THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

RECEIVED
MAR 31 2014
SC Court of Appeals

Case No. 2012-CP-10-7929
Appellate Case No. 2013-001817

In Re: Estate of Sylvia J. Reagan
Linda Reagan Shelley..............................Appellant,

v.

Ramona D. Becker, individually and as Personal Representative of the Estate of Sylvia J. Reagan, Beryl Routon, Kayla Dawn Kastrup, and Tom Coats............................Defendants.

Of Whom

Ramona D. Becker, individually and as Personal Representative of the Estate of Sylvia J. Reagan is..Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent agrees with Appellant's identification of the parties, and agrees that events occurred on February 25, 2011, regarding a purported will of testator Sylvia J. Reagan. Respondent disagrees, however, with the statement that testator Reagan acknowledged to all present that the document was her will and the signature was in fact hers. The inconsistent testimony on this subject is discussed in the Argument section of this brief.

STANDARD OF REVIEW

Appellant argues that the validity and admission to probate of a testatrix's last will and testament are reviewed *de novo*, citing *S.C. Nat'l Bank v. Copeland*, 248 S.C. 203, 210, 149 S.E. 2d 615 (1966). However, the Court's reference in *S.C. Nat'l Bank v. Copeland* to a *de novo* standard of review related to review *by the Circuit Court*, upon appeal from the Probate Court. "The heirs at law appealed from this Order [of the Probate Court] to the Court of Common Pleas, where, on a question of 'will or no will', issues of fact are tried De novo." *Id.*

In this case, of course, the issue is currently on appeal to the Court of Appeals. To reach this stage, the issue was initially decided by the Probate Court (R. pp. 1-5), and Order Denying Motion for Reconsideration (R. pp. 6-7.) The Order of

the Probate Court was affirmed by the Circuit Court by Order dated July 26, 2013 (R. pp. 8-9).

The fact that the Probate Court initially made factual findings, and the Order of the Probate Court has been affirmed by the Circuit Court, prompts application of the "two-judge rule." Pursuant to the two-judge rule, even in cases in which the Circuit Court would have the duty or authority to review issues of fact *de novo*, when the Circuit Court concurs with the Probate Court, then the standard of review for the Court of Appeals is whether there is any evidence which reasonable supports the findings of the court below. *Dean v. Kilgore*, 313 S.C. 257, 437 S.E. 2d at 154 (Ct. App. 1993); *Eagles v. S.C. Nat'l Bank*, 301 S.C. 402, 392 S.E. 2d 187 (Ct. App. 1990).

ARGUMENT

I. APPELLANT ARGUES THAT THE TRIAL COURT ERRED IN HOLDING THAT A NOTARY PUBLIC CANNOT PROPERLY SERVE AS AN ATTESTING WITNESS TO A WILL, WHERE THE NOTARY MEETS ALL OTHER REQUIREMENTS OF LAW FOR WITNESSES.

A) Appellant's argument is procedurally barred by the two-issue rule.

1. *S.C. Code Ann.* § 62-2-502 requires two witnesses.

The Order of the Probate Court under appeal applies *S.C. Code Ann.* § 62-2-502, noting that the statute "requires two witnesses to the Testator's signature on the Will." (R. p. 2).

Appellant "had the burden of proving that the February 25 will was a writing signed by [the testator] and witnessed by two individuals, 'each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.'" R. p. 3, citing *S.C. Code Ann.* § 62-2-502).

2. The Probate Court found that *neither* of the two proffered witnesses satisfied *S.C. Code Ann.* § 62-2-502.

"I find that [Appellant] has not met her burden due to the inconsistent testimony from Mrs. Jones *and* Mrs. Belin-Burns...." (R. p. 4, emphasis added). "Based on the testimony of *both* Ms. Jones *and* Ms. Belin-Burns, I find that the February 25 Will was not validly executed." (R. p. 4, emphasis added).

3. Appellant has sought to rehabilitate the testimony of only notary Doris Belin-Burns.

Appellant's sole issue on appeal is whether a notary public can serve as a witness to a will. The individual whose name appears on the will as a notary is Doris Belin-Burns. (R. p. 94, lines 5-7; R. p. 148). Appellant has not addressed the rejection by the Probate Court of Sara H. Jones as a witness to satisfy *S.C. Code Ann.* § 62-2-502.

4. Since the Probate Court also found the testimony of Ms. Jones failed to satisfy *S.C. Code Ann.* § 62-2 502, and Appellant has not appealed that finding, the appeal must fail.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atlantic Coast Builders & Contractors, LLC, v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012). Because Appellant has not appealed the finding of the Probate Court that Ms. Jones' testimony did not satisfy *S.C. Code Ann.* § 62-2-502, that finding has become the law of the case. *S.C. Code Ann.* § 62-2-502 requires two witnesses, and thus even complete rehabilitation by Appellant of notary Ms. Belin-Burns would not satisfy *S.C. Code Ann.* § 62-2-502.

