

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Circuit Court

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No.: 2018-000562

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SC Court of Appeals

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,

v.

Angus M. Lawton, Personal Representative of the Estate of
Lucinda Pringle, Evelina Brown Moses, Thomas P. Brown, Jr.
and unknown Personal Representative of the Estate of Rebecca
Patricia Brown,Respondents.

INITIAL BRIEF OF RESPONDENTS

Jonathan S. Altman, Esquire
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403

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

Attorneys for Respondents

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT PROPERLY AFFIRM THE PROBATE COURT'S DENIAL OF APPELLANTS' PETITION FOR FORMAL TESTACY AFTER REVIEWING THE PROBATE COURT'S CONSIDERATION OF EVIDENCE OF THE VALIDITY OF DECEDENT'S WILL AND THE PROBATE COURT'S PRIOR FINDINGS AND ORDERS?
2. DID THE CIRCUIT COURT PROPERLY AFFIRM THE PROBATE COURT'S FINDINGS AS TO THE ACCURACY OF DECEDENT'S WILL AFTER REVIEWING THE RECORD, INCLUDING APPELLANTS' DISSEMINATION OF IDENTICAL COPIES OF THE WILL AFTER DECEDENT'S DEATH?
3. DID THE CIRCUIT COURT PROPERLY AFFIRM THE PROBATE COURT'S FINDING THAT APPELLANTS' ADMITTED CONCEALMENT OF DECEDENT'S WILL CAUSED RESPONDENTS TO SUFFER PREJUDICE AND HARM?
4. DID APPELLANTS FAIL TO FILE THEIR PETITION FOR FORMAL TESTACY WITHIN THE EIGHT (8) MONTH TIME LIMIT SET FORTH IN S.C. CODE ANN. § 62-3-1083, RENDERING IT UNTIMELY?

STATEMENT OF THE CASE

Decedent's will was executed on July 30, 1988. At the time of Decedent's death (October 11, 1989), she was vested with an undivided fifty percent (50%) interest in a ten and a half (10.5) acre tract of land located on US Highway 17 North in Mount Pleasant, South Carolina.

Decedent's surviving heirs were her three (3) grandchildren, Respondents Evelina Brown Moses, Thomas P. Brown, Jr., and Rebecca Patricia Brown, and her daughter, Appellant Emma Smalls. Decedent had raised Respondents following the death of their mother, Evelina Brown, one of Decedent's five (5) daughters. Decedent's surviving daughters concealed Decedent's will in order to live out their lives on Decedent's property which Decedent intended Respondents to inherit. To do so, Appellants maintained that Decedent did not have a will and died "*intestate*".

Following Hurricane Hugo, Appellant Emma Smalls processed a claim with the Public Savings Fire & Casualty Insurance Company seeking to obtain monies to repair Decedent's house in which she resided. The insurance company issued a check to Appellant Emma Smalls

naming as payees Emma Smalls and Respondents as “*Executors of the Estate*” on January 15, 1990. The payees on the insurance check were identical in form and sequence with the provisions of Decedent’s will.

Appellants filed an Application for Informal Appointment in the Charleston County Probate Court on May 5, 1999. The Probate Court administered the estate as “*informal*” assuming intestacy in accordance with S.C. Code Ann. § 62-3-3014.

On August 3, 2005, Respondent Evelina Brown Moses received Decedent’s original will from Appellant Emma Smalls and filed it with the Probate Court on August 4, 2005. Since its filing, Appellants, including Emma Smalls, have denied producing the will to Respondents.

On October 19, 2005, Respondents filed an Application/Petition for Subsequent Administration and sought the appointment of a Special Administrator for Decedent’s estate. In their application, Respondents alleged that, “*Decedent’s will was concealed and, therefore, the Personal Representative made distributions in accordance with the laws of intestacy rather than pursuant to the terms of the will of Decedent.*”

On October 20, 2005, Appellants filed a Petition for Recovery of Improper Distribution. By Order dated January 4, 2005, the Court granted Appellants’ application and appointed Shirrese B. Brockington as Special Administrator.

On January 18, 2007, Respondents filed a Motion for Vacation of Order and sought the issuance of an order finding that Appellants knowingly and intentionally concealed Decedent’s will. On April 18, 2008, Respondents filed a memorandum detailing evidence of the validity of the will which included Appellant Emma Smalls’ claim with the Public Savings and Fire Casualty Company.

