

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM FLORENCE COUNTY  
CIRCUIT COURT

Thomas A. Russo, Circuit Court Judge

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APPELLATE CASE NO. 2018-001144

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**RECEIVED**  
NOV 01 2018  
SC Court of Appeals

IN THE MATTER OF:  
THOMAS G. MOORE (Decedent)

Michael Dennis Moore.....Appellant,

v.

Thomas Paul Moore, Francine Laura Lawhon,  
Linda Kaye Moore, Phillip Frederick Moore.....Respondents.

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INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the lower courts err in applying the doctrine of integration, where alleged integrated document was a separate envelope containing a document with instructions devising a piece of the Testator's estate and no evidence or testimony from attesting witnesses spoke as to the validity of the document or the presence of the document at the time of the signing of the will?
  
- II. Did the lower courts err in ruling that a contract to sell real property extinguished the rights of survivorship of the Appellant, the joint tenant with rights of survivorship, when the Testator, the deceased joint tenant died after the signing of a contract to sell real property, but before the closing and recording of the transfer of Deed?
  
- III. Did the circuit court err in ruling that the Appellant did not preserve the issue for review of prejudicial submission of evidence and allowance of additional claims the day of trial, when counsel for the Appellant did not object to evidence and claims at time of submission but later requested the ability to respond to Respondents allegations and submission of evidence, but was denied the opportunity by the Probate Court?
  - a. And if the issue was preserved, than did the probate court err in allowing the submission of new evidence and claims by the Respondent on the day of the final hearing?

## STATEMENT OF THE CASE

The Decedent, Thomas G. Moore passed away on December 20, 2013. *See* Final Order. The Decedent left a Last Will and Testament (herein after referred to as “Will”) dated September 27, 1997. *Id.* The decedent’s son Michael Dennis Moore was appointed personal representative under the Will. *Id.* The Will was admitted to the Florence County Probate Court on February 20, 2014. *Id.* The Decedent was survived by five children, Thomas Paul Moore, Phillip Frederick Moore, Michael Dennis Moore, Francine Laura Lawhon, and Linda Kaye Moore. *Id.* On April 24, 2014 the Personal Representative filed an Original Inventory and Appraisement for the Estate. *Id.*

This matter appeared in front of the Florence County Probate court with the consent of all parties to approve the Estate’s closing documents on December 22, 2015. A second hearing was held on July 27, 2016. *Id.* Both Testimony and exhibits were taken into to evidence by the Probate court at these hearings. *Id.* The Probate court reviewed and heard several matters presented to it by interested parties of the Will, including the following issues prevalent to this appeal: (1) whether a separate writing found near the Decedent’s Last will and Testament should be considered a part of the Will under the doctrine of integration; (2) whether the Decedent or his estate had any interest in the proceeds of a sale of property that was titled in the Decedent and Appellant Michael Dennis Moore’s names as joint tenants with rights of survivorship, when the Decedent was alive at the time a contract was signed to sell the property, but passed away before the closing and signing of the deed; and (3) whether checks written by the Decedent before his death should be added to the estate and deducted out of the Appellants share.

The Honorable J. Mumford Scott, Jr. ruled on the above stated issues accordingly. First, that a document separate<sup>1</sup> from the Will within the Decedent's safe and accessible by the heirs, should be integrated into that Will. *See* Final Order Pg. 2-6. The Probate courts stated in its order that the document was not attached to the Decedent's will. *Id.* Further, there was no testimony presented by attesting witnesses that the document was present at the time of the signing of the Will. Secondly, the Probate court ruled that the joint tenancy with right of survivorship<sup>2</sup> was effectively terminated by a contract of sale of the property, which was signed by both joint tenants, even when the Decedent passed away before the deed was transferred. *See* Final Order Pg. 10-12. Finally, the Probate court found that alleged loans and payments made by the Decedent before he passed away were properly presented to the court, and that Appellant Dennis Moore is indebted to the estate in the amount of \$473,838.00. *See* Final Order Pg. 17-20. The Probate court's basis for its order for repayment of indebtedness, relies on evidence disclosed and submitted by Phillip F. Moore on the day of the hearing. *Id.* The Probate Court denied the Appellant's request to file a counter "Summary Brief" to Phillip F. Moore's evidence provided. *Id.* The Honorable J. Mumford Scott, Jr. signed the Probate court Order on November 28, 2016 and the order was filed November 29, 2016.

