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.*

REPLY BRIEF OF THE APPELLANTS

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I. **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.**

The thrust of Respondent's argument is that the Probate Court's decision to use a pro-rata distribution, as opposed to the distribution scheme proffered by the Appellants, "assured an indisputably fair and equal division ... rather than a contrived and self-serving distribution." *See*, "*Respondent's Brief*" at p. 8. A holding that Appellants' proposed plan does not comport with their fiduciary duties, or that their proposed division is not fair and equal, assumes that either (1) there is a disparity in values amongst the proposed shares of distribution; or, (2) that this Court, and the Personal Representatives, are required to make considerations of non-pecuniary, intangible factors such as alleged sentimental attachment, in creating a proposed distribution. Respondent should be estopped from arguing the former due to their failure to raise the issue at trial. The latter argument fails to comport both with the terms of the decedent's will, and the laws of this State.

Appellants would again urge the Court to look again to the singular guiding principle in an action for will construction: the testator's intent. *See, Matter of Clark*, 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992) (Cardinal rule of will construction is to determine and give effect to the testator's intent.); *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); *See, also Allison v. Wilson*, 306 S.C. 274, 278, 411 S.E.2d 433, 435 (1991) ("Rules of construction are of secondary importance to the need to ascertain what the testator meant by the terms used).

In this vein, Appellants would first like to address what appears to be a clerical error in the trial court's Order which has been inadvertently duplicated by all parties in several places throughout

the Record, including the Statement(s) of the Case which, and once corrected, may shed more light on the Testator's intent. The Decedent was actually survived by two (2) daughters and one (1) step-daughter, along with three (3) sons. *See*, "*Last Will & Testament of Jacquelin K. Stevenson*" (The previous statements in this case reference three (3) daughters, two (2) sons, and one (1) step-son.)

This distinction is important because the Appellants' proposed distribution scheme is the only plan which accurately reflects their late mother's intent: the family properties (the Rockville and Lake Summit properties) ought to be left only to the four children of her marriage to Appellants' father. Looking to the original Estate plan as enumerated in the will, there are no dispositions of family property to the Decedent's step-daughter. Similarly, the Decedent also made no disposition of family property to her husband's step-son. (Her own son from a previous marriage.)

Respondent is correct about one point: there was simply no way to predict the malfeasance of the Stevenson brothers, nor that the Estate would end up in the predicament that it was currently in due to same. However, the Appellants are attempting to honor the original Estate Plan of their late mother by crafting a distribution scheme which reflects her original intent. Absent some disparate value in the properties (an argument which Respondent should be enjoined from advancing due to their failure to previously raise the same before the Court), or to argue that an alleged sentimental attachment should weigh on the Court's consideration (despite conceding that no legal authority exists to support the same) would be improper.

Appellants challenge the present decision by the trial court as there is no provision contained in the Will which reflects an intent by the Testator to require a distribution only through equal ownership interests in each piece and every separate piece of real property. Such an interpretation usurps the declared Intent of the Testator and binds the hands of the Personal Representatives in direct opposition to the Testator's 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 trial court erred

in holding that the testator's intent was was that any and all real property passing through the Residuary Estate should only pass to each devisee undivided ownership interest shares as opposed to a distribution to each residuary devisee based on equal monetary value.

This Court should **REVERSE** the trial court's decision and allow the Co-Personal Representatives to administer the Estate in accordance with the plainly stated intent of the Testator.

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 10.1 and 10.6 of the Last Will & Testament of Jacquelin K. Stevenson.

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. Respondent's main arguments are that Appellants proposal for distribution is "devoid of reason" and is simply an attempt to "obtain for themselves the most desirable property remaining the Estate ... a distribution that cannot be seen as anything other than self-serving." See, Respondent's Brief at p. 11. To put it plainly, Respondent contends that Appellants are self-dealing and violating their fiduciary duties to Respondent.

In support of this position, Respondent previously relied on the Vermont Supreme Court case, *In re: Fitzsimmons* in support of their position.[1] As was previously argued in the inferior Appellate court, Appellants contend the *Fitzsimmons* holding concurred with Appellants' interpretation that the authority delegated by sections 10.1 and 10.6 applied to "distribution ... under the residuary clause" and language requiring an equal division of the property "does not require that each piece of property, real or personal, has to be divided equally between devisees."

[1] *In re: Fitzsimmons*, 86 A.3d 1026 (Vt. S.Ct. 2013). *In re Fitzsimmons* is an opinion by the Vermont Supreme Court interpreting the application of Vermont Probate Law to a piece of property located in the State of New York.

Appellants do acknowledge that Respondent is correct in stating that these powers are not unlimited, however, as noted by the *Fitzsimmons* court "in most cases, distributions in kind from different classes of property that results in equal beneficiaries receiving equal value would not show a violation of the executor's duty." *Id., citing Harp v. Pryor*, 276 Ga. 478, 578 S.E.2d 424, 425 (2003).

Ultimately, in order to prevail, Respondent has to show that the monetary values are disparate—a position they cannot take without disputing the values they previously consented to or by raising arguments they failed to raise at trial in this matter. *See, Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct.App.1999) ("It appears the first time [Appellant] made this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not properly preserved for our review.")

Alternatively, Respondent must argue that non-economic factors should play a role in the Court's analysis—a position unsupported by the law of this State. Respondent relies on the *Zimmerman* (and *Campbell*, in the inferior court[2]) decision in support of their position. *See, Zimmerman v. Marsh*, 618 S.E.2d 898 (S. Ct. 2005) *and Campbell v. Jordan*, 382 S.C. 445 (Ct. App 2009). 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." 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. (And further, that any distribution mirror the original intent of the testator.)

[2] The Campbell court reached a similar decision to *Fitzsimmons* (citing *Wilson v. McGuire*, 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.

Therefore, the Appellants restate that 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 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 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 trial court to enter an Order approving the distribution scheme proposed by the Appellants.

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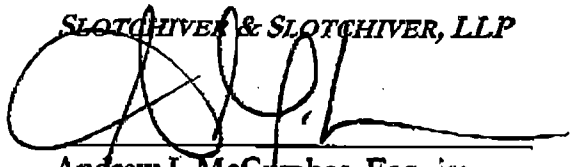
Respectfully Submitted,

SLOTCHIVER & SLOTCHIVER, LLP



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June 19, 2018

Charleston, South Carolina

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PROOF OF SERVICE

I certify that I have served the **Reply Brief** on the Respondents, Estate of James Kelly King and Genevieve S. Felder, by depositing a copy of same in the United States Mail, postage prepaid, on **June 19, 2018** addressed to their attorney of record, **George R. McElveen, Esquire**, of the law firm, **McElveen & McElveen**, located at **2229 Bull Street, Columbia, SC 29201.**

Respectfully submitted this **19th** day of **June, 2018.**

By: **SLOTCHIVER & SLOTCHIVER, LLP**

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VIA REGULAR MAIL & FACSIMILE:

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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:

Enclosed for filing you will please find two (2) copies of Appellants' Reply Brief, along with two (2) copies of a Proof of Service for the same. 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 Court Rules.

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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June 19, 2018

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