On April 8, 2008, the Probate Court held a final hearing. In addition to memorandum and briefs filed by the parties, the deposition transcripts of Respondents Thomas P. Brown, Jr. and Evelina Brown Moses, and Appellants Viola Pringle, Maezell Mitchell Jefferson, Emma Smalls, Robert Pringle, Cephus Thornton, and Mary P. Smith were entered into evidence by consent.

On October 20, 2008, the Probate Court denied Appellants' motion to vacate based on the ten (10) year limit set forth in S.C. Code Ann. § 62-3-108. In its order, the Probate Court made the following findings:

1. *Emma Smalls, in the aftermath of Hurricane Hugo in late 1989, processed a claim with the Public Savings & Fire Casualty Insurance Company with reference to damages which resulted to the house she resided in on decedent's property; and*
2. *As a result of the claim, the insurance company issued a check naming as payees Emma Smalls and the Appellants as Executors of the estate of the decedent on January 15, 1990;*
3. *The payees on the insurance check match in order and number the apparent nomination of the executors listed in Item IV on decedent's will; and*
4. *Appellant Emma Smalls used the money received from this check to repair the home on decedent's property in which Appellant Emma Smalls resided.*

Appellants' sole argument in opposition to Respondents' Petition for Improper Distribution was that the ten (10) year statute of limitation set forth in S.C. Code Ann. § 62-3-108 barred the relief sought by Respondents. The Probate Court found that "*clearly, the Respondents have shown good cause, but it has no choice other than to rule that it is incontestable that decedent left no will and that decedent's estate passed by intestate succession.*"

Respondents appealed this order. In their Brief, Appellants did not dispute the validity of the will and, in fact, argued that Appellants Annabelle Thornton and Mary Smith had copies of

the will which they showed to Respondent Thomas Brown several days after Decedent's death. Appellants also maintained that Appellant Viola Pringle provided a copy of the will to Respondent Thomas Brown about three (3) years after Decedent's death.

By opinion filed August 9, 2011, the Court of Appeals reversed the Probate Court and found the following:

1. *Decedent was predeceased by one of her five daughters, Evelina Brown, the mother of Respondents;*
2. *Appellants had hidden the existence of the will in order to live out their lives on decedent's property;*
3. *One by one, Decedent's other daughters lived their lives and passed away until the last surviving daughter confessed to Evelina's children that she and her sisters had hidden the existence of the Will in order to live out their lives on the property; and*
4. *Decedent intended Respondents to inherit from her will.*

The Court of Appeals remanded the case to the Probate Court for further proceedings consistent with its opinion.

In accordance with the Court of Appeals' remand, the Probate Court held a final hearing as to all matters at issue on November 9, 2012. On March 24, 2013, the Probate Court issued an Order in which it "*accepts for probate the Last Will and Testament of Lucinda Pringle dated July 30, 1988.*"

On April 5, 2013, Appellants filed a Notice of Intent to Appeal to the Circuit Court and a Notice of Motion and Motion to Alter/Amend. On April 15, 2013, Appellants filed a Notice of Motion and Motion to Dismiss. In these filings, Appellants argued that the Probate Court's acceptance of the will was barred by S.C. Code Ann. § 62-3-108. On December 20, 2013, a hearing was held as to Appellants' motions and the Probate Court again issued an order finding

that it was “*required to accept and probate the Last Will and Testament of Lucinda Pringle dated July 30, 1988.*”

On February 20, 2015, Appellants filed a Notice of Motion, Motion to Dismiss and Brief in Support of Motion again arguing that Respondents’ efforts were barred by S.C. Code Ann. § 62-3-108. By Order dated June 21, 2015, the Probate Court denied Appellants’ motion and found that “*by order dated March 24, 2013, the Court had previously accepted for probate the Last Will and Testament of Lucinda Pringle dated July 30, 1988.*” On July 14, 2015, Appellants filed a Notice of Motion to Amend or Alter which was later withdrawn.

