THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. Thomas A. Russo, Circuit Court Judge
(The Hon. Tamara C. Curry, Probate Court Judge)

Appellate Case No. 2017-001196
(Civil Action No. 2007-ES-10-1437)

Jacquelin S. Bennett and Kathleen S. Turner as
Personal Representatives of the Estate of
Jacquelin K. Stevenson ..... *Appellants.*

v.

Estate of James Kelly King and Genevieve S. Felder ..... *Respondents.*

BRIEF OF THE APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court erred in affirming the trial court's holding that the Testator's Intent was that the real property passing through the Residuary Estate shall pass in equal ownership interest shares to each devisee as opposed to as directed by the Personal Representative, provided that the distributions are of equal monetary value?

2. Whether the Circuit Court erred in affirming the trial court's holding that the Co-Personal Representatives do not have the discretionary authority to make determinations as to what property falls within general descriptions, and to make distributions in any reasonable manner, including the use of cash, specific property, real or personal, or an undivided interest, without regard to the income tax basis of specific property allocated to any beneficiary and without making pro-rata distributions of specific assets pursuant to 10.1 and 10.6 of the Last Will & Testament of Jacquelin K. Stevenson?

STATEMENT OF THE CASE

On or about September 17, 2007, the decedent, Jacquelin K. Stevenson, died testate. At the time of her demise, she was survived by her three daughters, Kathleen S. Turner and Jacquelin S. Bennett (hereinafter "the Appellants") and their half-sister Genevieve S. Felder (hereinafter "Respondent Felder"); her two sons, Thomas C. Stevenson, III and Daniel R. Stevenson; her step-son, James Kelly King (hereinafter "Respondent King").[1] Each of the aforementioned parties are devisees of the Estate of Jacquelin K. Stevenson, as evidenced by the Last Will & Testament dated October 21, 1996. In that Will, the Testator nominated certain beneficiaries as Co-Personal Representatives. The October 21, 1996 Will was admitted to probate in the Charleston County Probate Court in 2007, and the Appellants were appointed as Co-Personal Representatives of the Estate during the course of its Administration.[2]

At the time of her demise, the decedent owned real property in Charleston, S.C., Mt. Pleasant, S.C., Edisto, S.C., and Henderson County, N.C. The first three of the aforementioned properties are all located within the County of Charleston, State of South Carolina. Specifically, they are:

1. 2414 Rockland Ave., Town of Rockville, Wadmalaw Island (T.M.S. No. 150-00-00-051) (hereinafter "Wadmalaw Property");
2. Lot No. 19, Dupree Creek Ln., Town of Mt. Pleasant (T.M.S. No. 617-15-00-020) (hereinafter "Mt. Pleasant Property"); and,

[1] Although the Respondent James Kelly King survived the Testator, he passed away several years after the Estate of Jacquelin K. Stevenson was admitted to probate. Accordingly, the Estate of James Kelly King is named as a Respondent in this action to represent Mr. King's interest in the Estate of Jacquelin K. Stevenson.

[2] The Testator nominated Kathleen S. Turner and Thomas C. Stevenson as Co-Personal Representatives in her 1996 Last Will & Testament. During the course of administration, Mr. Stevenson was removed as Personal Representative, and Ms. Jacquelin Bennett was appointed as successor Co-Personal Representative.

3. Glascow Island Lane, Edisto Island (T.M.S. No. 013-00-00-041) (hereinafter "Edisto Property").

The out-of-state real property is located in the County of Henderson, State of North Carolina at Lots No. 34, 35, 36 and 37, Lakefront Dr., Henderson County, N.C. (T.M.S. No. 9585.13-03) (hereinafter "Henderson Property").[3]

On or about May 4, 2015, the Appellants filed a Demand for Hearing with the Charleston County Probate Court, seeking authorization to distribute all of the above-named properties except for the Wadmalaw property.[4] The demand came before the trial court by way of a hearing which was held on or about June 16, 2015. Present at said hearing were the Appellants, along with their Counsel, and the Respondent Genevieve S. Felder, along with her Counsel.

