by allowing a testator to refer in his will to a separate *non-testamentary* instrument disposing of tangible personal property. The "separate writing" authorized by § 62-2-512 is *not* a will, codicil, testamentary trust, or other testamentary instrument and does not have to satisfy the formalities governing the execution of a will, codicil, or testamentary trust. See Wilkins, 48 P.3d at 647; Palecki, 920 A.2d at 418-19; Medlin, Selected Substantive Provisions of the South Carolina Probate Code, 38 S.C. L. REV. at 650-51.

While § 26-6-30(B)(2)(a) of the UETA alone would not validate using an e-mail or electronic signature to satisfy the requirements for the execution of a will, codicil, or testamentary trust, it does validate using an e-mail to satisfy the requirements for a non-testamentary instrument such as a "separate writing" under § 62-2-512. Because the "separate writing" validated by § 62-2-512 is not a testamentary instrument and does not need to satisfy the formalities required for a testamentary instrument, the language in § 26-6-30(B)(2)(a) of the UETA is inapplicable to such "separate writings." Instead, § 26-6-70 mandates that this Court must treat an e-mail as satisfying any laws requiring a record to be in writing or requiring a signature, which is all that § 62-2-512 requires.

B. Respondent's Counterclaims Against Petitioners for Constructive Trust, Unjust Enrichment, and Quantum Meruit.

The Court finds and concludes that Petitioners are entitled to judgment in their favor and against the estate as to Respondent's counterclaims for constructive trust and unjust enrichment/*quantum meruit*.

1. The TOD Agreement is Controlling.

Although Respondent individually filed no claim against Decedent's estate, she argues (in her capacity as personal representative) that he breached an oral promise to use the funds in his Merrill Lynch account to pay his medical bills and income taxes, thus she posits it would be inequitable or unjust for Petitioners to keep the funds from the account after Decedent's death without first paying the income taxes or medical bills. However, the Court rejects Respondent's counterclaims because the written TOD Agreement that Decedent executed is controlling and it would not be unjust or inequitable under the facts of this case for Petitioners to keep the funds their father gave them.

As discussed above, on February 13, 2013, Decedent executed a written TOD Agreement with Merrill Lynch under which he expressly directed that Petitioners are the beneficiaries of the account upon his death and that any funds held in the account upon his death shall be paid over to Petitioners in equal shares. Chakeris reviewed the document with Decedent and he understood the document.

The TOD Agreement states that "[u]pon the Death of the Account Owner, all of the TOD Assets shall be transferred to the Beneficiaries." See Pet. Exh. 12 ¶ 1. The agreement also states: "I hereby designate the person(s) named below as Beneficiary(ies) to receive payment of the balance of the TOD Account upon my death pursuant to the terms of this Transfer on Death Agreement." Id. p. 3. Petitioners are clearly designated as the beneficiaries of the account immediately after the above-quoted provision. Id. The agreement further states that "[t]his Agreement revokes any prior agreement relating to the TOD Assets and may be revoked or changed by the Account Owner at any

time prior to the Death of the Account Owner by executing a new Agreement or a written and notarized revocation of this Agreement, which shall be delivered to [Merrill Lynch]." Id. ¶ 6. Decedent never executed a new TOD Agreement and never revoked the agreement that he signed on February 13, 2013. The TOD Agreement also states that it "supersedes all Account Owners' wills, trusts and other instruments, regardless of the date of execution, which provide for the contrary disposition of the TOD Account or TOD Assets." Id. ¶ 8.

South Carolina statutory law validates TOD Agreements. The South Carolina Uniform Transfer on Death Security Registration Act, S.C. CODE ANN. §§ 35-6-10 et seq., allows an investment account holder to transfer ownership of the account upon the account holder's death by "registering" the account "in beneficiary form." Id. § 35-6-10(B)(6), -30. An investment account "is registered in beneficiary form when the registration includes a designation of a beneficiary to take ownership at the death of the owner or the death of all multiple owners." Id. § 35-6-40. "Registration in beneficiary form may be shown by the words, 'transfer on death' or the abbreviation 'TOD', or by the words 'pay on death' or the abbreviation 'POD', after the name of the registered owner and before the name of a beneficiary." Id. § 35-6-50. "A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this chapter and is not testamentary." Id. § 35-6-90(A). The act specifically states that "[o]n death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners." Id. § 35-6-70.