5. Similarly, since the Probate Court found multiple reasons to reject the testimony of notary Ms. Belin-Burns, and Appellant has appealed only one of the reasons, the appeal must fail.

Appellant's sole argument relative to notary Doris Belin-Burns is that a notary can serve as a witness to a will. This argument does not address the Probate Court's finding that Appellant did not meet her burden "due to the inconsistent testimony from Mrs. Jones and Mrs. Belin-Burns." (R. p. 4). Appellant's argument regarding whether notary Ms. Belin-Burns can be counted as a witness despite her signing only to notarize the signature of the other witness, which is

discussed below, ignores the alternative finding that the testimony of Ms. Belin-Burns did not satisfy *S.C. Code Ann.* § 62-2-502 because of its inconsistency. That unchallenged finding has likewise become the law of the case and thus this appeal must fail because there is an alternative unappealed basis for the Probate Court's decision.

B) <u>The decision of the Probate Court has ample law and evidence to support it</u>.

1. Law

a) Appellant has framed the issue in a way that, while constituting good advocacy, recharacterizes the basis of the Probate Court's Order.

The Probate Court did address the fact that Ms. Belin-Burns, one of the two individuals whose names appear on the proffered will, signed only as a notary: "While the statute does allow for the Notary Public to be a witness to a Will along with Notarizing the Will there is no provision for a Notary Public to Notarize without also signing as a witness." (R. p. 4). Thus, the Probate Court's decision was based on the fact that Ms. Belin-Burns did not sign as a witness, but only as a notary to the signature of Ms. Jones, rather than, as argued by Appellant, an automatic disqualification of Ms. Belin-Burns because she happened to be a notary.

The Probate Court's holding was squarely based on the testimony by Ms. Belin-Burns that she was not asked to be a witness to anything about the will itself, but only to notarize the signature of Ms. Jones:

" Q. Did Sylvia call you and ask you to come over?

A. She did.

Q. What did she ask you to do?

A. To notarize the nurse's signature.

Q. Did she ask you to do anything else?

A. No."

(R. p. 94, lines 20-25 - R. p. 95, line 1). Thus, the one clear thing about the testimony of Ms. Belin-Burns is that she did not sign the purported will as a witness.

b) A person who signs a will as a notary only, and not as a witness to the will, does not satisfy *S.C. Code Ann.* § 62-2-502.

Respondent has found no South Carolina authority directly on the point of whether a person who signs a will only as the notary for a witness' signature should be treated as one of the two witnesses required by *S.C. Code Ann.* § 62-2-502. There is, however, authority from other jurisdictions that precisely so holds. Each of the cases discussed just below holds, as did the Probate Court in this case, that a notary can, under

proper circumstances, be counted as one of the two required witnesses, but only when the notary has signed as a witness to the will, and not merely as a notary.

The Probate Court cited and relied on *Estate of Alfaro*, 301 Ill. 3d 500, 703 N.E.2d 620, 234 Ill. Dec. 759 (Ill. App. 2 Dist. 1998), which holds that a notary can be considered to have attested a will, but only if the notary signs the will as a witness. If the notary signs only to notarize a witness or witness' signatures on a will, the signature of the notary is not effective as an attesting witness. Appellant seeks to distinguish *Alfaro* on the ground that Illinois had a statute that required witnesses to "attest" a will. South Carolina obviously also has such a statute, *S.C. Code Ann.* § 62-2-502; Appellant has made no showing that the Illinois requirements differ so much from South Carolina's that the logic of the Illinois court is unpersuasive.

Decisions from other jurisdictions have reached the same conclusion reached in *Alfaro* and by the Probate Court in this case. In *Will of Priddy*, 171 N.C. App. 395, 614 S.E.2d 454 (N.C. App. 2005), the propounder of a will argued that a notary could be counted as a second witness to a will. *Id.*, 614 S.E.2d at 459. The Court acknowledged that under appropriate circumstances, a notary could count as a witness to a will. *Id.* Further, the Court noted that under North

Carolina law, a testator need not formally request a witness to attest his will, as the request may be implied from his acts and from the circumstances attending the execution of the will. *Id.* The Court concluded, though, that based on the evidence presented, which included an affidavit from the notary that she had signed as an attesting witness, there was a factual discrepancy as to whether the testator requested the notary to witness the will or merely to notarize it. *Id.*, 614 S.E.2d 460.