At the hearing, the Appellant's argued that the Last Will & Testament gives the Co-Personal Representatives the discretion to make distributions of Estate assets in any reasonable manner, provided that such distribution resulted in equal distributions to all devisees. Appellants contended that this discretionary authority to employ "any reasonable manner" for making distributions included the use of undivided interests in real property or various combinations of interests in all of the properties, provided that the final distribution results in equal values to each devisee. Respondents, however, argued that each respective devisee should receive an equal ownership percentage in each piece of real property. Respondent further contended that the distribution could not be made in a "fair and equitable manner" if the distribution was based "strictly on monetary value."

[3] In addition to the aforementioned properties, there are also five (5) tracts of marshland located throughout Charleston County, each with an assessed value of roughly Two Hundred ($ 200.00) Dollars, worth collectively One Thousand ($1,000.00) Dollars. The current proposed distribution of these properties is not disputed amongst the parties.

[4] The Parties have previously entered into a Private Family Settlement Agreement, leaving only the issue of the Residuary Estate before the Probate Court. The Testator specifically devised the Wadmalaw property to the Appellants in the Last Will & Testament of Jacquelin K. Stevenson, accordingly, that property is not a part of the Residuary Estate.

The trial court, J. Curry presiding, issued an Order on or about July 30, 2015 holding that "it appears the Decedent's intent was to have the Residuary Estate distributed equally between the children." The trial court ordered that the Appellants were to divide the Henderson, Edisto and Mt. Pleasant Properties "in equity and good faith among the devisees so that each respective devisee receives an equal ownership interest in each piece of real estate."

Appellants took exception to the trial court's Order, and on or about August 12, 2015, Appellants filed a Motion to Alter or Amend, pursuant to Rule 56, S.C.R.C.P., asking the Court to reconsider its previous findings and holdings. The Court, in an Order issued on or about September 10, 2015 denied the Appellants' motion. The Court held that "based on the plain language and ordinary sense of the words used in the Residuary Estate" all of the real property which "'not effectively disposed of' should be divided into 'equal shares.'" The Court further held that "the property in dispute here is covered by the language of the Residuary Estate, not the provisions of Article 3 or 4 which control general devises and specific devises..." Accordingly, the Court held that the language from Sections 10.1 and 10.6 of the Last Will & Testament of Jacquelin K. Stevenson "is not controlling of property that is 'not effectively disposed of'", but rather any such property would be subject to the Court's interpretation of the Residuary Clause. The Court was silent as to S.C. Code § 62-3-715, and nonetheless affirmed its previous Order dated July 30, 2015, holding that all the "real property passing through the Residuary Estate shall do so in equal ownership interest shares to each respective devisee.

These Orders were appealed to the Circuit Court by the Appellants on September 15, 2015. On June 3, 2016, the Circuit Court, sitting in its appellate jurisdiction, held oral arguments on the issues with Judge Thomas Russo presiding. On or about April 18, 2017, Judge Russo issued an Order affirming the Probate Court's decision. This Order is now on Appeal before this Court.

SUMMARY OF LEGAL ARGUMENTS

I. The Circuit Court erred in affirming the trial court's holding that the Testator's intent was that all real property passing through the Residuary Estate should only pass to each devisee in equal ownership interest shares as opposed to a distribution to each residuary devisee in equal monetary value where there is no provision requiring same found within the will, and when reading the Will as a whole, considering all parts contained therein, it is clear the Testator intended that the decision regarding the specific manner of distributions be left to the discretion of the Co-Personal representatives.

II. The Circuit Court erred in affirming the trial court's holding that the Co-Personal Representatives did not have the broad discretionary authority to make determinations as to what property falls within general descriptions, and to make distributions in any reasonable manner, pursuant to sections of 10.1 and 10.6 of the Last Will & Testament of Jacquelin K. Stevenson which mirror the language found at S.C. Code Ann. 62-3-715. The authority granted to the Co-Personal Representatives includes the discretion to choose the manner in which the Estate is to be distributed, and does not require the consent of any beneficiary to effect same.