The Appellant filed a Notice of Appeal on December 15, 2016 with both the Circuit Court and the Probate Court and served it on all parties. The Appellant then filed its Statement of Issues on Appeal on January 26, 2017. The Appeal to the Circuit Court

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<sup>1</sup> This separate document sought to devise a one half interest in a four acre piece of property located in Richland County.

<sup>2</sup> The joint tenancy with a right of survivorship concerns property located on Cypress Avenue in Garden City, South Carolina.

was held on February 14, 2018, and the Honorable Thomas A. Russo signed an order affirming the Probate court's decision on April 25, 2018, filed May 8, 2018.

The Appellant filed a Motion to Alter or Amend the Court's Order on May 14, 2018 and the Motion was denied on June 5, 2018. The Appellant then filed his Notice of Appeal June 18, 2018 and thereafter requested the transcript to the February 14, 2018 hearing. The transcript to the February 14, 2018 hearing was delivered and received by the Appellant on September 4, 2018. The Appellant now files his Initial Brief.

### **STANDARD OF REVIEW**

An "Appeal from the probate court is governed by the provisions of the Probate Code." In re Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993). The Probate Code requires appeals from the probate court be to the circuit court. S.C. Code Ann. § 62-1-308 (Supp.2004). The Probate Code further instructs the circuit court to "hear and determine the appeal according to the rules of law." S.C.Code Ann. § 62-1-308(d) (Supp.2004). "As used in this statute, the phrase 'according to the rules of law' means according to the rules governing appeals." In re Howard, 315 S.C. at 360, 434 S.E.2d at 257. "[I]f there is neither a statute nor a rule of court expressly prescribing a different standard of review, the circuit court must apply the same standard that [the appellate court] would apply were the appeal taken directly to either [the supreme court or court of appeals]." Id. at 361, 434 S.E.2d at 257.

The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity. In re Estate of Hyman, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct.App.2004); In re Thames, 344 S.C.

564, 568, 544 S.E.2d 854, 856 (Ct.App.2001). An issue regarding statutory interpretation is a question of law. Wimberly v. Barr, 359 S.C. 414, 597 S.E.2d 853 (Ct.App.2004). Thus, “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.” In re Howard, 315 S.C. at 361, 434 S.E.2d at 257; see also In re Estate of Pallister, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005) (“If the proceeding in the probate court is in the nature of 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 there is no evidence to support them.”). The standard of review at law is the same whether the facts are found by a jury or the judge sitting without a jury. In re Howard, 315 S.C. at 361, 434 S.E.2d at 257.

### **ARGUMENT**

- I. **The lower courts erred in ruling that a separate envelope containing a document with instructions giving a piece of the Testator’s estate, should be integrated into the Testator’s will when the separate document was not connected to the Testator’s will, was not referenced in the said will, and was not attested to by appropriate witnesses that it was present at the time of the signing of the Will.**

The typed letter referencing instructions to devise a piece of property to an heir, should not be integrated into the Will, when the letter was not signed, witnessed, dated or notarized, and the letter was not physically attached to the Will but in a separate envelope located near the will.

According to South Carolina Code, for a will to be properly executed and enforceable the following requirements must be met: (1) in writing; (2) signed by the testator or signed in the testator's name by some other individual in the testator's presence and by the testator's direction; and (3) signed by at least two individuals each of whom

witnessed either the signing or the testator's acknowledgment of the signature or of the will. S.C. Code Ann. § 62-2-502. The Reporter's Comments state the following: the effect of Section 62-2-502 is that every will must be in an integrated writing, signed and witnessed as described, except only as provided in Sections 62-2-505 (written wills duly executed elsewhere) and 62-2-512 (writings disposing of tangible personal property).

