

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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SC Court of Appeals

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APPELLATE CASE NO. 2018-001144

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 RESPONDENT PHILLIP FREDERICK MOORE

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**TABLE OF CONTENTS**

	Page
TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES .....	iii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW .....	4
ARGUMENT.....	6
I. THE COURTS OF PROBATE AND COMMON PLEAS BELOW ERRED IN RULING THAT THE "DOCTRINE OF INTEGRATION" IS RECOGNIZED AND APPLIED IN SOUTH CAROLINA IN CASES INVOLVING DECEDENTS' WILLS.....	6
II. ASSUMING, <i>ARGUENDO</i> , THAT SOUTH CAROLINA RECOGNIZES AND APPLIES THE DOCTRINE OF INTEGRATION IN CASES INVOLVING DECEDENT'S WILLS, THE COURTS OF PROBATE AND COMMON PLEAS ERRED IN APPLYING THE DOCTRINE IN A CASE INVOLVING AN UNDATED, UNSIGNED, AND UNWITNESSED TYPEWRITTEN DOCUMENT THAT WAS NOT MENTIONED IN A DECEDENT'S WILL AND WAS FOUND IN A SEALED ENVELOPE THAT WAS SEPARATE FROM THE WILL.....	13
CONCLUSION.....	20

## TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

	Page(s)
<b><u>CASES</u></b>	
<u>Campbell v. Christian</u> , 235 S.C. 102, 110 S.E.2d 1 (1959).....	4
<u>Finley v. Gravely</u> , 302 S.C. 220, 394 S.E.2d 847 (Ct. App. 1990).....	5
<u>Goethe v. Browning</u> , 146 S.C. 7, 143 S.E. 362 (1928).....	5, 14, 15
<u>Golini v. Bolton</u> , 326 S.C. 333, 482 S.E.2d 784 (Ct. App. 1997) .....	4, 5
<u>Guerin v. Hunt</u> , 118 S.C. 32, 110 S.E. 71 (1921) .....	8
<u>In re Callahan's Estate</u> , 237 Cal. App. 2d 818, 47 Cal. Rptr. 220 (4th Dist. 1965) .....	17
<u>In re Estate of Morris</u> , No. M2014-00874-COA-R3-CV, 2015 WL 557970 (Tenn. Ct. App. Feb. 9, 2015), <i>appeal denied</i> (Tenn. June 15, 2015), <i>appeal after remand</i> , No. M2016-02557-COA-R3-CV, 2017 WL 5304464 (Tenn. Ct. App. Nov. 13, 2017), <i>appeal denied</i> (Mar. 15, 2018).....	11
<u>In re Estate of Stewart</u> , 545 S.W.3d 458 (Tenn. Ct. App. Oct. 20, 2017), <i>appeal denied</i> (Feb. 14, 2018) .....	11
<u>In re O'Neill's Estate</u> , 259 S.C. 55, 190 S.E.2d 754 (1972) .....	4
<u>In the Matter of the Estate of Thomas G. Moore</u> , No. 2014-ES-21-00134 (S.C. Prob. Ct. Florence Cnty. Nov. 29, 2016).....	11
<u>Martin v. Hamlin's Ex'rs</u> , 35 S.C.L. 188, 4 Strob. 188, 1850 WL 2884 (Ct. App. 1850).....	3, 11, 12, 13, <i>passim</i>
<u>Martin v. Skinner</u> , 286 S.C. 527, 335 S.E.2d 252 (Ct. App. 1985) .....	4
<u>Mordecai v. Canty</u> , 86 S.C. 470, 68 S.E. 1049 (1910).....	4
<u>Smith v. Todd</u> , 155 S.C. 323, 152 S.E. 506 (1930) .....	9
<u>State v. McKettrick</u> , 14 S.C. 346 (1880).....	9

**STATUTES OF SOUTH CAROLINA AND OTHER CODES**

S.C. Code Ann.

§ 62-1-100(a) ..... 6

§ 62-1-100(b)(1)..... 6

§ 62-1-100(b)(2)..... 6

§ 62-1-100(c) ..... 6

§ 62-1-103 ..... 8

§ 62-1-201(53) ..... 7, 18

§ 62-1-308(i) ..... 4

§ 62-2-502 ..... 7, 18

§ 62-2-503(b) ..... 7

§ 62-2-505 .....  
6

§ 62-2-509 ..... 7, 18

§ 62-2-512 ..... 6, 7, 8

**Other Authorities**

Restatement (Third) of Property § 3.5 ..... 11, 17

95 C.J.S. *Wills* § 213 (Westlaw current through December 2018 Update)..... 17

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Research Institute of America (RIA)) ..... 10

## STATEMENT OF ISSUES ON APPEAL

Respondent Phillip Frederick Moore ("Phillip") has no objections to the Statement of the Issues that appears in Appellant Michael Dennis Moore's ("Michael's") Initial Brief of Appellant that was filed with this Court on November 1, 2018 (R. \_\_\_\_, Initial Brief of Appellant, Statement of the Issues on Appeal), except that Phillip would express as follows the issue of whether an undated, unsigned, and unwitnessed typewritten document that was allegedly found in a sealed envelope that was separate from a decedent's will can be admitted for probate as being part of the will if the document is not mentioned in the will:

1. Did the Courts of Probate and Common Pleas err in ruling that the “doctrine of integration” is recognized and applied in South Carolina in cases involving decedents' wills?
2. Assuming, *arguendo*, that South Carolina recognizes and applies the doctrine of integration in cases involving decedent's wills, did the Courts of Probate and Common Pleas err in applying the doctrine in a case involving an undated, unsigned, and unwitnessed typewritten document that was not mentioned in a decedent's will and was allegedly found in a sealed envelope that was separate from the will?