STANDARD OF REVIEW

The rules governing appeals at law and in equity are well settled. If the proceeding in the probate court is in the nature of an action at law, then [the appellate court] may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them. *Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989). However, where the probate proceeding is equitable in nature, the [appellate court] may make factual findings according to its own view of the preponderance of the evidence. *In re Estate of Weeks*, 495 S.E.2d 454, 329 S.C. 251 (S.C. App., 1997) *citing Ex parte Small*, 69 S.C. 43, 48 S.E. 40 (1904); *Eagles v. South Carolina National Bank*, 301 S.C. 402, 392 S.E.2d 187 (Ct. App. 1990).

This case involves the construction of a will which is an action at law. *Epting v. Mayer*, 283 S.C. 517, 323 S.E.2d 797 (Ct.App.1984). If the essential nature of the cause of action is legal, the action to be taken by the circuit court is controlled by its determination of whether or not there is any evidence to support the factual findings of the court below. *Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct. App. 1993) In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Assoc., Ltd v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

LEGAL ARGUMENTS:

I. The Circuit Court erred in affirming the trial court's holding that the Testator's intent was that all real property passing through the Residuary Estate should only pass to each devisee in equal ownership interest shares as opposed to a distribution to each residuary devisee in equal monetary value.

The cardinal rule of will construction is to determine and give effect to the testator's intent from a reading of the will as a whole. *Matter of Clark,* 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992); *May v. Riley,* 279 S.C. 248, 250, 305 S.E.2d 77, 78 (1983); *Albergotti v. Summers,* 205 S.C. 179, 182, 31 S.E.2d 129, 130 (1944). A court may not consider the will piecemeal, but must give due weight to all its language and provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with each other and with the will as a whole. *King v. S.C. Tax Commn.,* 253 S.C. 646, 649, 173 S.E.2d 92, 93 (1970); *Wise v. Poston,* 281 S.C. 574, 578, 316 S.E.2d 412, 414 (Ct.App.1984).

The rules of construction are of secondary importance to the need to ascertain what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions. *Allison v. Wilson,* 306 S.C. 274, 278, 411 S.E.2d 433, 435 (1991). An interpretation that fits into the whole scheme or plan of the will is most likely to be the correct interpretation of the intent of the testator. *Lemmon v. Wilson,* 204 S.C. 50, 69, 28 S.E.2d 792, 800 (1944). While precedent is helpful at times, "no will has a brother." A court may find little guidance in prior decisions interpreting wills and testamentary trusts in other cases due to the different intent and circumstances of each testator or settlor. *E.g. Estate of Houston,* 491 Pa. 339, 421 A.2d 166, 170 n. 5 (1980) ("No will has a brother, declared Sir William Jones.... Each will is its own best interpreter, and a construction of one is no certain guide to the meaning of another.").

The Circuit Court, sitting in its Appellate jurisdiction erred by failing to determine the testator's intent, instead finding that "[r]egardless of whether [Appellant's] interpretation was actually the testator's intent ... I find ... a pro-rata distribution—to be appropriate in light of the evidence presented." *See*, "*Circuit Court Order*" dated April 18, 2017 at p. 7. Disregarding the testator's intent is a clear error of law in an action to determine the construction of a will. *See, e.g. Matter of Clark,* 308 S.C. at 330; *May v. Riley,* 279 S.C. 248; *Albergotti v. Summers,* 205 S.C. 179. The Circuit Court chose to instead affirm the erroneous trial court ruling, citing to an alleged violation of a fiduciary's duty of good faith.

As was argued in the lower appellate tribunal, Appellants contend the trial court erred in holding that the Testator's intent was that all property should be divided in equal ownership shares, as opposed to an equal distribution of the property in shares of equal monetary value. Appellants base this contention on a reading of the entire text of the entire document, as is appropriate in a case determining the construction of a will. *See, e.g. Matter of Clark,* 308 S.C. at 330; *Allison v. Wilson,* 306 S.C. at 278, 411 S.E.2d at 435.

Looking first to the text of the Last Will & Testament of Jacquelin K. Stevenson, there is no provision contained therein which either specifically states, or implies by the verbiage contained therein, that the Testator intended for the property to be passed in equal ownership shares for each Residuary beneficiary. The original estate plan of the Testator evidences a clear intent to bequeath certain real properties to four of her five children: Kathleen Turner; Jacquelin Bennett; Thomas Stevenson; and, Daniel Stevenson. The Wadmalaw property was specifically devised to the Appellants, and the Henderson Property was specifically devised to the Stevenson brothers of the Estate.[5]

[5] The Edisto and Mt. Pleasant properties were both acquired after the execution of the Will, and are not included as specific devises.