The South Carolina Supreme Court in Goethe v. Browning examined a contested will composed of two sheets. Goethe v. Browning, 146 S.C. 7, 4 (1928). The first sheet of the will contained clauses 1, 2, 3, and 4, and was not signed by the testatrix nor by either of the attesting witnesses and the second page contained clause 5, which merely appointed the executor, and the signature of the testatrix and the attestation clause. Id. The South Carolina Supreme Court stated

The will itself must be executed in accordance with the formalities prescribed by the statute, but not each separate sheet making up the will. Pearson v. Wightman, 1 Mill, Const. (8 S.C.L.) 336; 12 Am. Dec. 636. Martin v. Hamlin, 4 Strob. (35 S.C.L.) 188; 53 Am. Dec., 673. Goethe v. Browning, 146 S.C. 7, 5 (1928)

The Jury found as a matter of fact that the first sheet, although not signed by the testatrix, was a part of the overall will. In reviewing this case Goethe v. Browning states “(w)hen a will is composed of more than one sheet, it may become a question of fact for a jury, in a trial of will or no will, to determine whether the unsigned sheet or sheets composing the purported will is or are in fact a part of the will of a testator. The proof of such fact depends upon the rules of evidence, which require that the separate unsigned sheets be identified at the time of the execution of the will, or upon the probate thereof, by all or any one of the attesting witnesses.” This case is the closest example of the doctrine of integration being applied in the State of South Carolina.

In our case the Circuit Court in affirming the Probates Court's decision states the following:

The Probate Court found, and the record reflects, that after Decedent's death, the safe at his home was opened. Contained in the safe were the Decedent's will and a letter in an envelope with Decedent's letterhead on it. This letter identified the Church Property and included testamentary language bequeathing Decedent's interest in the property to Respondent Thomas Paul Moore. The Probate Court applied the law of integration and found that it was the intent of the Decedent that the document regarding disposition of the Church Property be part of the Decedent's will.

With respect and deference to the Circuit Court and the Probate court, the facts presented in our case does not enable or authorize the Probate court to apply the doctrine integration in this instance or apply the current South Carolina law addressing individual documents not signed according to S.C. Code Ann. § 62-2-502.

The Appellant does not ask this court to disturb the lower courts finding of the facts. The Appellant base their Appeal on the position, that with the facts presented, the lower court erred as a matter of law in applying the doctrine of integration in this case.

The Respondent, Thomas Paul Moore, submitted a letter to the Probate court, asking the Probate court to integrate this letter into the Decedent's Last Will and Testament. The undisputed facts on the Record are as follows:

- a) The letter submitted was found in a separate envelope located in the same safe in which the Will was located;
- b) The letter was typed;
- c) The letter was not signed;
- d) The letter was not witnessed;

- e) The letter was not physically attached to the Will;
- f) The letter did not correctly reference the date the Will was signed;
- and
- g) There was no testimony from attesting witnesses as to the presence of the document at the time of signing of will.

In Goethe v. Browning the court states that “(t)he proof of such fact depends upon the rules of evidence, which require that the separate unsigned sheets be identified at the time of the execution of the will, or upon the probate thereof, by all or any one of the attesting witnesses.” The Respondent never put forth on the record any of the attesting witnesses to prove, under the rules of evidence, that the subject document was in fact identified at the time of the execution of the will.

Therefore, for these reasons set forth above the Probate Court erred in ruling that the separate document should be integrated into the Decedent’s Will.

**II. The lower courts erred in ruling that the joint tenancy with a right of survivorship between the Testator and the Appellant was defeated at the time of the purchase agreement to sell the property was signed.**

The Appellant was the sole owner of the subject property located at Cypress Avenue in Garden City, South Carolina, at the time the subject property was sold, when the Appellant and the Decedent owned the property as joint tenants with a right of survivorship and the Decedent passed away before the final closing and recording the said property.