On February 9, 2016, Appellants filed a Petition for Formal Testacy. Although the Probate Court had previously ruled on the issues raised by Appellants, it, in an abundance of caution, again considered the issues and denied Appellant’s’ petition. The Probate Court also affirmed that the ten (10) year statute of limitations as set forth in S.C. Code Ann. § 62-3-108 does not bar the admission of Decedent’s will for probate in light of Appellants’ concealment of the will and the prejudice suffered by Respondents.

Appellants filed a Notice of Appeal to the Circuit Court which affirmed the Probate Court by order dated March 16, 2018. This Appeal followed.

STANDARD OF REVIEW

“*An action to contest a will is an action at law,*” *Neely v. Thomasson*, 365 S.C. 345, 349, 350, 618 S.E.2d 884, 886 (2005). “*When a Probate Court proceeding is an action at law, the Circuit Court and the Appellate Court may not disturb the Probate Court’s findings of fact unless a review of the record discloses that there is no evidence to support it.*” *Id.* at 350, 618 S.E.2d 886.

ARGUMENTS

I. DID THE CIRCUIT COURT PROPERLY AFFIRM THE PROBATE COURT'S DENIAL OF APPELLANTS' PETITION FOR FORMAL TESTACY AFTER REVIEWING THE PROBATE COURT'S CONSIDERATION OF EVIDENCE OF THE VALIDITY OF DECEDENT'S WILL AND THE PROBATE COURT'S PRIOR FINDINGS AND ORDERS?

The Probate Court considered the validity of Decedent's will and reviewed its prior findings and orders in denying Appellants' Petition for Formal Testacy. In their Initial Brief and appeal to the Circuit Court, Appellants acknowledged that the Probate Court "*did make findings related to the validity of the will*" and that "*a ruling on these findings may be moot.*" In affirming the Probate Court, the Circuit Court found that "*the Probate Court made specific findings in regards to the validity of the will and found further inquiry was unwarranted.*" The Circuit Court noted Appellants' concession in its order. Appellants' contention that there is no evidence of the will's validity is contrary to the record.

The Probate Court also correctly interpreted S.C. Code Ann. 62-3-406(3) in denying Appellants' Petition for Formal Testacy. At the hearing of November 9, 2016, counsel for Appellants and Respondents advised the Probate Court that the witnesses to the will were deceased. In its order, the Probate Court made specific reference to the witnesses' unavailability and stated that S.C. Code Ann. § 62-3-405 and 62-3-406 requires "*one of the attesting witnesses to establish proper execution if the witnesses are within the state and are competent to testify.*" (Emph. Added.)

While Appellants maintain that Respondents "*should not be relieved of the requirement to produce testimony of one of the witnesses to the will if the witnesses were living during the pendency of the case,*" this argument is contrary to S.C. Code Ann. § 62-3-406(3). In affirming the Probate Court, the Circuit Court noted that "*the Appellants have not cited to any rule or*

requirement to Respondents to obtain an affidavit in anticipation of circumstances in which live testimony could not be given.” Appellants hid Decedent’s will for over sixteen (16) years. The circumstance of which the Appellants now complain is entirely of their own making.

II. DID THE CIRCUIT COURT PROPERLY AFFIRM THE PROBATE COURT’S FINDINGS AS TO THE ACCURACY OF DECEDENT’S WILL AFTER REVIEWING THE RECORD, INCLUDING APPELLANTS’ DISSEMINATION OF IDENTICAL COPIES OF THE WILL AFTER DECEDENT’S DEATH?

In their Petition for Formal Testacy, Appellants questioned the accuracy of Decedent’s will and maintained that the will was altered. Appellants also contended that additional inquiry was required as page 2 of the will refers to a “*Lucinda Springer*” as opposed to “*Lucinda Pringle*,” the Decedent, who is accurately identified on pages one (1) and three (3) of the will. While Respondents argued that no further inquiry was required, the Probate Court considered the issues raised by Appellants in its order denying Appellants’ petition. The record in this case contains considerable support for the Probate Court’s findings as noted by the Circuit Court which stated that “*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 filed by Evelina Brown Moses on August 4, 2005.*”

The will filed by the Respondents on August 4, 2005 is identical in form to the will submitted by Appellant Emma Smalls to Public Savings Fire & Casualty Insurance Company in 1989. While Respondents testified that copies of the will were provided to Respondent Thomas Brown following Decedent’s death, none of the Respondents testified that these copies were different in form than the will filed with the Probate Court.