Despite the TOD Agreement's clear terms, Respondent offers testimony of Decedent's oral statements indicating that during his lifetime he planned to use the Merrill Lynch account to pay income taxes and medical bills. However, nothing in the TOD Agreement states that any of the

funds in the account are to be disbursed to Decedent's estate or to Respondent upon his death. The agreement nowhere provides that he earmarked or designated funds in the account to be used to pay income taxes or medical bills upon his death.

The Court finds and concludes that the TOD Agreement is binding, enforceable, and was never revoked or modified. The Court further finds and concludes that the terms of the TOD Agreement specifically govern and control the disposition of the Merrill Lynch account funds at Decedent's death notwithstanding any verbal statements that he may have made about how he planned to use any of the account funds during his lifetime. The TOD Agreement specifically governs the ownership of the Merrill Lynch account funds upon Decedent's death. Under the document's clear terms, Petitioners are the owners of the Merrill Lynch account at his death. Decedent's oral statements about his plans for using the funds during his lifetime are insufficient to defeat the express provisions of the written TOD Agreement.[12]

ACC
3/8/39
7/14/17

2. *Absence of Clear, Definite, Unequivocal, and Convincing Evidence to Impose a Constructive Trust or Find Unjust Enrichment.*

The Court further finds and concludes that Respondent has failed to establish by clear, definite, unequivocal, and convincing evidence that it would be inequitable for Petitioners to retain the proceeds from the Merrill Lynch account or that they have been unjustly enriched.

Under South Carolina law, the elements of a constructive trust "must be established by evidence which is clear, definite, unequivocal, and convincing." Hemingway v. Small, 284 S.C. 42, 324 S.E.2d 335, 338 (Ct. App. 1984). Constructive trust is an equitable remedy arising when circumstances exist that make it inequitable for one holding another's property or money to retain it. Doe v. Roe, 475 S.E.2d 783, 786 (S.C. Ct. App. 1996).

In Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559, 561 (1987), the court explained that "[a] constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." Id. (citation omitted). "Fraud is an essential element, although it need not be actual fraud." Doe, 475 S.E.2d at 786–87. "A constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience hold and enjoy." Halbersberg v. Berry, 302 S.C. 97, 394 S.E.2d 7, 13 (Ct. App. 1990).

Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff. Barrett v. Miller, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (Ct. App. 1984). *Quantum meruit* is an equitable doctrine to allow recovery for unjust enrichment. Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (S.C. 1994). To establish a cause of action for unjust enrichment or *quantum meruit*, a claimant must show: "(1) that a non-gratuitous benefit was conferred [by the plaintiff] on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." Sauner v. Pub. Serv. Auth. of S. Carolina, 354 S.C. 397, 581 S.E.2d 161, 167–68 (2003).

As a matter of law, a party cannot recover for an alleged implied contract or in *quantum meruit* when a valid express contract touches upon the same obligations. See Eldeco, Inc. v. LPS Const. Co., 2009 WL 4586003, *5 (D.S.C. 2009); Texcon, Inc. v. Anderson Aviation, Inc., 326

[12] The parol evidence rule prevents introduction of extrinsic evidence to contradict, vary, or explain the written agreement. Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577, 581 (1990); Suttles v. Wood, 280 S.C. 272, 312 S.E.2d 574, 576 (Ct. App.1984).

S.E.2d 168 (S.C. Ct. App. 1985); Gantt v. Morgan, 18 S.E.2d 672 (S.C. 1942); Riddle v. George, 181 S.C. 360, 187 S.E. 524, 525 (1936). It is also settled law that "[t]he enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract." In re Automotive Parts Antitrust Litigation, 29 F. Supp. 3d 982, 1023 (E.D. Mich. 2014).