The Testator made pecuniary bequests to her remaining child, Respondent Felder, and to her step-son, Respondent King. Appellants contend the bequests found in the original Estate planning scheme as reflected by the terms of the will in no way reflect an intent on behalf of the Testator to divide all real property in equal ownership interest shares amongst each of the children. Rather, the Testator intended that certain properties go to certain beneficiaries. However, certain intervening actions by heirs of the Estate would result in the lapse of two of these specific devises.

In 2010, the Co-Personal Representatives filed a Petition for Setoff on behalf of the Estate of Jacquelin K. Stevenson against the Stevenson brothers. The Petition was largely based upon the fact that the Estate had obtained a judgment against the Stevenson brothers in the amount of Ten Million Eight Hundred Ten Thousand Five Hundred Forty-One and no/100 ($ 10,810,541.00) Dollars for Breach of Fiduciary Duty, Breach of Trust, Conversion, and Fraud. The Court held a hearing on or about February 11, 2011 regarding same and on or about February 28, 2011, the Court issued an Order granting the Petition for Setoff. Accordingly, the specific devise of the Henderson property, along with the Stevenson brothers' Residuary interests, were declared void by the Probate Court since the amount of their liquidated indebtedness to the Estate of Jacquelin K. Stevenson exceeded the value of the devise and their Residuary interests and the Henderson Property became part of the Residuary Estate.

The Residuary Clause of the Last Will & Testament of Jacquelin K. Stevenson provides that the "rest, residue and remainder of [the Testator's] property and estate, real and personal ... *including any property before mentioned but not effectively disposed of*" should be divided in "equal shares" per *stirpes*, and not per capita amongst the residuary beneficiaries. *See, Last Will & Testament of Jacquelin K. Stevenson*, at p. 5. The only other property in the Residuary Estate was two pieces of real property, the Mt. Pleasant and Edisto Properties, which were not acquired until roughly ten (10) years after

the execution of the Will and the Will contained no provision which effectively disposed of either property. The only remaining Residuary beneficiaries are the Appellants and the Respondent.

Looking again to the actual text of the Residuary Clause, the Will calls for an equitable distribution of the Residuary Estate. It is important to note that although the Stevenson brothers no longer had residuary interests, the original Estate Plan of the Testator included a setoff provision for monies loaned by Testator to both Stevenson brothers during her life. Accordingly, at the time of drafting, the intent of the Testator was **not** to provide "equal ownership shares" amongst all children in any certain real property, but rather that any residuary property should pass in equal monetary shares, after adjusting for any monies owed to the Estate by a beneficiary. A "reading of the will as a whole" and giving "due weight to all its language and provisions, giving effect to every part" reveals that the original intent of the Testator was an equitable division of the property such that all her children and step-children were to be treated equally and fairly. *See, respectively, Matter of Clark,* 308 S.C. at 330, 417 S.E.2d at 857 (1992); and *King,* 253 S.C. at 649, 173 S.E.2d at 93 (1970).

The specific devises sought to provide, as nearly as possible, equal monetary interests in the Estate. Further, the residuary clause sought to provide equal shares after accounting for monies owed. Such provisions clearly express an intent of the Testator to treat the children equitably and fairly. However, there is nothing in the four corners of the document which suggests that the Testator ever intended for the children to share any property in equal ownership shares. The residuary clause is silent on whether the parties shall have equal ownership shares in each property, but requires only equal interests in the Residuary Estate. However, the court "may not consider the will piecemeal, but must give due weight to all its language and provisions" *King,* 253 S.C. at 649, 173 S.E.2d at 93 (1970).

As further addressed in Section II, *infra,* the Testator clearly intended that the Personal Representatives ought to have broad discretion in distributing and administering her Estate:

> In the administration of the Estate... my Personal Representatives shall have all the powers granted by law, including but not limited to the powers granted ... by S.C. Code Section 62-3-715... which powers shall not be revoked or reduced if said statutes should hereafter be repealed... ***It is my intention in specifying the following powers to give broad discretion and flexibility to my Personal Representatives.***

See, *Last Will & Testament of Jacquelin K. Stevenson* at p. 9 (***emphasis added***).