With regard to the reference to “*Lucinda Springer*”, the Probate Court inquired into this issue and noted that “*Decedent’s will is three (3) pages in length. Pages one (1) and three (3) identify the document as the Last Will & Testament of Lucinda Pringle. The nominating*

provision on page two (2) is identical to the nominating provision on page one (1). It is the finding of the Court that the reference to Lucinda Springer on page two (2) of the will is a scrivener's error and no further inquiry is warranted." The Circuit Court's finding that the Probate Court did not err as a matter of law on these grounds is consistent with the record in this case.

III. DID THE CIRCUIT COURT'S PROPERLY AFFIRM THE PROBATE COURT'S FINDING THAT APPELLANTS' ADMITTED CONCEALMENT OF DECEDENT'S WILL CAUSED RESPONDENTS TO SUFFER PREJUDICE AND HARM?

While Appellants now acknowledge that Appellant Emma Smalls concealed the will, they maintain that this concealment did not prejudice Respondents as Appellants provided Respondent Thomas Brown with a copy of it. Respondent Thomas Brown testified that he attempted to file this copy but was told by the Probate Court that it would only accept the original will for probate.

Respondent Thomas Brown's testimony is uncontradicted. Respondents Evelina Brown Moses and Rebecca Patricia Brown had no knowledge of the existence of this copy or their brother's efforts. It is against public policy to penalize Respondents for relying on an improper and inaccurate statement from the Probate Court. Moreover, if a time limit applied to the subject scenario, Appellants' fraud estops Appellants from asserting any statute of limitations. The Probate Court properly found that Appellants' concealment prejudiced Respondents and prevented Respondents from offering the will for probate. In light of the admitted concealment by Appellants, the ten year statute of limitations as set forth in S.C. Code Ann. § 62-3-108 does not bar the admission of Decedent's will.

S.C. Code Ann. § 62-3-1005 and 62-3-1006, otherwise providing limitations for remedies by heirs and devisees against Personal Representatives and distributees, do not bar actions to

recover for fraud, misrepresentation or inadequate disclosure. More generally, S.C. Code Ann. § 62-1-1006 creates a fraud related time period to bring an action within two years from the discovery of the fraud. As discussed, herein, Respondents promptly filed Decedent's will upon discovery of its concealment. The Circuit Court properly affirmed the Probate Court's findings as to this issue.

IV. DID APPELLANTS FAIL TO FILE THEIR PETITION FOR FORMAL TESTACY WITHIN THE EIGHT (8) MONTH TIME LIMIT SET FORTH IN S.C. CODE ANN. § 62-3-1083, RENDERING IT UNTIMELY?

Appellant Emma Smalls produced the will to Respondent Evelina Brown Moses on August 3, 2005. By this time, Appellants had concealed its existence for sixteen (16) years. From 2005-2016, Appellants filed a series of motions asserting that the will's admission was barred by S.C. Code Ann. § 62-3-108. While not addressed by the Probate Court, Respondents contend that Appellants' Petition for Formal Testacy failed to comply with the eight (8) month time limit set forth in S.C. Code Ann. § 62-3-108(c) which states:

“a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within eight months from informal probate or one year from the decedent's death, whichever is later.”

Appellants' Application/Petition for Informal Subsequent Administration was filed on October 19, 2005. On January 4, 2006, the Probate Court appointed Shirrese Brockington as Special Administrator and ordered her to proceed with the administration of the estate. Within eight (8) months of that appointment, Appellants should have proceeded to contest Decedent's will. The record reflects that Appellants waited over ten (10) years to do so.

By opinion dated August 9, 2011, the Court of Appeals reversed the Probate Court and remanded the case. By orders dated March 21, 2013 and December 20, 2013, the Probate Court accepted Decedent's will for probate. Rather than commence a proceeding to contest the

accepted will and raise the issues set forth in their Petition for Formal Testacy, Appellants filed a series of motions contending that the Court of Appeals had erred. All of these motions were denied.