## STATEMENT OF THE CASE

Phillip has no objections to the Statement of the Case that appears in Michael's Initial Brief of Appellant that was filed with this Court on November 1, 2018. (R. at \_\_\_\_, Initial Brief of Appellant at pp. 1-3). However, Phillip, by and through his attorney of record, would add or substitute the following facts and circumstances of the case in the record that bear on the dual issues of whether the doctrine of integration is recognized in South Carolina and, if so, whether it is applicable in the present case.

The late Thomas G. Moore's ("Mr. Moore's") Will, dated September 27, 1997, was admitted for probate in Florence County, South Carolina Probate Court on February 20, 2014. (R. \_\_\_\_, Probate Court Order at p. 1). Almost two years later, on December 22, 2015, at a hearing before the probate court, Mr. Moore's attorney, Mr. Campbell, "move[d] to fully admit [a] document as a portion of [Mr. Moore's] will under the doctrine of integration that it being located with the will as presumed to have been present at the time of execution." (R. \_\_\_\_, Prob. Ct. Hearing, dated Dec. 22, 2015, Tr. at p. 161, ll. 13-15). The typewritten undated, unsigned, and unwitnessed document (the "Document") was accepted for probate as part of Mr. Moore's Will, even though the Document was not mentioned in the Will and was allegedly found in a sealed envelope that was separate from the Will (Id. R. \_\_\_\_, Tr. p. 160, ll. 9-12), is the subject of this Initial Brief of Respondent Phillip Moore.

The validity and admissibility of the Document for probate is critical in this case because it purports to bequeath or gift real property to only one of the late Mr. Moore's five surviving children. If this Court or a lower court, on remand, finds that the Document is invalid and not admissible for probate, Mr. Moore's five surviving children will receive equal shares of the subject realty, either under the residuary clause of Mr. Moore's 1997 Will or by virtue of the laws of intestate succession.

(R. \_\_\_, Prob. Ct. Hearing Feb. 14, 2018 Tr. at p. 20, ll. 6-18).

In an Order that was filed on November 29, 2016, the probate court dodged the specific question of whether any South Carolina statute or court decision stands for the narrow proposition that the doctrine of integration is recognized in cases involving wills that were executed by South Carolina decedents. (R. \_\_\_, Prob. Ct. Order at pp. 2-6. Instead, citing to only one South Carolina court decision that was decided in 1850 and is not on-point here, three cases nationally that are not on-point, and secondary resources that are not on-point, the probate court summarily asserted that the doctrine of integration is followed by South Carolina courts in wills cases and that it applies in a case involving an undated, unsigned, and unwitnessed typewritten document that was found in a sealed envelope that was separate from and not mentioned in a decedent's will. (Id. at pp. 2-3). The only South Carolina court decision that was cited and relied upon by the probate court for the propositions that the doctrine of integration is recognized in South Carolina in wills cases and that the doctrine applies in this case is an 1850 decision by a South Carolina appellate court, Martin v. Hamlin's Ex'rs, 35 S.C.L. 188, 4 Strob. 188, 1850 WL 2884 (Ct. App. 1850). In Martin, the South Carolina Court of Appeals never mentioned the doctrine of integration by name and simply recited the well-settled rule that a valid will can consist of multiple documents. Id.

On May 8, 2018, the common pleas court below affirmed the probate court's Order that the Document is part of the late Mr. Moore's Will. (R. \_\_\_, Com. Pleas Court Order at pp. 1-2). In reaching its decision, the court of common pleas stated that "[t]he Probate Court applied the law of integration" and that "the doctrine of integration has not been analyzed by many South Carolina courts . . . ." (Id. R. \_\_\_; at p. 1).

## STANDARD OF REVIEW

"The circuit court, court of appeals, or Supreme Court shall hear and determine the appeal according to the rules of law." S.C. Code Ann. § 62-1-308(i) (Westlaw current through 2018 Act No. 292, subject to technical revisions by the Code Commissioner as authorized by law before official publication); Golini v. Bolton, 326 S.C. 333, 482 S.E.2d 784 (Ct. App. 1997) (in a case involving the validity of a decedent's will, an appeal from a probate court to a circuit court must be treated as a case at law); Campbell v. Christian, 235 S.C. 102, 110 S.E.2d 1 (1959) (in a case involving the validity of a decedent's will, an appeal from a probate court to a court of common pleas is considered to be a case at law rather than one in equity).