"[A] third party is not liable under unjust enrichment simply for benefitting from a contract between two other parties." Thimjon Farms Partnership v. First Intern. Bank & Trust, 837 N.W.2d 327, 336 (N.D. 2013); see Haggard Drilling, Inc. v. Greene, 236 N.W.2d 841, 846 (Neb. 1975); Commercial Fixtures & Furnishings, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977); Morris Pumps v. Centerline Piping, Inc., 729 N.W.2d 898, 904 (Mich. Ct. App. 2006); In re Park W. Galleries, Inc., Mktg. & Sales Practices Litig., 2010 WL 2640237, at *7 (W.D. Wash. June 25, 2010). As stated in Wright v. Wright, 289 S.E.2d 347 (N.C. 1982), "[n]ot every enrichment of one by the voluntary act of another is unjust" and "[w]here a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched." Id. at 351. "The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." Id.

Instead, "[t]here must be some misleading act, request for services, or the like, to support [an] action" for quasi contract, unjust enrichment, or restitution. Adams, 564 P.2d at 774; see also Niggel Associates, Inc. v. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 374 S.E.2d 507, 509 (Ct. App. 1988) ("For restitution to be warranted, the plaintiff must confer the benefit nongratuitously: that is, it must either be (1) at the defendant's request or (2) in circumstances where the plaintiff reasonably relies on the defendant to pay for the benefit and the defendant understands or ought to understand that the plaintiff expects compensation and looks to him for payment. It is not enough that the defendant has knowledge of the plaintiff's conduct; he must have induced the plaintiff to confer the benefit."); Gibbs v. Bank of America, N.A., 2015 WL 4645009, *3 (E.D. Mich. 2015); Fed. Home

Loan Mortg. Corp. v. Guntzviller, 2014 WL 1383555, at *9 (Mich. Ct. App. April 8, 2014). "[A] person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other *merely* because of the failure of performance by the third person." DCB Const. Co. v. Cent. City Dev. Co., 965 P.2d 115, 121 (Colo. 1998) (citing RESTATEMENT OF RESTITUTION § 110 (1937)); Federal Sav. and Loan Ins. Corp. v. Quality Hotels and Resorts, Inc., 1991 WL 30211, *4 (4th Cir. 1991); Adams, 564 P.2d at 774; Park W. Galleries, 2010 WL 2640237 at *7.

Respondent's counterclaims fail for several reasons. First, Decedent executed a written TOD Agreement with Merrill Lynch on February 13, 2013, expressly governing the ownership of the proceeds in the investment account upon his death. Because he executed a valid express contract transferring ownership of the account funds to Petitioners upon his death, resort to an implied contract or unjust enrichment is improper. Decedent owned the Merrill Lynch account outright and he alone controlled the designation of the persons to whom the account was to be given at his death. It was within Decedent's prerogative to dispose of the proceeds in his Merrill Lynch account in any manner that he saw fit. Macaulay v. Wachovia Bank of South Carolina, N.A., 351 S.C. 287, 569 S.E.2d 371, 377 (Ct. App. 2002) ("[A]n important element of ownership of property is the right of the owner to convey it on any terms within [his] intention.").

Decedent and a representative of Merrill Lynch (not Petitioners) made all of the arrangements for the account. The unambiguous terms of the written TOD Agreement signed by Decedent expressly name Petitioners as beneficiaries and provide that the balance of any funds held in the account upon his death shall be distributed to Petitioners in equal shares. Section 35-6-70 further mandates that ownership of the account passes to Petitioners on Decedent's death. If he had so desired, Decedent could have designated his estate or Respondent as beneficiaries of his account at

his death or he could have changed the TOD Agreement prior to death, but he did not. Decedent simply chose to leave the account funds to Petitioners at his death. There is nothing inequitable or unlawful about his decision.[13]

Second, Respondent has failed to prove by clear, definite, unequivocal, and convincing evidence that Petitioners had a fiduciary or confidential relationship with Decedent or that they abused any such relationship. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477, 484 (Ct. App. 1997). Although a fiduciary relation "is not confined to any specific association of parties," it "appears when the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed." Chapman v. Citizens & S. Nat. Bank of S. Carolina, 302 S.C. 469, 476, 395 S.E.2d 446, 451 (Ct. App. 1990).