The eight (8) month limitation period set forth in S.C. Code Ann. § 62-3-108(3) runs from the time a will is admitted to probate. See *Wooten v. Wooten*, 235 S.C. 228, 110 S.E. 2d 922 (1959). Moreover, the language in S.C. Code Ann. § 62-3-301, *et seq.* clearly envisions that a will is “*informally probated, upon admission by the Court.*” See also *In the Matter of George Theisen*, 314 S.C. 140, 442 S.E.2d 179 (1994). In *Theisen*, the Supreme Court noted that “*legal treaties are in accord at the time limitations in which to challenge a will run with the time it is admitted to probate.*” See *95 CJS Wills, § 533* [*time limitation on right to seek review of a will commences from the date of its proof, or, in other words, the day it was admitted to probate or refers to the act of the Clerk accepting the will for probate, rather than the date upon which the estate is closed.*] *Emphasis added.*

While Appellants contend that the prior hearings in this case were limited to consideration of the ten (10) year time limit set forth in S.C. Code Ann. § 62-3-108, many of these hearings were “*final hearings*” in which all matters at issue were considered. Respondents submit that Appellants’ Petition for Formal Testacy did not satisfy the eight (8) month limitation period set forth in S.C. Code Ann. § 62-3-108(3).

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the order of the Circuit Court affirming the Probate Court be affirmed.

Respectfully submitted,

Date: August 17, 2018

A handwritten signature in black ink, appearing to read 'JSA', written over a horizontal line.

Jonathan S. Altman, Esq.
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403

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

Attorneys for Respondents

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Angus M. Lawton, Personal Representative of the Estate of
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and unknown Personal Representative of the Estate of Rebecca
Patricia Brown,Respondents.

PROOF OF SERVICE

I hereby certify that Respondents' Initial Brief and Designation of Matter to be Included
in the Record on Appeal have been served via U.S. Mail, properly addressed to the following
counsel of record on August 17, 2018:

T. Jeff Goodwyn, Jr., Esq.
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205

Attorney for Appellants

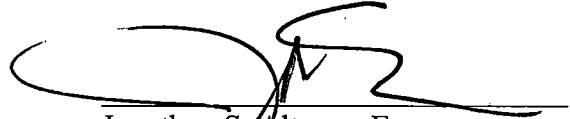
Angus M. Lawton, Esq.
496 Bramson Court, Suite 100
Mt. Pleasant, SC 29464

PR of the Estate of Lucinda Pringle

Ayesha T. Washington, Esq.
The Washington Law Firm, LLC
P.O. Box 30026
Charleston, SC 29417

*Attorney for Appellants/
Special Administrator*

August 17, 2018



Jonathan S. Altman, Esq.
Derfner & Altman, LLC
575 King Street, Suite B
Charleston, SC 29403

Stephen S. Slotchiver, Esq.
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

Attorney for Respondents

D · & · A

DERFNER
& ALTMAN

August 17, 2018

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

RE: Mary P. Smith, et al. v. Angus M. Lawton, et al.
Appellate Case No. 2018-000562

Dear Ms. Kitchings:

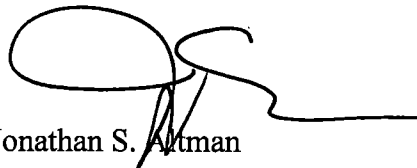
Please find enclosed an original and one copy of the following relative to the above referenced matter:

1. Respondents' Initial Brief and Designation of Matter; and
2. Proof of Service upon Appellants' counsel of same.

Please file the originals and return clocked-in copies to me in the enclosed self-addressed stamped envelope. Please contact me with any questions you may have regarding the above matter.

Yours Very Truly,

DERFNER & ALTMAN, LLC



Jonathan S. Altman

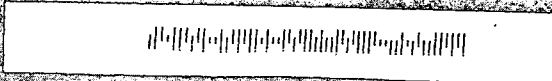
JSA/rs

Enclosures

cc: Stephen M. Slotchiver, Esq.
Angus M. Lawton, Esq.
T. Jeff Goodwyn, Jr., Esq.
Ayesha Washington, Esq.

ARMAND DERFNER | SAMUEL H. ALTMAN | JONATHAN S. ALTMAN

843.723.9804 (PHONE) | 843.723.7446 (FAX) | 575 KING STREET | SUITE B | CHARLESTON, S.C. 29403 | WWW.DERFNERALTMAN.COM



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