If the genuineness of testator's signature on an alleged will or other factual issues concerning the validity of a will exist, a party that appeals a probate court decision on such fact issues has an absolute right to a trial de novo in the circuit court and does not have to file a notice of demand for a trial de novo even if he or she waived his or her right to a trial by jury. Martin v. Skinner, 286 S.C. 527, 335 S.E.2d 252 (Ct. App. 1985). Similarly, the question of due execution of a will and other factual issues are properly submitted to a circuit court jury in a case involving an appeal to a circuit court from a probate court's decision. In re O'Neill's Estate, 259 S.C. 55, 190 S.E.2d 754 (1972). If it appears, on an appeal from a decree of the probate court in probate proceedings, that the case was decided on a question of law without considering the facts and issues of fact were involved, the circuit court can order a new trial in the probate court. Mordecai v. Canty, 86 S.C. 470, 68 S.E. 1049 (1910).

On an appeal from an order admitting a will or copy thereof for probate, the court of appeals will review the record to see if there was any evidence to reasonably support factual findings of

probate court. Golini, 326 S.C. 333, 482 S.E.2d 784; Finley v. Gravely, 302 S.C. 220, 394 S.E.2d 847 (Ct. App. 1990) (in a case that involves the validity of a decedent's will, although the court of appeals cannot weigh the evidence, it can and must determine whether the evidence in the record "reasonably supports" the judgment of the circuit court below); Goethe v. Browning, 146 S.C. 7, 18, 143 S.E. 362, 366 (1928) (since the question whether two separate sheets of paper constituted the will of a decedent involved underlying fact issues that were submitted to a jury, the South Carolina Supreme Court could properly determine whether the evidence supported the jury's factual findings—"[w]e find sufficient testimony to sustain the verdict of the jury, and there was no error on the part of the judge in refusing to disturb that verdict").

As the Statement of the Case, *supra*, and the Argument, *infra*, reveal, there were and still are unresolved issues of fact in this case as to whether the late Mr. Moore was the true author of the Document in question. There were and are fact issues as to the chain of custody, location, and finder(s) of the typewritten Document and why it was not signed and/or witnessed given that it was not typed at the same time or contemporaneously the Will was drafted and executed. There is absolutely no evidence in the record that shows one way or another whether Mr. Moore actually authored the undated, unsigned, and unwitnessed typewritten Document. There is evidence in the record that suggests that Mr. Moore did not have continuous custody of the Document, if he ever actually had any custody thereof and whether the Document changed locations.

## ARGUMENT

### I. THE COURTS OF PROBATE AND COMMON PLEAS BELOW ERRED IN RULING THAT THE “DOCTRINE OF INTEGRATION” IS RECOGNIZED AND APPLIED IN SOUTH CAROLINA IN CASES INVOLVING DECEDENTS’ WILLS

At the outset, it is critical to note that the South Carolina Probate Code applies to this case because Mr. Moore's Will was executed on September 27, 1999 and he died on December 20, 2013:

§ 62-1-100. Effective date.

(a) Except as otherwise provided, this Code takes effect July 1, 1987.

(b) *Except as provided elsewhere in this Code, on the effective date of this Code:*

- (1) *the Code applies to any estates of decedents dying thereafter;*
- (2) *the procedural provisions of the Code apply to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;*

\* \* \*

(c) *Section 62-2-502 [Execution] is effective for all wills executed after June 27, 1984, whether the testator dies before or after July 1, 1987.*

S.C. Code Ann. § 62-1-100(a), (b)(1, 2), (c) (Westlaw current through 2018 Act No. 266, subject to technical revisions by the Code Commissioner as authorized by law before official publication) (emphasis added).

The Probate Code provides that “[e]xcept as provided for writings within Section 62-2-512 and wills within Section 62-2-505, every will shall be: (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 (emphasis added). For purposes of the rules for proper execution of a will, the Probate Code states that a "[w]ill' includes codicil and any testamentary instrument that merely appoints an executor or revokes or revises another will." Id. § 62-1-201(53) (emphasis added).

The Probate Code allows post-execution "self-proof" of a will by stating that "[a]n attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavit of at least one witness, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached, or annexed to the will in the following form or in a similar form showing the same intent . . . ." Id. § 62-2-503(b). The Probate Code also allows a testator to incorporate by reference in his or her will, another writing that is already in existence by providing that "[a]ny writing in existence when a will is executed may be *incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.*" Id. § 62-2-509 (emphasis added). The Probate Code also recognizes that a testator can incorporate by reference in his or her will a separate *handwritten or signed writing* that disposes *only* the testator's "tangible personal property":

§ 62-2-512. Separate writing identifying bequest of tangible property.

*A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that*

has no significance apart from its effect upon the dispositions made by the will.

S.C. Code Ann. § 62-2-512 (emphasis added).

The Probate Code contains no provisions that even remotely suggest that a testator can “integrate” a separate document or writing other than by including a provision in his or her will that expressly incorporates by writing the separate document. In South Carolina, a testator may alter or change his or her will as many times as he or she wants to do so and in any way that he or she sees fit as long as the alterations, changes, or modifications are carried out in compliance with the legal requirements for proper execution of a will. Guerin v. Hunt, 118 S.C. 32, 110 S.E. 71 (1921).