The Appellant would argue, that an Agreement, signed by both joint tenants, to sell the subject property does not terminate a joint tenancy with a right of survivorship.

Code of Laws of South Carolina 1976 Ann. § 27-7-40(a)(i) and (iv) and § 27-7-40(b) and (c) states the following:

(a) In addition to any other methods for the creation of a joint tenancy in real estate which may exist by law, whenever any deed of conveyance of real estate contains the names of the grantees followed by the words "as joint tenants with rights of survivorship, and not as tenants in common" the creation of a joint tenancy with rights of survivorship in the real estate is conclusively deemed to have been created. This joint tenancy includes, and is limited to, the following incidents of ownership:

(i) In the event of the death of a joint tenant, and in the event only one other joint tenant in the joint tenancy survives, the entire interest of the deceased joint tenant in the real estate vests in the surviving joint tenant, who is vested with the entire interest in the real estate owned by the joint tenants.

(iii) The fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance.

(iv) If all the joint tenants who own real estate held in joint tenancy join in an encumbrance, the interest in the real estate is effectively encumbered to a third party or parties.

(b) The surviving joint tenant or tenants may, following the death of a joint tenant, file with the Register of Deeds of the county in which the real estate is located a certified copy of the certificate of death of the deceased joint tenant. The fee to be paid to the Register of Deeds for this filing is the same as the fee for the deed of conveyance. The Register of Deeds must index the certificate of death under the name of the deceased joint tenant in the grantor deed index of that office. The filing of the certificate of death is conclusive that the joint tenant is deceased and that the interest of the deceased joint tenant has vested by operation of law in the surviving joint tenant or tenants in the joint tenancy in real estate.

(c) Except as expressly provided herein, any joint tenancy severed pursuant to the terms of this section is and becomes a tenancy in common without rights of survivorship. S.C. Code Ann. § 27-7-40

The lower court cites S.C. Code Ann. § 27-7-40(a)(iv) in its order as stated above.

There is nothing within S.C. Code Ann. § 27-7-40(a)(iv) which states that an encumbrance severs a joint tenancy with a right of survivorship. In fact, South Carolina Code Ann. § 27-7-40(a)(iv) allows for Joint tenancies with a right of survivorship to

effectively encumber property to third parties, while conversely S.C. Code Ann. § 27-7-40(a)(iii) states joint tenant may not encumber a piece of property individually, which would infer that in encumbering a property individually, not jointly, would effectively terminate rights of survivorship.

The Appellant argues that the Probate court incorrectly claimed jurisdiction over a non-probate asset and ruled that the Joint tenancy with the right of survivorship was terminated the moment the contract for sale of the property was signed. The Appellant argues that there is no South Carolina case law that directly addresses the facts of this case. However, there are several out of State opinions that directly broach the issue.

The Washington Supreme Court in Estate of Phillips v. Nyhus, states that “(m)ere execution of an earnest money agreement for the sale of real property held in joint tenancy with right of survivorship does not sever the joint tenancy nor the right of survivorship.” Estate of Phillips v. Nyhus, 124 Wn. 2d 80, 88 (1994). The Washington Supreme court continues stating a “contract or agreement by only one joint tenant to convey property held in joint tenancy destroys the right of survivorship, terminates the joint tenancy and converts it into a tenancy in common. Id., 85. This interpretation corresponds well with South Carolina Code Ann. § 27-7-40(a)(iv) (allows encumbering by all joint tenants with rights of survivorship) and South Carolina Code Ann. § 27-7-40(a)(iii) (terminates joint tenancy with rights of survivorship where individual tenant encumbers property).

Therefore for these reasons set forth above, the Probate court erred in ruling that the joint tenancy with a right of survivorship is defeated solely by the signing of a contract to sale real property, when both parties signed the subject agreement.