In the case currently on appeal, there is no factual dispute that the notary, Dolores Belin-Burns, was asked *only* to notarize the signature of witness Jones. (R. p. 94, lines 20-25 - R. p. 95, line 1). Thus, as a matter of law, Ms. Belin-Burns did not witness the will, but only notarized Ms. Jones' signature. Even if there were an issue of fact, the Probate Court served as the finder of facts, and found against Appellant on this issue.

In *In re McDonough*, 201 A.D. 203 (N.Y. App. Div. 1922), the question was the same, whether the signature of a notary should be counted as one of the two required witnesses to a will. The court held that it was necessary that the signature be as a witness; if the person signed not in the capacity of a witness but as a notary, the notary's signature does not serve to comply with the statutory requirement of two

witnesses. *Accord, In re Hammer's Estate*, 72 N.Y.S.2d 236, (N.Y. 1946).

All of these cases are based on a similar policy, that the fact that a will is a very important document warrants the enforcement of the specific statutory requirements for its execution. "A substantial compliance with the statutory formula may suffice but the liberality of the judicial rule which tends to accomplish justice in a proper case cannot be strained to the point of ignoring the requirements of the statute." *In re McDonough*, *supra*, 201 A.D. at 205. This policy led directly to the holding that a notary who merely notarizes the signature of a witness to a will does not sign in the capacity of a witness attesting to the will itself, and therefore cannot be counted as one of the two required witnesses.

While Appellant has found no South Carolina authority directly on the point of whether a person who signs a will only as a notary for a witness' signature should be treated as one of the two witnesses required for a will, there is South Carolina authority on the question of whether a person who signs a *deed* only as the notary for the grantor's signature should be treated as one of the two witnesses required for a deed. In *Leasing Enterprises, Inc. v. Livingston*, 294 S.C. 204, 363 S.E.2d 410 (Ct. App. 1987), Livingston had deeded

property to Schlee. Although *S.C. Code Ann.* § 27-7-10 requires a deed to have two witnesses to be valid, the deed from Livingston to Schlee had only one witness, plus the signature of a notary to the signature of Livingston. The South Carolina Court of Appeals held that the deed was not subscribed by the required number of witnesses and thus was not effective to convey title. *Id.*, 363 S.E.2d at 413.

While *Leasing Enterprises* involved a deed rather than a will, the policy is the same as the policy that underpins the decisions of other jurisdictions and of the Probate Court in this case, that a will or deed is a very important document with specific statutory requirements for its execution. A notary, acting in the capacity of notarizing the signature of a witness, and not in the capacity of witnessing the document, does not satisfy the requirement that there be two witnesses to the document.

2. Evidence

a) The fact-finder can accept or reject any or all of a witness' testimony.

The Probate Court, as the finder of fact, was free to accept or reject any or all of each witness' testimony. *Moore v. Benson,* 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010); *S.C. Dep't of Transp. V. M & T Enterprises of Mt. Pleasant, LLC,* 379 S.C. 645, 667 S.E.2d 7, 20 n. 12 (Ct. App. 2008). The

Probate Court found that the testimony of *both* Ms. Jones and Ms. Belin-Burns "was inconsistent in what they indicated they witnessed, whether they actually saw her sign the Will, or whether Ms. Sylvia Reagan verbally acknowledged that the February 25 Will was her 'Last Will and Testament.'" (R. p. 4).

b) The Probate Court had ample basis to reject the testimony of proffered witness Jones.

With regard to Ms. Jones, the Probate Court found that "The testimony of Sarah H. Jones as to her role in this process and what she 'witnessed' is problematic, and is not helpful in determining whether her signature as a witness is valid." (R. p. 4).

Ms. Jones testified at one point that "I believe I saw her sign that document," (R. p. 77, line 22), but when asked whether she was clear in her recollection of that, she stated "I'm unclear." (R. p 78, line 4). Curiously, after testifying that she thought she saw the testator sign the will, Ms. Jones testified that the testator told Ms. Jones that it was the testator's signature on the will (R. p. 86, lines 14-17). It would be most peculiar for a person first to sign a document in the presence of a witness, and then to proceed to tell the witness that it was the person's signature.

Ms. Jones was also inconsistent regarding whether the

testator declared the proffered will to be her will. Although Ms. Jones testified at one point that the testator told Ms. Jones that was her will (R. p. 75, lines 2-4), at other points Ms. Jones equivocated: "And you heard her declare that to be her will? Yes. She indicated that this is what her wishes were." (R. p. 75, lines 13-16; *see* R. p. 76, lines 18-21).

