

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2017-CP-10-0398

MARY P. SMITH, MAEZELL MITCHELL)
JEFFERSON, INDIVIDUALLY AND AS)
PERSONAL REPRESENTATIVE OF THE)
ESTATE OF ANNABELLE THORNTON,)
SHIRRESE B. BROCKINGTON, AS)
SPECIAL ADMINISTRATOR OF THE)
ESTATE OF JANINE GOURDINE, EMMA)
SMALLS, VIOLA PRINGLE, CEPHUS)
THORNTON, ARTHUR GRADDICK, III,)
AN IMPRISONED PERSON, VENETRA)
WATSON, AND ANY KNOWN OR)
UNKNOWN PERSONS OR ENTITIES)
CLAIMING ANY INTEREST IN THE)
ESTATES OF LUCINDA PRINGLE,)
ODESSA GRADDICK, ARTHUR)
GRADDICK, JR., ANNABELLE)
THORNTON, AND JANINE GOURDINE,)

Appellants)

vs.)

ANGUS M. LAWTON, PERSONAL)
REPRESENTATIVE OF THE ESTATE OF)
LUCINDA PRINGLE, EVELINA BROWN)
MOSES, THOMAS P. BROWN, JR., AND)
UNKNOWN PR REBECCA PATRICIA)
BROWN,)

Respondents.)

FILED
2018 MAR 19 PM 4:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY

**ORDER ON APPEAL FROM PROBATE
COURT**

RECEIVED

MAR 29 2018

SC Court of Appeals

THIS MATTER comes before the Circuit Court on an appeal from the Probate Court of Charleston County, the Honorable Judge Irvin G. Condon presiding. An appeal hearing was held on February 1, 2018. Attorney for Appellant T. Jeff Goodwyn and Attorneys for Respondents Jonathan Altman and Stephen Slotchiver filed appellate briefs in the matter. Following a review of the record and arguments made by counsel, this Court affirms the ruling of the Probate Court.

PROCEDURAL HISTORY

The decedent passed away on October 11, 1989. No formal attempt to probate Decedent's estate was made until an application for informal appointment was filed on May 5, 1999. The estate was probated and a Deed of Distribution of the Property at issue was filed April 17, 2000. A Certificate of Discharge was issued on June 26, 2011.

The Respondents filed a Petition for Recovery of Improper Distribution based on their claim that a will had been discovered which left the Property to the Respondents on October 20, 2005. Respondents filed a Motion to Vacate the Order dated June 25, 2001, on January 8, 2007. A hearing on this Motion to Vacate was held on April 8, 2008. The Probate Court found the ten year statute of repose pursuant to S.C. Code § 62-3-108 applied and denied Respondent's Motion to Vacate in an Order dated October 20, 2008.

Respondents appealed the Probate Court's decision. The Court of Appeals issued an Order filed August 9, 2011, reversing the Probate Court's ruling that the ten year statute of repose prevented the court from considering the will in cases where there is evidence that a fraudulent concealment of the will has taken place. The case was remanded to the Probate Court for further findings consistent with this opinion.

The will was not offered to probate after the Court of Appeals issued its decision. On June 25, 2015, the Probate Court issued an order ordering Angus Lawton, Special Administrator of the estate, to file a Petition to Probate the will. The Petition for Appointment and Informal Probate of a Will was filed September 4, 2015. Appellants filed a Petition for Formal Testacy on February 9, 2016, challenging the validity of the will and requesting the court address all issues on remand from the Court of Appeals.

A hearing was held November 9, 2016, by the Probate Court. The Probate Court issued an Order dated January 18, 2017, denying Appellants' Petition and finding that the will was valid and able to be probated.

ARGUMENTS

Appellants raise the following arguments on appeal:

- I. The Probate Court erred as a matter of law in allowing Decedent's will to be probated when the validity of the will was properly raised and no evidence was offered to prove the proper execution of the will.
- II. The Lower Court erred as a matter of law in finding the offered will to be an accurate version of the will of the Decedent when the beneficiary designation portion of the will is clearly altered on its face and there was no Petition to probate something other than the original will and no evidence presented as to how the original will disposed of the decedent's property.
- III. The Probate court erred as a matter of finding that Emma Smalls perpetrated a fraud on Respondents by concealing the will when it is admitted and the court found that the Respondents had possession of a copy of the will within three years of death and failed to timely offer it for probate.

LAW

An appeal from a decree of the probate court may be made to the circuit court in the same county. S.C. Code § 62-1-308. The standard of review applicable to cases originating in probate court is determined by whether the underlying cause of action is at law or in equity. *In re Estate of Hyman*, 362 S.C. 20, 25 (2004). An action to construe a will is an action at law. *Id.* Actions at law are reviewed to correct legal errors of the lower court. *Id.* The Circuit 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. *See* S.C. Code 62-1-308(d); *see also* *University of Southern California v. Moran*, 365 S.C. 270 (2005).

ANALYSIS

- I. **Appellant's first argument states, "The Probate Court erred as a matter of law in allowing Decedent's will to be probated when the validity of the will was properly raised and no evidence was offered to prove the proper execution of the will."**

The Appellants argue that the Probate Court failed to inquire into the validity of the will, stating that the Probate Court failed to comply with S.C. Code § 62-3-407. S.C. Code § 62-3-407 states, in pertinent part, "If a will is opposed by the petition for probate of a later will revoking the former, it must be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it must be determined first whether the will is entitled to probate."