Respondent has shown nothing more than the existence of a parent-child relationship between Decedent and Petitioners. The mere fact that Petitioners are Decedent's children does not *per se* establish a confidential or fiduciary relationship; rather, the existence of a confidential relationship must be determined independently of a preexisting family relationship. Chapman, 395 S.E.2d at 451; United States v. Chestman, 947 F.2d 551, 568 (2nd Cir. 1991); Economopoulos v. Kolaitis, 528 S.E.2d 714, 718 (Va. 2000); Cooper v. Cavallaro, 481 A.2d 101, 104 (Conn. Ct. App. 1984); see also 37 AM. JUR. 2D Fraud and Deceit § 39 (2016) ("Typical familial relationships are not

[13] Respondent's counterclaims essentially maintain that Paul breached an oral promise to her to use the funds in his Merrill Lynch account to pay his medical bills and income taxes. However, even assuming *arguendo* Paul breached a promise that he made to Respondent, Paul's mere failure to perform his promise does not give rise to a right of restitution against Petitioners (third parties). At most, Petitioners are innocent beneficiaries of an agreement breached by Paul with Respondent, which is insufficient to allow recovery as a matter of law.

'confidential relationships' *per se* unless there is specific evidence of domination and control of one family member over the other."). "'[A]t the heart of the fiduciary relationship' lies 'reliance, and de facto control and dominance.'" Chestman, 947 F.2d at 568 (citation omitted). It must be shown that "the one in whom the trust or confidence is reposed must possess the power to abuse the trust of the confiding party in his business affairs to the detriment of the confiding party." Chapman, 395 S.E.2d at 451. "The evidence must show the entrusted party actually accepted or induced the confidence placed in him." Moore v. Moore, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004).

Respondent failed to show that Petitioners dominated or exercised *any* control or influence over the Decedent involving his decisions to create and fund the Merrill Lynch account or that Petitioners and the Decedent were on unequal terms when he created and funded the account. There is a complete lack of evidence showing that the Decedent created or funded the Merrill Lynch account because of his reliance upon any representation or inducement by any of Petitioners. See McDaniel v. Kendrick, 386 S.C. 437, 688 S.E.2d 852, 857 & n.4 (Ct. App. 2009) (rejecting daughter's constructive trust claim when the record contained no clear and convincing evidence to demonstrate her father conveyed property to his second wife in reliance on representations by his second wife that she would hold the property for daughter's benefit). Petitioners were not even aware of the Merrill Lynch account until *after* Decedent had created it. The creation and funding of the account were matters that Decedent performed on his own without Petitioners' influence. Petitioners had no control over Decedent's designation of the beneficiaries in the TOD Agreement. Respondent offered no evidence showing Petitioners dominated or exerted any control over Decedent or that Decedent created the Merrill Lynch account because of some special confidence or trust that he imposed on Petitioners.

Finally, Respondent has failed to present any—much less clear, definite, unequivocal, and

convincing—evidence that Petitioners engaged in any fraud, bad faith, or other misconduct with respect to any funds deposited by Decedent in the Merrill Lynch account. Respondent does not even claim Petitioners tricked or induced Decedent into creating the account or executing the TOD Agreement. Instead, Decedent created the account of his own volition and he signed the TOD Agreement and deposited the funds into the account without Petitioners' knowledge or involvement. Petitioners simply received what their father gave to them. It is not inequitable or unjust for Petitioners to keep the funds disbursed to them from the account under these circumstances. See Baptist Foundation for Christian Educ. v. Baptist College at Charleston, 282 S.C. 53, 317 S.E.2d 453 (Ct. App. 1984).

Respondent argues that Decedent must have deposited the monies into the Merrill Lynch account based on a "mistake of fact." However, Respondent presented no evidence showing that Decedent was mistaken about to whom or where the funds in the account would be disbursed at his death. The only evidence regarding Decedent's intent for the Merrill Lynch funds at his death is the TOD Agreement that he signed, which states the funds are to be disbursed to Petitioners, and the testimony of Chakeris (Decedent's financial advisor) and Slotchiver (Decedent's estate-planning attorney), who both testified that Decedent told them that he knew the funds in the Merrill Lynch account would go to Petitioners at his death. There is no evidence suggesting that Decedent was mistaken or confused about the meaning, purpose, or effect of the TOD Agreement when he signed it or thereafter. Indeed, the only evidence in the record is directly to the contrary—*i.e.*, that Decedent fully understood the effect of the TOD Agreement and he wanted Petitioners to receive the Merrill Lynch account upon his death.