Further, Article 10 of the Will explicitly states that distributions could be made in any number of manners, including, without limitation, the use of cash, **undivided interests**, a hybrid of cash gifts and interests in property. *Id.* at 10 (**emphasis added**). The Testator explicitly stated that such distributions were not contingent upon any beneficiary's consent, and further, that the Personal Representatives **did not** have to make pro-rata distributions of any specific assets. *Id.* at 10 (**emphasis added**). The Circuit Court erroneously argues that the trial court ruled correctly in interpreting the residuary clause by holding that "a plain and ordinary reading of this language called for a pro-rata distribution." *See*, "*Circuit Court Order*" dated April 18, 2017, at p. 7. However, this interpretation focuses only on one portion of Residuary Estate Clause in a vacuum.

While the Court correctly noted that they must use the "ordinary, plain meaning" of words, such an interpretation may only be used if such a meaning would not lead to an inconsistency with the testator's declared intent. *Buist v. Walton,* 104 S.C. 95, 88 S.E. 357 (1916) The Circuit Court's interpretation creates such an inconsistency as it wholly disregards the plainly stated intent of the Testator as found in the remainder of the Residuary Estate Clause's texts (regarding the use of a set off), as well as other clauses of the Will as referenced herein. Such an interpretation is in contravention of our State's well settled law regarding the interpretation of a testamentary document. *Allison v. Wilson,* 306 S.C. at 278, 411 S.E.2d at 435 ("each item of a will must be considered in relation to other portions").

Looking at the Will in its entirety, the clearly stated intent of the Testator was never to pigeon-hole the Co-Personal Representatives into an Estate distribution scheme as envisioned by

the trial court's ruling, and as affirmed by the Circuit Court. The Testator specifically denounced pro-rata distributions of specific assets, authorized the use of cash and property hybrid distributions, and also authorized the use of undivided interests in property. Each of these clauses show a clear, unequivocal intent to allow the Personal Representatives to distribute the estate in any reasonable manner so long as the final distribution was fair and equitable, taking into account the monetary values distributed to each beneficiary, and accounting for any setoffs contained in the residuary clause.

Absent any statements to the contrary contained in the will, it is clear that there is no provision which reflects an intent by the Testator to require a distribution which allows only for equal ownership interests in each property. Such an interpretation usurps the declared Intent of the Testator, and binds the hands of the Personal Representatives in direct opposition to her stated wishes. It forces a distribution scheme upon the Estate which is unsupported by any text contained in the four corners of the Will.

Accordingly, the Circuit Court erred in disregarding the Testator's intent, and in affirming the trial court's holding that the testator's intent was was that all real property passing through the Residuary Estate should only pass to each devisee in equal ownership interest shares as opposed to a distribution to each residuary devisee in equal monetary value. This Court should **REVERSE** the Circuit Court's decision, and allow the Co-Personal Representatives to administer the Estate in accordance with the plainly stated intent of the Testator. Appellants will address in the following section how their exercise of this discretionary power satisfies the "good faith" requirements.

II. The Circuit Court erred in affirming the trial court's holding that the Co-Personal Representatives did not have the broad discretionary authority to make determinations as to what property falls within general descriptions, and to make distributions in any reasonable manner, pursuant to sections of 10.1 and 10.6 of the Last Will & Testament of Jacquelin K. Stevenson.

A personal representative has the duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this code... [They] shall use the authority conferred upon [them] by this code, the terms of the will and any Order in proceedings to which [they are] a party..." S.C. CODE ANN. § 62-3-703. In construing the language of a will, the appellate court must give words their ordinary, plain meaning unless it is clear the testator intended a different sense, or unless such a meaning would lead to an inconsistency with the testator's declared intention. *Buist v. Walton,* 104 S.C. 95, 88 S.E. 357 (1916); *In re Estate of Fabian,*326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct.App.1997); *Clark v. Evans,* 308 S.C. 328, 330, 417 S.E.2d 856, 857 ("A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, ... or inconsistency with the declared intention of the testator... would follow from such construction.) *Id.*; *See also, Love v. Love,* 208 S.C. 363, 369, 38 S.E.2d 231, 233 (1946). A court may not consider the will piecemeal, but must give due weight to all its language and provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with each other and with the will as a whole. *King v. S.C. Tax Commn.,* 253 S.C. 646, 649, 173 S.E.2d 92, 93 (1970); *Wise v. Poston,* 281 S.C. 574, 578, 316 S.E.2d 412, 414 (Ct.App.1984).