Since the Probate Code sets forth clear and straightforward rules as to proper execution of wills and codicils, allows for express incorporation by reference into a will other “writings” and “written statements or lists that dispose of items of tangible personal property,” but makes no mention of the concept of “integration” of other documents or writings, there is an issue in this case whether there are any exceptions to the above-described statutory requirements for executing a will or any other rules that would allow a South Carolina court to admit, as part of a testator's will, an undated, unsigned, and unwitnessed typewritten document that was not mentioned in the decedent's will and was allegedly found in a sealed envelope that was separate from the will. The proponent of the Document that is at issue in this case argues that the so-called “doctrine of integration” would permit the admission of the Document as part of Mr. Moore's Will and that the doctrine is recognized in South Carolina. (R. \_\_\_, Tr. Prob. Ct. Hearing, dated Dec. 22, 2105, p. 161, ll. 13-15).

The South Carolina Probate Code states that “[u]nless *displaced* by the particular provisions of this Code, the principles of law and equity *supplement* its provisions.” S.C. Code Ann. § 62-1-103 (emphasis added). “The common law is superseded by a statute, in so far as it is repugnant to the

latter." State v. McKettrick, 14 S.C. 346, 350 (1880). "In order to hold that a statute has abrogated common law rights existing at the date of its enactment, it must clearly appear that they are so repugnant to the act, or the part thereof invoked, that their survival would in effect deprive it of its efficacy and render its provisions nugatory." Smith v. Todd, 155 S.C. 323, 336-37 152 S.E. 506, 511 (1930).

In recent years, courts in other jurisdictions have expressly or impliedly ruled that statutory rules as how to execute a valid will and properly incorporate by reference another document or writing into a will operate to "displace," rather than "supplement," the common law "doctrine of integration." In other words, courts in other jurisdictions have declined to apply or recognize the so-called "doctrine of integration" unless the doctrine has been codified:

In the case from Tennessee, *In re Estate of Chastain*, [401 S.W.3d 612], 2012 WL 5838609 (Tenn., 2012), the issue before the court was, in the words of the court, 'whether the statutory requirements for execution of an attested will prescribed by Tennessee Code Annotated §32-1-104(1) (2007) were satisfied when the decedent failed to sign the two-page will but signed a one-page affidavit of attesting witnesses.' The trial court denied probate, but the Tennessee Court of Appeals, in a two-to-one decision, reversed the trial court. On further review to the Supreme Court of Tennessee, the decision of the court of appeals was reversed and the judgment of the trial court reinstated.

According to the Supreme Court of Tennessee, the Tennessee will execution statute, requiring the signature of the testator, gives the testator 'some latitude' in meeting the signature requirement in the case of an attested will: The testator may either sign the will in the presence of the attesting witnesses, or acknowledge a signature already made in the presence of attesting witnesses, or direct someone else to sign the will in the presence of the testator and of the attesting witnesses. On the other hand, the *Chastain* court noted that the Tennessee courts have required 'strict compliance' with the will execution statute.

*The court explicitly declined to adopt the doctrine of integration (a process whereby a separate document becomes part of the will) stating that 'to adopt the doctrine of integration because doing so would amount to a relaxation of statutory requirements.' The court added that decision to adopt the doctrine of integration was a matter for the legislature.*

Ronald R. Volkmer, 40 *Estate Planning* 46 (September 2013) (Copyright © 2013 Research Institute of America (RIA)) (emphasis added).

In a post-Chastain case, the Tennessee Court of Appeals reiterated the view that the doctrine of integration is nothing more than a prohibited means of ignoring statutes that prescribe rules for proper execution of a will:

In essence, Appellees are asking this Court to apply the doctrine of integration by which "a separate writing may be deemed an actual part of the testator's will, thereby merging the two documents into a single instrument." *In re Will of Carter*, 565 A.2d 933, 936 (Del. 1989). In *In re Estate of Chastain*, 401 S.W.3d 612 (Tenn. 2012), the Tennessee Supreme Court held that the decedent's signature on the affidavit did not satisfy the statute requiring the testator's signature on a will. The *Chastain* court explained that, in these types of cases, *Tennessee has not adopted the doctrine of integration "because doing so would amount to a relaxation of statutory requirements."* *Id.* at 622. The Supreme Court opined [that]:

the General Assembly has not enacted Section 2-504(c) of the Uniform Probate Code, which provides that '[a] signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution.' (quoting *Unif. Probate Code* § 2-504(c) (2008)) .... the Legislature is the entity authorized to prescribe the conditions by which property may be transferred by will in this State, ... and courts have no authority to modify those conditions.... [*W*]e decline to adopt the doctrine of integration because doing so would amount to a relaxation of statutory requirements.

*Id.* at 621-22 (internal citations omitted).