State law holds that "a party who signed a contract is deemed to have read and understood 'the effect' of the contract." York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139, 146

(Ct. App. 2013). The mere fact that Decedent may have planned to use some of the Merrill Lynch account to pay his medical bills and income taxes while he was alive does not indicate he was mistaken about what would happen to the account proceeds once he died. Respondent must present clear, definite, unequivocal, and convincing evidence to support her claims. She has failed to present any evidence showing that Decedent deposited funds in the account or executed the TOD Agreement based on a mistake of fact or that Petitioners induced Decedent to deposit the funds into the account or to execute the TOD Agreement based on any mistake of fact.

In summary, the Court finds and concludes that Petitioners did not engage in any fraud, bad faith, abuse of confidence, violation of any fiduciary duty, or inequitable conduct with respect to the Merrill Lynch account. The Court further finds and concludes that Respondent has failed to show any mistake of fact by Decedent involving the execution of the TOD Agreement or the disposition of the funds in the account upon his death. There is no evidence—much less clear, definite, unequivocal, and convincing evidence—showing that it would be inequitable for Petitioners to retain the proceeds from the Merrill Lynch account or that they have been unjustly enriched. Judgment in Petitioners' favor on the counterclaims is warranted.

C. Attorneys' Fees and Costs.

Petitioners seek an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 62-1-111, which provides that "[i]n a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy." Pursuant to § 62-1-111, the Court finds that justice and equity require that Petitioners be awarded their reasonable attorneys' fees and costs incurred in prosecuting their claims and defending against Respondent's counterclaims. It will be necessary for the Court to determine the specific account of fees and costs to be awarded based on

the factors enumerated in Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989) and Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). Accordingly, Petitioners are directed to file and serve a motion for attorneys' fees and costs with supporting affidavit(s) within ten days of notice of entry of this Order at which time the Court will take the matter into consideration.

III. CONCLUSION

Based on the above findings of fact and/or conclusions of law, it is hereby

ORDERED that judgment shall be entered in favor of Petitioners Richard Stein, Sarah Stein, and Nichole Stein Jones and against Respondent Victoria Martindale Stein, as the Personal Representative of the Estate of Paul J. Stein, on the claims asserted in the Petitioners' Amended Petition filed on October 7, 2014; and

FURTHER ORDERED that judgment shall be entered in favor of Petitioners Richard Stein, Sarah Stein, and Nichole Stein Jones and against Respondent Victoria Martindale Stein, as the Personal Representative of the Estate of Paul J. Stein, on the counterclaims asserted in Respondent's Answer to Amended Petition and Counterclaims filed on October 27, 2014; and

FURTHER ORDERED that Petitioners may file and serve a motion for attorneys' fees and costs with supporting affidavit(s) within ten (10) days of notice of entry of this Order; and

AND IT IS SO ORDERED!

TAMARA C. CURRY
ASSOCIATE JUDGE OF PROBATE

Charleston, South Carolina.

This 14th day of September, 2017.

Attest: A True Copy:
Deputy Clerk Probate Court
Charleston County, South Carolina

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
)
COUNTY OF CHARLESTON)

IN RE: THE ESTATE OF)
)
PAUL J. STEIN)
CASE NO: 2013-ES-10-1054)
)

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN TO:

RICHARD S. ROSEN, ESQUIRE
DANIEL F. BLANCHARD, III, ESQUIRE
POST OFFICE BOX 893
CHARLESTON, SC 29402
ATTORNEYS FOR PETITIONER

JACK CORDRAY, ESQUIRE
POST OFFICE DRAWER 22857
CHARLESTON, SC 29413

JOHN A. MASSALON, ESQUIRE
CHRISTY FORD ALLEN, ESQUIRE
POST OFFICE BOX 859
CHARLESTON, SC 29402
ATTORNEYS FOR RESPONDENT

PETITIONER OR PETITIONER'S COUNSEL SHALL CAUSE NOTICE (PURSUANT TO SCPC SECTION 62-1-401) TO BE GIVEN TO ALL INTERESTED PERSONS OR THEIR ATTORNEYS. AS THE PETITIONER YOU ARE RESPONSIBLE FOR OBTAINING A COURT REPORTER FOR THE HEARING THAT YOU HAVE REQUESTED. IF YOU NEED MORE THAN ONE HOUR ON YOUR CASE - YOU MUST NOTIFY THE CLERK OF PROBATE COURT IMMEDIATELY.