**III. Did the circuit court err in ruling that the Appellant did not preserve the issue for review of prejudicial submission of evidence and allowance of claims the day of trial, when counsel for the Appellant did not object to evidence and claims at time of submission but later requested the ability to respond to Respondents allegations and submission of evidence but was denied by the probate court.**

**a. And if the issue was preserved, did the probate court err in allowing the submission of new evidence and claims by the Respondent on the day of the final hearing?**

The Appellant did preserve the issue of the prejudicial submission of new evidence and claims by the Respondent on the day of the final hearing, when the Appellant's request to respond to the Respondent's summary was denied by the Probate court.

The South Carolina Supreme Court in the State v. Dunbar states the following in regards to preservation of an issue for appeal:

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). State v. Dunbar, 356 S.C. 138, 142 (2003).

The Lower court ruled that the Appellant did not preserve this issue for appeal based upon the Appellant's lack of objections in regards to the submission of checks claiming an absence of accounting by the Appellant. In our case at the end of the July 27,

2016 hearing the Presiding Probate court Judge requested a written summary of the evidentiary checks submitted by the Respondent Phillip Moore. The Appellant's counsel at the time of the hearing, requested from the court an opportunity to respond to the Respondent's submission of his written summary of the evidence. The Probate court denied the Appellant's request to respond. The Appellant argues that the Probate court's denial of the Appellant's request for a response to the Respondent written summary submitted after the hearing was a preservation of this issue for appeal.

For the reasons set forth immediately above, the Appellant preserved the issue of prejudicially submitted checks for appeal.

The submission and admission of evidence of copies of checks<sup>3</sup> by the Respondent Phillip Moore, who had such documents in his possession before the first hearing on December 22, 2015, and never disclosed such documents to the Personal Representative, his attorney or to the Appellant or his attorney, prejudiced the Appellant, making it impossible for him to take the stand and defend the claims made against him.

The South Carolina Rules of Evidence Rule 403 states the following:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. South Carolina Rules of Evidence Rule 403.

In our case, the Respondent, Phillip Moore, appeared in front of the Probate Court on the day of the hearing on July 27, 2016, with a bag full of documents that he wished to enter into evidence. A majority of these documents were copied checks that were written by the Decedent to the Decedent with Memos stating that they were "Loans to Moore's

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<sup>3</sup> "Copies of checks" refers to evidence submitted by Respondent Phillip Moore in order to show: (1) loans made by the Decedent to Tammy Jackson; (2) funds received for the repossession and sale of a 2004 Jaguar; and (3) loans to Moore's Car LLC.

Cars” or “Loans to Moore’s Cars LLC.” Per testimony and exhibits, both the Decedent and the Appellant had bank accounts under the name of Moore’s Cars LLC. The Respondent Phillip Moore submitted the abovementioned documents as evidence. Relying on these documents as evidence, the Probate court ordered that the Appellant Michael Dennis Moore owed four hundred seventy three thousand eight hundred and thirty eight (\$473,838.00) dollars to the Estate. The Appellant claims and argues that admitting such evidence was unfair and prejudicial. These documents admitted were copied checks that were subpoenaed by and were in the Respondent Phillip Moore’s possession prior to the first December 22, 2015 hearing, yet he did not disclose the documents, even though he had the documents in his possession for more than seven months before. Furthermore, within this timeframe, Phillip Moore never once submitted claims for unpaid loans to the Estate to the Personal Representative.

As stated above, at the closing of the July 27, 2016 hearing the Probate court requested a written summary from Phillip Moore, as to his position in regards to the documented copied checks that he submitted. See July 27, 2016 Transcript Pg. 90. Attorney Smith, the Appellant’s counsel at the time of the hearing, requested thereafter that he be allowed to provide a counter brief summary in response to Phillip Moore’s summary. *Id.* at 93. The Court denied the Appellant a right to refute Phillip Moore’s summary regarding the checks, stating that the Appellant had an opportunity to cross examine the witness when the checks were presented. *Id.* This denial coupled with the unjust delay of Respondent Phillip Moore’s presentation of these documents were unfair and prejudicial to the Appellant.