\* \* \*

Courts endeavor to effectuate a testator's intent "unless prohibited by a rule of law or public policy," *In re Estate of McFarland*, 167 S.W.3d 299, 302 (Tenn. 2005), and courts will sustain a will as legally executed if it can be done consistently with statutory requirements, *Leathers v. Binkley*, 264 S.W.2d 561, 563 (Tenn. 1954). *However, courts may not ignore statutory mandates in deference to a testator's intent.* *Chastain*, 401 S.W.3d at 621; *Ball v. Miller*, 214 S.W.2d 446, 449-50 (Tenn. Ct. App.1948). "Tennessee courts have consistently interpreted statutes prescribing the formalities for execution of an attested will as mandatory and have required strict compliance with these statutory mandates." *Chastain*, 401 S.W.3d at 619. \* \* \*

In re Estate of Morris, No. M2014-00874-COA-R3-CV, 2015 WL 557970, at \*3-4 (Tenn. Ct. App. Feb. 9, 2015) (Slip Copy) (emphasis added), *appeal denied* (Tenn. June 15, 2015), *appeal after remand*, No. M2016-02557-COA-R3-CV, 2017 WL 5304464 (Tenn. Ct. App. Nov. 13, 2017), *appeal denied* (Mar. 15, 2018).

In a 2017 case, the Tennessee Court of Appeals noted that the decision in In re Estate of Morris was superseded in part by a new Tennessee statute that expressly recognizes that if a will itself is not signed by two attesting witnesses, the two witnesses can sign an affidavit that says that they witnessed the execution of the will. In re Estate of Stewart, 545 S.W.3d 458, 463 (Tenn. Ct. App. Oct. 20, 2017), *appeal denied* (Feb. 14, 2018). Thus, even though the decision in In re Estate of Morris may have been superseded in part by statute, that portion of the Morris decision that rejected the doctrine of integration was and has not been superseded.

In footnote 3 of its decision below, the probate court cited the provisions of the Restatement (Third) of Property that say that "[t]o be treated as part of a will, a page or other writing must be present when the will is executed and must be intended to be part of the will." Restatement (Third) of Property § 3.5. However, the probate court failed to cite any South Carolina statute or court decision in which the provisions of § 3.5 of the Restatement have been adopted or cited for the proposition that the doctrine of integration is recognized in this State.

As noted in the Statement of the Case, *supra*, the probate court below relied on an 1850 decision by the South Carolina Court of Appeals, Martin, 35 S.C.L. 188, 4 Strob. 188, 1850 WL 2884, for the proposition that the "doctrine of integration" is recognized in South Carolina and that it applies in this particular case. In re Estate of Thomas G. Moore, No. 2014-ES-21-00134, at pp. 3-6.

With all due respect to the probate court, the Martin court did not mention the “doctrine of integration,” much less invoke and rely on the doctrine for its decision. Instead, as stated previously, the main purposes of the Martin decision were to recognize that in order to comply with the statutory formalities for executing a multi-page or multi-sheet will that appears to be one single continuous document: (1) a testator does not have to sign each and every page of his or her will in order for the document to be a validly executed will, and (2) the witnesses do not have to attest to or sign each and every page of a will. Martin, 35 S.C.L. at 189-91, 4 Strob. at 189-91, 1850 WL 2884, at \*2-3. According to the Martin court, “[o]ne signing by the testator, and one attestation only, are required by the statute, and it has never been contended that where there are several sheets every one should be separately attested, but only that every one should be signed.” Id. at 190, 4 Strob. at 190, 1850 WL 2884, at \*2. The Martin court repeatedly emphasized in its decision that a testator still must comply with all statutory requirements for executing a valid will. As the Martin court pointed out, “if the [unsigned] separate writing be present, and the witnesses who attest can prove that it was a part of the general instrument which was signed and executed,” the separate writing can be admitted as part of the will that was signed because “neither testator nor witnesses can, after the execution, incorporate into a will anything which was not in it at the execution, without a renewal of the requisite formalities.” Id. at 190-91, 4 Strob. at 190-91, 1850 WL 2884, at \*2-3.

The Martin court did not hold or rule that an undated, unsigned, and unwitnessed typewritten paper that is found in a separate sealed envelope and is not mentioned in a decedent's will can be deemed to be part of the will even though it was not executed in compliance with the South Carolina statutes that govern the making of a valid will. It is precisely because doctrine of integration flies in the face of statutory requirements for executing a valid will that very few states

actually have recognized and applied the doctrine in wills cases and that the doctrine has never been expressly applied in a South Carolina case that involved a decedent's will. In fact, courts nationally have expressly rejected the doctrine because it is contrary to statutory requirements for executing a valid will. For additional discussion of the Martin decision and its applicability in the present case, *see* Argument II, *infra*.

In short, the “doctrine of integration” has not been recognized in South Carolina and should not be adopted here because the doctrine is nothing more than a prohibited way to try to make an end run around the clear, plain, and simple statutory requirements for executing a valid will or codicil, or for incorporating by reference within the four corners of a properly executed will, a separate writing. In other words, the doctrine flies in the face of established statutory rules for executing valid wills and codicils and incorporating by reference therein other documents. It is up to the state legislature rather than the courts to adopt the doctrine of integration in this State.