DATES OF HEARING: DECEMBER 12, 2017
TIME: 11:00 A.M.
PLACE: Charleston County Probate Court
Historic Courthouse
84 Broad Street, Second Floor
Charleston, South Carolina 29401

DESCRIPTION/SUBJECT MATTER:

ON PETITIONER'S MOTION FOR AWARD OF ATTORNEYS FEES AND COSTS; ON RESPONDENT'S MOTION FOR ATTORNEY FEES AGAINST INTERVENING RESPONDENT MARIAN STEIN-STEINFELD.

EXHIBIT
tabbies
B

This 5th day of October, 2017.

Signature: _____
Name: IRVIN G. CONDON, JUDGE OF PROBATE
Address: 84 BROAD STREET - THIRD FLOOR
CHARLESTON, SOUTH CAROLINA 29401
Telephone: (843) 958-5030

Attest: A True Copy
Clerk Probate Court
Charleston County, South Carolina

STATE OF SOUTH CAROLINA	)	**IN THE PROBATE COURT**
	)	
COUNTY OF CHARLESTON	)	**CASE NO. 2013-ES-10-1054**
	)	
IN RE: ESTATE OF PAUL J. STEIN	)	
	)	
RICHARD STEIN, SARAH STEIN, and NICHOLE STEIN JONES,	)	
	)	
Petitioners,	)	**ORDER ON RESPONDENT'S MOTION TO ALTER OR AMEND**
	)	
-v-	)	
	)	
VICTORIA MARTINDALE STEIN, Personal Representative of the Estate of PAUL J. STEIN,	)	
	)	
Respondent,	)	
	)	
-v-	)	
	)	
MARIAN STEIN-STEINFELD,	)	
	)	
Intervening Respondent.	)	

1CC
2
4/17

THIS MATTER comes before the Court upon a Motion to Alter or Amend filed by Respondent Victoria Martindale Stein pursuant to Rule 52(b) of the South Carolina Rules of Civil Procedure. Respondent filed the present to Motion to Alter or Amend on September 25, 2017 in response to this Court's Order dated September 14, 2017. Respondent first argues that the Court's Order should be amended to deny the Petitioners attorneys' fees, or in the alternative to provide an opportunity for the parties to present evidence and argument about whether or not attorneys' fees and costs should be awarded. Along with her Motion to Alter or Amend, Respondent also filed a Motion for Attorneys' Fees Against Intervening Respondent Marian Stein-Steinfeld. Also on September 25, 2017, Petitioners filed a Motion for Award of Attorneys' Fees and Costs. As

such, a hearing shall be held on the issue of attorneys' fees and costs with the date, time, and location to follow.

Respondent also argues that the Court's Order should be amended to find against the Petitioners on their claim to the art collection because neither of the emails at issue are "signed by" Paul Stein, nor are the emails a sufficient list or statement to qualify under section 512. The issues of whether or not the emails were signed by the Decedent and whether or not the emails are sufficient to qualify as a separate writing under S.C. Code Ann. § 62-3-512 were already litigated at the trial on the merits and Respondent's Motion to Alter or Amend raises no new arguments or evidence.

Based upon the foregoing, it is now therefore,

ORDERED, ADJUDGED, AND DECREED that a hearing shall be held on Respondent's Motion for Attorneys' Fees Against Intervening Respondent filed September 25, 2017 and Petitioners' Motion for Award of Attorneys' Fees and Costs, the specific date, time, and location to follow; it is further

1CC
10/2
10/4/17

ORDERED, ADJUDGED, AND DECREED that Respondent's Motion to Alter or Amend is otherwise hereby respectfully **DENIED.**

AND IT IS SO ORDERED this 1 day of October, 2017.