Appellant concedes in their Initial Brief that "a ruling on this finding may be moot given the fact that the court did make findings related to the validity of the will." Initial Brief of Appellants, p. 8. The Probate Court made specific findings in regards to the validity of the will and found further inquiry was unwarranted. *See* Order of the Probate Court Dated January 18, 2017, p. 5.

The Appellants further argue that the Probate Court failed to conduct further inquiry into the validity of the will, stating that the will is not notarized or self-proved. S.C. Code § 62-3-406(3) states: "if the will is witnessed pursuant to Section 62-2-502, but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this State, competent, and able to testify. Proper execution may be established by

other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred."

Both of the witnesses to the will were deceased at the time of the hearing. Appellants' position is that because the case has been in litigation for over ten years, the Respondents had an opportunity to obtain an affidavit of one of the witnesses to the will. Appellants argue that because the burden is on the Respondents, the Respondents have failed to meet their burden to prove the validity of the contested will.

The Probate Court found that the law requires "one of the attesting witnesses to establish proper execution if the witnesses are within the state **and** are competent and able to testify." Order of the Probate Court Dated January 18, 2017, p. 5 (*emphasis in original*). As both witnesses were deceased, the Probate Court found no further inquiry was needed. The Appellants have not cited to any rule requiring Respondents to obtain an affidavit in anticipation of circumstances in which live testimony could not be given.

The Appellants further argue that the attestation clause fails to create the rebuttable presumption noted by S.C. Code § 62-3-406, because the attestation clause states the witnesses observed "Lucinda Springer" instead of "Lucinda Pringle" sign the will. The Probate Court found this to be a scrivener's error, but the Appellants argue this was an error by the Probate Court, and without extrinsic evidence to prove this was in fact a "scrivener's error," this would create a method for "unscrupulous heir[s] to create fraudulent will[s] that no one can dispute." The Probate Court found that the nominating provision on page two was identical to the nominating provision on page one of the three-page will. Appellants cite to *Fenzel v. Floyd* for the statement that "extrinsic evidence is admissible to prove and correct a scrivener's error." *Fenzel v. Floyd*, 289 S.C. 495

(1986). The Probate Court did not find extrinsic evidence was required, and Appellants do not claim any evidence which would contradict the Probate Court's finding on this matter.

This Court affirms the Probate Court's findings on these grounds. The Appellants have not demonstrated that the Probate Court made any error of law.

II. The Appellants further argue, "The lower court erred as a matter of law in finding the offered will to be an accurate version of the last will of the Decedent when the beneficiary designation portion of the will is clearly altered on its face and there was no Petition to probate something other than the original will and no evidence presented as to how the will disposed of the decedent's property."

Appellants claim the Probate Court made a finding that because Emma Smalls made the alterations and Appellants are not questioning Emma Smalls's status as an heir, "any such alteration by Ms. Smalls does not preclude Decedent's will from being probated and that further inquiry is unwarranted." Initial Brief of Appellants, p. 15. Based on this statement, the Appellants argue the Respondents failed to comply with the requirements of S.C. Code § 62-3-402, which states, in part, "If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable." Appellants further argue that the court has no basis to determine the testator's intent based on the alterations made to the will.

Respondents challenge Appellants reading of the Probate Court's Order, and argue the Probate Court did not make a finding of alteration. As Respondents argue, the Order of the Probate

Court states: "Petitioners maintained that Decedent's will was altered and that the beneficiary designations were changed. Appellants contend that if the will was altered, any alteration was committed by Emma Smalls who had possession of it." Order of the Probate Court Dated January 18, 2017, p. 5. The record reflects that following Decedent's death, Appellants possessed copies of the will and disseminated it to third parties and family members. These copies were identical to the original will filed by Evelina Brown Moses on August 4, 2005.

This Court finds the Probate Court did not err as a matter of law on these grounds. Sufficient evidence exists in the record to support the Probate Court's findings.

III. The Appellants also argue, "The Probate Court erred as a matter of finding that Emma Smalls perpetrated a fraud on Respondents by concealing the will when it is admitted and the court found that the Respondents had possession of a copy of the will within three years of death and failed to timely offer it for probate."

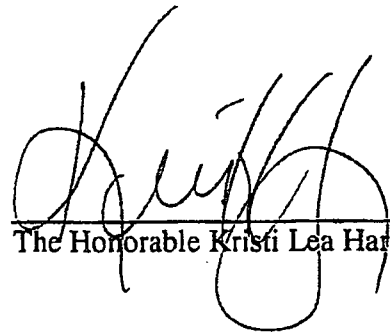
Appellants contend that the Probate Court was capable of making additional findings on this issue at the November 9, 2016 hearing. *See* Initial Brief of Appellants, p. 20. Appellants do not dispute the finding that Emma Smalls concealed the will, but argue that the concealment did not cause harm to the Respondents. Appellants ask this Court to reverse the Probate Court, find that the statute of repose should not be tolled, and bar the will from admittance to probate based on the Respondents failure to file the will. The Probate Court found that Petitioners' concealment prevented Respondents from offering the will. The record reflects that Respondent Thomas Brown attempted to file a copy of the will, but a copy was not accepted by the Probate Court. Respondents filed the will upon discovery of the fraud.

Appellants have failed to demonstrate any error of law committed by the lower court, and as such, this Court affirms the Probate Court's findings on this issue.

CONCLUSION

Following a review of the record on appeal and the arguments presented at the hearing by counsel, this Court finds no error of law was made by the Probate Court. Therefore, the ruling of the Probate Court is affirmed. The Appeal is dismissed.

IT IS SO ORDERED.



The Honorable Kristi Lea Harrington

March 16, 2018

Charleston, South Carolina