In determining the powers of the Co-Personal Representatives in the present case, the court must look to the "authority conferred upon [them] by this code, the terms of the will and any Order in proceedings to which [they are] a party." S.C. CODE ANN. § 62-3-703. It is without question that the Testator's declared intent, by the terms of her will, was to "give broad discretion and flexibility to [her] Personal Representatives." *See, Last Will & Testament of Jacquelin K. Stevenson* at p. 9. The Testator specifically incorporates statutory authority granted by the Probate Code in stating that the powers of her Co-Personal Representatives shall include those enumerated in S.C. Code Ann. § 62-3-715. *Id.* Also, the specific provisions contained in Article 10 of the Will track the language of § 62-

3-715 nearly verbatim. See, generally, *"Article 10: Fiduciary Powers", Last Will & Testament of Jacquelin K. Stevenson*, pp. 9 to 11; *cf.* S.C. CODE ANN. 62-3-715.

Looking then both to § 62-3-715 and Article 10 of the Will, the Appellants have the broad discretionary authority to "determine what property is covered by general descriptions in this Will" (Section 10.1) and to make distributions in a variety of manners (Section 10.6). Viewing the Sections 10.1 and 10.6 through the lens of the Testator's stated desire to "give broad discretion and flexibility" to the Appellants, Appellants are authorized to determine what property falls within the Residuary Estate, and to make distributions of said Residuary in any reasonable manner provided that such distribution results in an equitable distribution to each beneficiary. Even the Circuit Court concedes that the Personal Representatives have this power. *See*, "*Circuit Court Order*" dated April 18, 2017, at p. 8.

As discussed in Section I, *supra*, the Trial Court's ruling as affirmed by the Circuit Court creates an arbitrary mandate in contravention to the Testator's plainly stated intent. The exact language of Section 10.6 clearly states the Appellants were empowered to make the distribution in any reasonable manner. Appellants were permitted to make distributions in "cash **or** in specific [real] property… **or** an undivided interest, **or** partly in cash and partly in such [real] property, **and** to do so without regard to the income tax basis of specific property allocated… **and without making pro-rata distributions of specific assets**." *See, Last Will and Testament of Jacquelin K. Stevenson*, at p. 10 (**emphasis added**).

Reading the will "in the ordinary and grammatical sense of the words employed," the exact text of the clause sheds light on the broad discretion granted to the Appellants in making distributions. *Clark*, 308 S.C. at 330, 417 S.E.2d at 857. As Personal Representatives, Appellants are free to distribute the property in the Residuary Estate to satisfy each beneficiary's equal share by distributing to them either: (1) cash; (2) a partial interest in a property; (3) a hybrid of a partial

interest in a property and cash; or, (4) an undivided interest in a property. Considering the remaining conjunctive phrases of the clause, the Appellants, in making any such distributions were not required to take into account any tax basis issues, nor were they required to make pro-rata distributions of any of the properties.

There is nothing improper about the proposed plan of distribution as proffered by the Appellants. The mere fact that it grants interests in certain properties to certain beneficiaries is not forbidden by the Will. Rather, such a distribution is encouraged by the Testator, with the decision to utilize same left wholly to the discretion of the Personal Representatives. The mere fact that the Respondents are unhappy with the proposed scheme means little given that the Personal Representatives are empowered to make such distributions "without the consent of any beneficiary." *See, Last Will and Testament of Jacquelin K. Stevenson*, at p. 10.

The authority to make the distribution without Respondents' consent is plainly stated by the terms of the Will and by the statutory authority conferred in S.C. Code Ann. § 62-3-715(23). Further, Respondents stipulated on the record that the valuation of all the properties were correct for purposes of distributing same to the beneficiaries. Appellants provided the accounting report of Herbert McGuire, CPA, who was hired by the Co-Personal Representatives to assist in formulating the proposed distribution scheme. Respondents did not dispute the values used by Mr. McGuire in creating the distribution plan. Accordingly, Respondents cannot in good faith argue that that there is disparity in value amongst the beneficiaries' shares, and should be estopped from proffering any such argument to the contrary.