TAMARA C. CURRY
ASSOCIATE JUDGE OF PROBATE

Attest: A True Copy

Clerk Probate Court
Charleston County, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PROBATE COURT
NINTH JUDICIAL CIRCUIT

Tamara C. Curry, Judge

Probate Court Case No. 2013-ES-10-1054

Richard Stein, Sarah Stein, and Nichole Stein Jones ..... Respondents,

v.

Victoria Martindale Stein, Personal Representative of the Estate of Paul J. Stein ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 17, 2017, addressed to their attorneys of record, Jack D. Cordray, Esquire, Cordray Law Firm, Post Office Drawer 22857, Charleston, South Carolina 29413, Richard S. Rosen, Esquire and Daniel F. Blanchard, III, Esquire, Rosen, Rosen & Hagood, LLC, Post Office Box 893 Charleston, South Carolina 29402, and on Intervening Respondent addressed to her attorneys of record, G. Trenholm Walker, Esquire, Walker Gressette Freeman & Linton, LLC, Post Office Box 22167, Charleston, South Carolina 29413.

October 17, 2017

John A. Massalon, Esquire
Christy Ford Allen, Esquire
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
jmassalon@wmalawfirm.net
callen@wmalawfirm.net

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY PROBATE COURT
Tamara C. Curry, Associate Probate Judge

Appellate Case No. 2017-002137
Probate Court Case No. 2013-ES-10-1054

IN RE: ESTATE OF PAUL J. STEIN

RICHARD STEIN, SARAH STEIN AND NICOLE STEIN JONES, *Respondents*,

versus

VICTORIA MARTINDALE STEIN, Personal Representative of the Estate of Paul J. Stein, *Appellant/Respondent*,

and

MARIAN STEIN-STEINFELD, *Intervenor, Respondent/Appellant.*

PROOF OF SERVICE

I certify that I have served a copy of the Respondents' Motion to Dismiss Appeal and for Expedited Decision on Motion on the Appellant by mailing copies to her attorneys of record on December 1, 2017 via first-class mail, postage prepaid, and addressed as follows:

Christie Ford Allen, Esquire
John A. Massalon, Esquire
Wills, Massalon & Allen, LLC
97 Broad Street
P.O. Box 859
Charleston, SC 29402

Stephen M. Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

G. Trenholm Walker, Esquire
Walker Gressette Freeman Linton, LLC
PO Box 22167
Charleston, SC 29403

ROSEN, ROSEN & HAGOOD, LLC

By: _____

Daniel F. Blanchard, III
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726
ATTORNEYS FOR RESPONDENTS

December 1, 2017.

ROSEN | HAGOOD

Daniel F Blanchard, III
dblanchard@rrhlawfirm.com
843-266-8123

December 1, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Richard Stein v. Victoria Martindale Stein
Appellate Case No. 2017-002137

Daer Ms. Kitchings:

Enclosed for filing in the above-referenced case are:

[1] The original and six copies of the Respondents' Motion to Dismiss Appeal and for Expedited Decision on Motion,
[2] The original and six copies of the Proof of Service, and
[3] A filing fee check of $25.00.

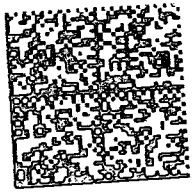
We would greatly appreciate your filing these and returning the date-stamped copies in the self-addressed return envelope enclosed herewith. Thank you for your assistance with this matter.

With best regards, I am

Sincerely,

Daniel F. Blanchard, III

DFB/db
Encls.
Cc: John A. Massalon, Esquire (w/ enclosures as stated)
Christie Ford Allen, Esquire (w/ enclosures as stated)
Jack Cordray, Esquire (w/ enclosures as stated)
Stephen M. Slotchiver, Esquire (w/ enclosures as stated)
G. Trenholm Walker, Esquire (w/ enclosures as stated)



US POSTAGE
$ 09.85
Mailed From 29401
12/01/2017
031A 0004181654

9427.000
~~9727.000~~ DFB

ROSEN | HAGOOD

151 Meeting Street, Suite 400
Charleston, South Carolina 29401

RECEIVED
DEC 05 2017
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211