**II. ASSUMING, ARGUENDO, THAT SOUTH CAROLINA RECOGNIZES AND APPLIES THE DOCTRINE OF INTEGRATION IN CASES INVOLVING DECEDENT'S WILLS, THE COURTS OF PROBATE AND COMMON PLEAS ERRED IN APPLYING THE DOCTRINE IN A CASE INVOLVING AN UNDATED, UNSIGNED, AND UNWITNESSED TYPEWRITTEN DOCUMENT THAT WAS NOT MENTIONED IN A DECEDENT'S WILL AND WAS FOUND IN A SEALED ENVELOPE THAT WAS SEPARATE FROM THE WILL**

Since there is no South Carolina statute or court decision in which the “doctrine of integration” has been expressly recognized and applied, it goes without saying that there is no primary South Carolina authority that explains the doctrine and how it must be applied in a given case. However, it is true that, in 1928, the Supreme Court of South Carolina acknowledged that a

testator's will can consist of multiple, separate pages or "sheets" and that each page or "sheet" of a will does not have to be individually signed and witnessed, but that the will nevertheless "must be executed in accordance with the formalities prescribed by the statute" that sets forth the requirements for executing a valid will:

The will in question is composed of two sheets. The first sheet contains "clauses" 1, 2, 3, and 4, and is not signed by the testatrix nor by either of the attesting witnesses. The second sheet contains clause 5, which merely appoints the executor, and the signature of the testatrix and the attestation clause. The appellants contend by their first exception that the sheet not signed by testatrix and attested and subscribed by three witnesses, as prescribed by the below-quoted section, is not part of the will. This contention is untenable. Section 5336, vol. 3, Code of 1922, is as follows:

"All wills and testaments of real and personal property shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, and of each other, by three or more credible witnesses, or else they shall be utterly void and of none effect."

The statute does not require the separate sheets composing a will to be signed by the testator and attested and subscribed by three witnesses. *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. There can be no doubt but that it is a safe practice for a testator to affix his signature to each sheet composing his will, and it is a further act of precaution to have each separate sheet attested and subscribed by the attesting witnesses, but the statute does not so require, and this court has no power to go beyond the requirement of the statute in the execution and attestation of wills. *When 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.* If the jury is satisfied by intrinsic evidence or otherwise that the purported will composed of one, two, or more sheets is the will of testator, and render their verdict accordingly, it is sufficient.

Goethe, 146 S.C. at 12-13, 143 S.E. at 363-64 (emphasis added).

As the Goethe court pointed out, although all pages or "sheets" of a multi-sheet will do not have to be signed and witnessed individually, "the separate unsigned sheets [must] be identified at the time of the execution of the will, or upon the probate thereof, by all or anyone of the attesting witnesses." Id.

In 1850, the South Carolina Court of Appeals similarly ruled that although each and every page or sheet of a multi-sheet will do not have to be individually signed and witnessed, "a separate [unsigned] writing not incorporated into the will by references" cannot be accepted as being part of the will unless "the separate writing be present, and the witnesses who attest[ed] can prove that it was a part of the general instrument which was signed and executed":

One signing by the testator, and one attestation only, are required by the statute, and it has never been contended that where there are several sheets every one should be separately attested, but only that every one should be signed. His signing of a sheet which is not attested, does not make it a will: it is a safe and prudent means of guarding against frauds, but in a question of execution under the statute, it serves only to indicate the intention of the testator to include that sheet in the execution, of which the formalities are written on another sheet. *Any other distinct act, indicating the intention, would serve the same purpose, even as to a separate writing not incorporated into the will by references, if the separate writing be present, and the witnesses who attest can prove that it was a part of the general instrument which was signed and executed.* In proportion as the identity of the separate paper and the intention to include it are otherwise manifested, may the memory of the witnesses be dispensed with. *Where it is exactly described in the attested paper, the separate paper need not be at all known to the witnesses, or present at the time of execution. Where the separate writing is not described, but is strongly connected by sense, and is signed by the testator, the case of Bond v. Seawell shows that it is sufficient if the edges of it were seen by the witnesses, and even if, although not at all seen by them, it was actually present.*

Shall it, then, it is asked, depend upon the honesty and memory of the witnesses to decide what is the will? As to all those matters which were necessary to the validity of a will at common law, the statute has made no alteration, as for instance the competency of the testator, his freedom from restraint, his understanding of the contents, the reading of the will to him if he is blind, and as to these a will, like any other instrument, must depend upon the testimony of witnesses, sometimes of a single witness. *The superadded requisites of the statute must be exactly complied*

*with, but the compliance in each particular is a question of fact depending upon witnesses.* In the question of attestation is involved the inquiry, what is attested? and that when the writing is all on one paper, no less than when it is on several papers. It is prudent to attach together in a firm manner beyond suspicion of unfairness, all the parts of a will or other instrument; and *where there is ground for suspicion, or any unusual circumstance, the proof of intention to include both in the execution, and of actual conjunction of them in the act, should be clear to connect detached papers as one instrument.* But if, where no unfairness can be suspected, and the union in the intention and act of the testator is manifest, a will must be defeated for want of some material connexion of different sheets which have not been separately signed by the testator, then the same result would follow if after execution, as in this case, on the last sheet, the testator should, himself, carefully bind the sheets together with tape and wax, and then sign his name on every page, all in the presence of the witnesses who had previously attested the last sheet whilst it was detached; for *neither testator nor witnesses can, after the execution, incorporate into a will any thing which was not in it at the execution, without a renewal of the requisite formalities.* By some possible freak or accident, separate devises and bequests, unconnected by reference or otherwise, might be written on separate slips of paper, and all being present and included in the intention and act of execution, be presented as a single will; and it might be hard for any witness to say which of these slips was and which was not included in the execution. The prudence of either witness or testator would prevent such a case. On the other hand cases may be imagined of a sheet which was pinned or otherwise attached to the attested sheet being detached-of a sheet which was signed, being in whole or in part abstracted or altered; of sheets which were signed, but afterwards rejected and not intended to constitute part of the will, *being at hand when other sheets were executed.* Frauds may be perpetrated, and the memory of witnesses must be invoked, whatever rules may be adopted. *All such cases only present questions of fact.* We cannot add to the requisites of the statute, by requiring indispensably that each sheet of a will, that as a whole has been properly executed, shall be either signed by the testator, tied to the paper upon which the attestation is written, or authenticated by any other formality which the statute has not presented.