For the above stated reasons, the lower court erred in allowing Respondent Phillip Moore to submit the above stated documents as evidence on the July 27, 2016 hearing, because it was unfair and prejudicial to the Appellant.

**CONCLUSION**

For the abovementioned reasons the Appellant respectfully requests this court to reverse the Lower courts' decision or in the alternative require a new hearing on the above stated issues.

Respectfully submitted,

Dated at Surfside Beach, South Carolina, this 31st day of October, 2018.

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THE STATE OF SOUTH CAROLINA  
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APPEAL FROM FLORENCE COUNTY  
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The Honorable Thomas A. Russo, Circuit Court Judge

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Appellant's Initial Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

October 31, 2018



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**DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

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1. Order from Probate Court, signed the November 28 and filed November 29, 2016; in regards to the hearings held December 22, 2015 and July 27, 2016;
2. Probate Court Transcript of Proceedings, December 22, 2015, pp. 1-8, pp. 19-25, pp. 49-52, pp. 68, pp. 85-92, pp. 101, pp. 106-110, 115-117, pp. 137-175, pp. 181-185 pp. 192-201, pp. 201-204, pp. 219 including all exhibits 1, 2, 4, 9, 10, 11, 18, 20, 21, 22, 27, 28;
3. Probate Court Transcript of Proceedings, July 27, 2016, including all exhibits;
4. Record on Appeal;
5. Order from Circuit Court Affirming the Probate Court, signed the April 25 and filed May 8, 2018; in regards to the hearing held February 14, 2018;
6. Circuit Court Transcript of Proceedings, February 14, 2018;

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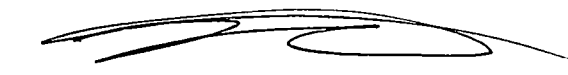
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Thomas Paul Moore, Francine Laura Lawhon,  
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**PROOF OF SERVICE**

I certify that I have served a copy of the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service by depositing a copy in the United States Mail, postage prepaid, on October 30, 2018, addressed to C. Pierce Campbell, Turner Padget, 319 South Irby Street, Florence, SC 29501.

October 31, 2018



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PROBATE EMAIL: [cjudge@lawofficesofdurant.com](mailto:cjudge@lawofficesofdurant.com)(Christina)  
REAL ESTATE EMAIL: [durantre@lawofficesofdurant.com](mailto:durantre@lawofficesofdurant.com)(Stacy)

October 31, 2018

**Via UPS Next Day Delivery**

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

**RE: Michael Dennis Moore v. Thomas Paul Moore, et al.  
Appellate Case No. 2018-001144**

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the following for filing in the above case:

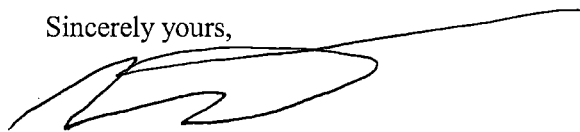
1. Appellant's Initial Brief;
2. Certificate of Counsel;
3. Designation of Matter to be Included on the Record;
2. Attorney's Certification; and
3. Proof of Service.

By copy hereof, all parties to this action have been served with an unlocked copy of the referenced documents. Once these documents have been filed, we will forward a clocked copy to all parties.

Thank you for your assistance in this matter and in the event you require any further documentation, please do not hesitate to contact our office.

In kind regards, I remain

Sincerely yours,



Norwood D. DuRant, Jr.

NDDjr/jlj

Enclosures

cc: C. Pierce Campbell, Esquire (via UPS Next Day Delivery only)  
Francine L. Lawhon (via UPS Next Day Delivery only)  
Linda K. Moore (via UPS Next Day Delivery only)  
Phillip F. Moore (via UPS Next Day Delivery only)  
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