However, both the trial court, and the Circuit Court erred in their holding that the duties imposed upon fiduciaries "required a pro-rata distribution of the Estate." *See*, Id. Specifically, the trial court held that Appellants could not satisfy their duty of good faith as fiduciaries by making any form of distribution which did not include equal ownership shares of all real property passing

through the Residuary Estate. This holding is a clear error of law by the trial court, and in its affirmation by the Circuit Court, as such a position is wholly contrary to the Testator's stated intent as well as the law of this State.

The Testator authorized the Appellants to distribute the Estate using any reasonable method, including the use of undivided interests. Such terms affirm Appellants' position that it was not the Testator's intent to bind the hands of Appellants by requiring only equal divisions of the properties, but rather the Testator intended to allow Appellants to make distributions in any form or manner they consider to be reasonable. The trial court is correct in stating that the Personal Representatives are bound by their duty as a fiduciary, and must "act in good faith and with due regard" to the other beneficiaries. However, said duty requires only that the property must be distributed in a fair and equitable manner with respect to the value of the property. The duty imposed by the trial court's interpretation of the plain terms of the Will vitiates both the Testator's intent and the authority conferred by the terms of the Will, and disregards our State legislature's purpose in enacting § 62-3-715(23).

The Circuit Court erred in affirming the holding that the only appropriate method of distribution was a "pro-rata" basis, a position advanced by the Respondents which has no legal basis in the jurisprudence of this state. Both the Circuit Court and Respondent have cited to several cases regarding the fiduciary duty of good faith owed by the Personal Representatives to the beneficiaries, yet they have failed to provide any case law or statutory authority which states the only way to satisfy this duty is to distribute real property in equal ownership shares if it is passing through the Residuary Estate. While the Circuit Court is correct that Appellants are bound by their duty as a fiduciary and must "act in good faith and with due regard" to the other beneficiaries, this duty requires only that each beneficiary receive a distribution of **equal value**.

The interpretation found in the trial court's ruling and as affirmed by the Circuit Court vitiates both the Testator's plainly stated intent in the terms of the will as it relates to the authority conferred upon Appellants. Further, such an interpretation disregards the intent of the legislature in enacting S.C. Code Ann. § 62-3-715(23).[6]

Respondents contend that Appellants must take into consideration non-monetary factors in dividing the property. However, As the *Zimmerman* court explicitly held that "While we find that equitable considerations such as ... sentimental attachment to the property may be considered, the pecuniary interests of all the parties is the determining factor." *Zimmerman v. Marsh*, 618 S.E.2d 898 (S. Ct. 2005) Any alleged sentimental attachment Respondent has to the subject property (the extent of which is highly disputed by Appellants) may be considered, what is ultimately required of Appellants is to ensure that all parties receive equal monetary distributions.

Further, the *Campbell* court reached a similar decision, citing a previous Court opinion in their rationale, *Wilson v. McGuire*, addressing the very issue now before this Court. *Campbell v. Jordan*, 382 S.C. 445 (Ct. App 2009) (*citing Wilson*, 320 S.C. 137, 463 S.E. 2d 614 (Ct. App 1995)). In *Wilson*, the Court held the allocation of a preselected tract to one heir was not prejudicial to other heirs unless evidence was presented to demonstrate tract was *more valuable* than other tracts. Appellants contend the *Wilson* court's holding should guide this Court in its decision. Respondent has not (and cannot) present any evidence to date which suggests that the monetary shares are unequal.