Martin, 35 S.C.L. at 190-91, 4 Strob. at 190-91, 1850 WL 2884, at \*2-3 (emphasis added).

As the Martin court pointed out, "if the [unsigned] separate writing be present, and the witnesses who attest can prove that it was a part of the general instrument which was signed and executed," the separate writing can be admitted as part of the will that was signed because "neither testator nor witnesses can, after the execution, incorporate into a will any thing which was not in it at the execution, without a renewal of the requisite formalities." Id.

As noted in Argument I, *supra*, the Probate Court relied in part on § 3.5 of the Restatement (Third) of Property, which is entitled "Integration of Multiple Pages or Writings Into a Single Will," and says that in order to "[t]o be treated as part of a will, a page or other writing *must be present when the will is executed* and must be intended to be part of the will." (emphasis added). It is critical to note, however, that Restatement (Third) of Property § 3.5 has never been adopted or applied by a South Carolina court and Respondent who is submitting this Brief is *not* recognizing that § 3.5 of the Restatement reflects the law in South Carolina. Phillip is citing § 3.5 of the Restatement for the sake of argument only.

In California, one of the very few states in which the doctrine of integration is recognized, the rule is that there can be no integration of a separate dispositive writing that is not itself a statutorily valid will or codicil unless that writing is actually *attached to a valid will* and its contents show that it was intended to be part of will. In re Callahan's Estate, 237 Cal. App. 2d 818, 47 Cal. Rptr. 220 (4th Dist. 1965). A leading national law encyclopedia says that, in those few states where the doctrine of integration is recognized, in order "[t]o invoke the doctrine of integration, under which a separate writing may be deemed an actual part of the testator's will, thereby merging two documents into a single instrument, *the separate writing must have existed at the time the will was executed*, and the testator must have intended it to constitute the will." 95 C.J.S. *Wills* § 213 (Westlaw current through December 2018 Update) (emphasis added) (footnote omitted). Furthermore, according to C.J.S., "[i]ntegration may not be utilized to alter the distributive portion of a valid will by way of an invalid codicil." Id.

In this case, the record is completely and totally devoid of evidence of any facts and circumstances that might suggest that the Document is admissible as part of Mr. Moore's Will under

the South Carolina Code, the doctrine of integration, or the rules set forth in the Goethe and Martin decisions. For example, *there is no evidence in the record that*: (1) the undated, unsigned, unwitnessed separate Document was identified when Mr. Moore executed his Will on September 27, 1999; (2) the Document was attached to Mr. Moore's Will; (3) the witnesses to the Will can or will attest to the fact that the Will and Document existed contemporaneously and that when Mr. Moore signed his Will, he intended that his signature was to cover the Document; (4) the Document and the Will are strongly connected by sense and form one single continuous and flowing Will that consists of multiple pages, e.g., the Document and Will are expressed in different tenses, the Will is in the first person and the Document is in the third person, the Document does not have a page number that would suggest it was part of the Will; (5) the Will incorporated by reference the Document, as required by S.C. Code Ann. § 62-2-509; and (6) the Document qualifies as a valid signed and witnessed codicil to the 1999 Will under S.C. Code Ann. §§ 62-1-201(53) (a codicil is a will) and 62-2-502 (signature and witnessing requirements for executing a valid will). Finally, since the doctrine of integration may not be utilized to alter the distributive portion of a valid will by way of an invalid codicil, the Document in this case cannot be used to negate Mr. Moore's bequest to all five of his children of 1/5 shares of real estate and instead give the land to only one child.

Although counsel for the proponent of the Document asserted during the December 22, 2015 hearing during which the Document was offered for probate that the Document was "located with" Mr. Moore's Will and is "presumed to have been present at the time of execution of the Will," transcripts of multiple proceedings before both the probate and common pleas courts below cast considerable doubt on the chain of custody and location of the Document and whether it truly was found at the same time and in the same place as Mr. Moore's Will. *See* R. \_\_\_\_, Tr. Com. Pleas Ct.

Hearing Feb. 14, 2018 Tr. p. 24, ll. 19-24 ("the [Document] itself, a copy of that letter was delivered to [the proponent] . . . physically delivered by his mother . . . but it could have been physically handed to him by his father . . . "); Id. Tr. at p. 64, ll. 19-23 ("Dennis found the Will and brought the Will with him for us to read it . . . [t]he [Document] was not with that Will, you know, and we never seen that letter until December the 22nd, 2015, whenever [the proponent] presented that [Document]"); Id. Tr. at p. 65, ll. 12-17 ("we believe three or four – I don't know whether Dennis does or not – three of us believe that [the proponent] typed this letter up, we don't know who done it – but had it typed up, and [the proponent] submitted it December 22, 2015"); R. \_\_\_\_, Prob. Ct. Hearing Dec. 22, 2015 Tr. p. 31, ll. 17-25, p. 32, ll. 1-3) (despite an agreement by all heirs to "go in the safe together" to "try to find the will," the proponent "went in the safe before we got there"); Id. R. \_\_\_\_, Tr. p. 160, ll. 21-23 ("[t]hat's my mother's handwriting" on the envelope that allegedly contained the Document); Id. R. \_\_\_\_, Tr. p. 164, ll. 11-15 ("they put the original [Document] with the will and my brother, he took it out, Dennis took it out of the will before it was presented to The Court"). In addition, there is nothing in the record that supports the unilateral and repeated assertions by counsel for the proponent of the Document that all parties agreed or have stipulated that the Document was drafted by Mr. Moore, found with and at the same time as the Will, and was executed contemporaneously with the Will. The fact that the separate undated, unreferenced, unsigned, and unwitnessed Document that was in a separate sealed envelope was not offered for probate until almost two years after the Will was accepted for probate is, in and of itself, strong evidence that the Document may not have been "located with" and found at the same time as the Will. In short, the above-described evidence in the record indicates that there is considerable doubt as to the veracity of the proponent's claims regarding both the authenticity and the location of the Document and where

and when it was found.

In short, even if it is assumed, for the sake of argument only, that the doctrine of integration is recognized in South Carolina, the facts and circumstances do not support the application of the doctrine in this particular case because: (1) there is no evidence that the Document was present when Mr. Moore executed his Will on September 27, 1999; (2) the Document seeks to alter the dispositive provisions of Mr. Moore's 1999 Will that left real property to all five of his children by instead leaving the property to only one of his five children; (3) Mr. Moore's Last Will and Testament and the separate Document are not strongly connected and do not form one single continuous, flowing Will that consists of multiple pages.

### **CONCLUSION**

For the reasons stated, Respondent Phillip Frederick Moore respectfully asks this Honorable Court to reverse the decisions by the probate and common pleas courts below to admit as part of Mr. Moore's Will the undated, unsigned, and unwitnessed typewritten Document that was not mentioned in the Will and was allegedly found in a sealed envelope that was separate from the Will. This invalid Document should not have been admitted for probate as part of Mr. Moore's Will. In the alternative, Respondent Phillip Frederick Moore asks this Court to reverse the lower courts' decisions and remand the case to the probate or common pleas courts for a trial to resolve the numerous factual questions as to, inter alia, the circumstances surrounding the drafting, storing, and chain of custody of the Document. In addition, this Court is asked to grant any other relief to Respondent Phillip Frederick Moore that it deems to be just and necessary.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke extending to the right.

---

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY  
CIRCUIT COURT

Thomas A. Russo, Circuit Court Judge

APPELLATE CASE NO. 2018-001144

**RECEIVED**  
JAN 16 2019  
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.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

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. 31-32, pp. 160-164
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;

THE STATE OF SOUTH CAROLINA  
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Linda Kaye Moore, Phillip Frederick Moore ..... Respondents.

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 and Rule 209(c) Attorney Certification by depositing a copy in the United States Mail, postage prepaid, on January 14, 2019, addressed to:

Norwood DuRant, Jr., Esq.  
P.O. Box 14722  
Surfside Beach, SC 29587

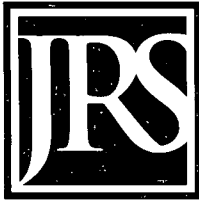
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James R. Snell, Jr. • Vicki Koutsogiannis

January 14, 2019

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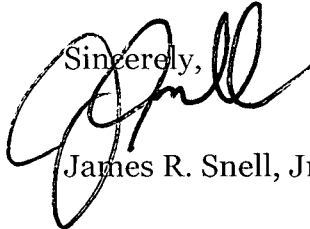
Office of the Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

Re: In the Matter of the Estate of: Thomas G. Moore  
Appellate Case No.: 2018-001144

Dear Madam or Sir:

Please find the initial brief of the respondent Phillip Frederick Moore,  
Designation of Matter to be included in the Record on Appeal, Rule 209(c) Attorney  
Certification, and Proof of Service.

Sincerely,



James R. Snell, Jr.

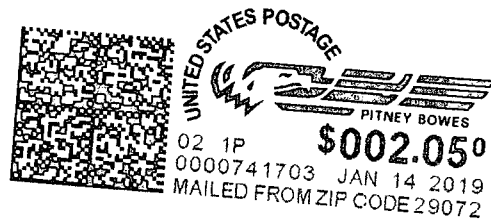
cc: Norwood David DurRant, Jr., Esq.  
C. Pierce Campbell, Esq.  
Francine Laura Lawhon  
Linda Kaye Moore



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