Ultimately, this case boils down to one unhappy sibling who wishes to vitiate the terms of their mother's will and disregard the laws of this State so that she can a share of a piece of property she was never entitled to in the first place. Respondent has accused Appellants of violating their fiduciary duties, of essentially attempting to steal from Respondent. While Respondent may be

[6] The Reporter's Comments to the South Carolina Probate Code recites that the purpose of enacting § 62-3-715 is "to set forth in some detail the power which a Personal Representative may exercise with respect to the estate and without the necessity of obtaining an order from the Probate Court in order to do so."

unhappy, there is nothing improper about the distribution scheme absent any evidence or proof that the values of each heirs' share are unequal. The Will specifically precludes requiring Appellants to obtain Respondent's consent or seal of approval on any proposed distribution. Respondent is simply and utterly incorrect in her assertions that the actions of the Appellants and their proposed distribution scheme are anything but proper and allowed by law.

Therefore, the Appellants restate that it is unequivocally clear the trial court erred in holding that the Co-Personal Representatives did not have the broad discretionary authority to make determinations as to what property falls within general descriptions, and to make distributions in any reasonable manner. Nothing contained in the terms of the Will, nor in the Probate Code, prohibits the distribution scheme proposed by Appellants. Finally, as each beneficiary's share is equal in value, Appellants have satisfied their good faith requirements to the other beneficiaries. Accordingly, this Court should **REVERSE** the Circuit Courts holding affirming the trial court's decision, and allow the Co-Personal Representatives to make distributions in accordance with the discretion granted to them by the Testator.

CONCLUSION:

Based upon the foregoing, the Appellants contend that the trial court erred in holding the Testator's intent was that all real property passing through the Residuary Estate should only pass to each devisee in equal ownership interest shares as opposed to a distribution to each residuary devisee in equal monetary value. Further, the trial court erred in holding that the Co-Personal Representatives did not have the broad discretionary authority, either by the terms of the Will or as authorized in § 62-3-715(23), to make determinations as to what property falls within general descriptions, and to make distributions in any reasonable manner, pursuant to sections of 10.1 and 10.6 of the Last Will & Testament of Jacquelin K. Stevenson. Accordingly, the Appellants

respectfully pray this Court to **REVERSE** the trial court's Order, to **REMAND** this matter to the inferior court to enter an Order approving the distribution scheme proposed by the Respondents.

(signatures contained on the following page)

Respectfully submitted this **15th** day of **January, 2018.**

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Hon. Thomas A. Russo, Circuit Court Judge
(The Hon. Tamara C. Curry, Probate Court Judge)

Appellate Case No. 2017-001196
(Civil Action No. 2007-ES-10-1437)

Jacquelin S. Bennett and Kathleen S. Turner as
Personal Representatives of the Estate of
Jacquelin K. Stevenson ..... *Appellants.*

v.

Estate of James Kelly King and Genevieve S. Felder ..... *Respondents.*

Proof of Service

The undersigned certifies that the **Appellants' Initial Brief** was served upon the parties to this action on this **15th** day of **January, 2018** by U.S. Mail to the following:

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January 24, 2018

VIA REGULAR MAIL & FACSIMILE:

THE HONORABLE JENNY ABBOTT KITCHINGS
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RE: JACQUELIN BENNETT & KATHLEEN TURNER VS. ESTATE OF JAMES KING & GENEVIEVE FELDER
Appellate Case No.: *2017-001196*
Case No.: *2007-ES-10-1437*

Dear Ms. Kitchings:

It has come to my attention that only the Proof of Service for the Initial Brief was filed with the Court, and per the court's instructions, a copy of the initial brief needs to be filed as well. In that vein, enclosed you will please find the following documents for filing:

1. Two (2) copies of Appellant's Initial Brief

If you would kindly file the original and return one clerk-stamped copy to my office using the self-addressed, postage-paid envelope I have also included, I would be most appreciative.

Please note that I have copied all counsel of record to this correspondence pursuant the South Carolina Appellate Rules.

I apologize for any inconvenience which may have been caused by this mistake, and I thank you in advance for your time and attention to this matter, please do not hesitate to contact me if you should have any questions regarding this correspondence or the matters addressed herein.

Sincerely,

Andrew J. McCumber

Enclosure(s) as stated.

cc: George R. McElveen, Esq., Attorney for Respondents ***(via regular mail)***

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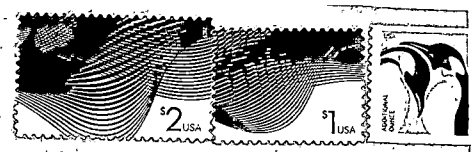

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