Significantly, after testifying to various statements by the testator, Ms. Jones admitted later in her testimony that the testator's responses were not verbal: "Mrs. Reagan never used the words that this was my last Will and Testament did she? Answer: Not verbally, no, not necessarily." (R. p. 87, lines 2-5). While it again is unclear, reference to multiple portions of the testimony of Ms. Jones shows that the substance of her testimony ultimately was that the only communication between her and the testator was that Ms. Jones asked the testator whether "this was what she wanted, and she either nodded or said yes to me." (R. p. 87, lines 17-19); *see* R. p. 87, lines 21-25; R. p. 89, lines 1-8). When asked whether there was any verbal communication at all between her and the testator, Ms. Jones responded: "She may have said yes or said uh-huh or -- I don't recall that." (R. p. 88, lines 10-11).

These inconsistencies were an ample basis for the Probate Court to conclude, as it did, that Ms. Jones' testimony was

problematic and failed to satisfy *S.C. Code Ann.* § 62-2-502.

c) The Probate Court had ample basis to reject the testimony of notary Belin-Burns.

Other than the fact that she signed only as a witness to the signature of Ms. Jones, Delores Belin-Burns' testimony is unclear. She did not see the testator sign the will, and the testator did not tell Ms. Belin-Burns that the testator had signed the will. The will was already signed when Ms. Berlin-Burns arrived at the home of the testator, and Ms. Belin-Burns "just assumed she signed it." (R. p. 93, lines 20-23). Ms. Belin-Burns was "somewhat" familiar with the testator's handwriting (R. p. 93, lines 9-11), and when asked whether she recognized the testator's signature, Ms. Belin-Burns answered that "It looks like it." (R. p. 93, lines 12-14).

In addition to the fact that the testimony of Ms. Jones and Ms. Belin-Burns was intrinsically unclear and inconsistent, the testimony of Ms. Jones and Ms. Belin-Burns contradicted the testimony of other witnesses. For instance, as noted above, Ms. Jones testified that the testator was not able to have a very lengthy conversation with anyone because she couldn't breathe, so there wasn't a lot of conversation going on verbally (R. p. 87, lines 20-22). The testimony of Ms. Jones boiled down to that Ms. Jones asked the

testator whether this was what the testator wished and did the testator wish for Ms. Jones to sign this document as a witness, and the testator indicated or nodded that it was (R. p. 87, lines 15-24; R. p. 88, lines 1-25; R. p. 89, lines 1-8). By contrast, Ms. Belin-Burns testified that the testator called Ms. Belin-Burns, asked her to come over, and then asked Ms. Belin-Burns to notarize the nurse's signature (R. p. 94, lines 20-24).

Ms. Jones testified in her deposition that she was "pretty sure" Delores Belin-Burns brought the proffered will to the residence of the testator; at another point during the deposition and during the trial, Ms. Jones testified she was unclear regarding whether the proffered will was already present in the home or Ms. Belin-Burns brought it (R. p. 82, lines 5-15). Linda Reagan Shelly testified that Ms. Belin-Burns did *not* bring the proffered will to the home (R. p. 101, lines 20-22.

C. The intent expressed within a will that is not properly witnessed cannot obviate the statutory requirement of two witnesses.

This case of course involves the finding of the Probate Court that the proffered will was not properly witnessed so as to satisfy the requirements of *S.C. Code Ann.* § 62-2-502. Appellant argues that the intent of the testator governs

interpretation of the will. While that is a correct legal principle for construction of a will, it has no applicability to the question of whether a will has been properly witnessed and thus can be accepted for probate.

CONCLUSION

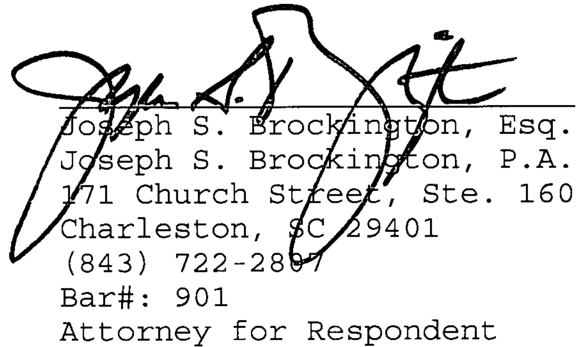
Appellant had the burden to persuade the Probate Court that the testimony of *both* Ms. Jones and Ms. Belin-Burns was sufficient to satisfy *S.C. Code Ann.* § 62-2-502. Appellant has sought to rehabilitate the testimony of notary Ms. Belin-Burns, on one of the grounds upon which the Probate Court found her testimony did not satisfy the applicable statute, but has not taken issue with the Probate Court's findings, affirmed by the Circuit Court, that the testimony of *both* Jones and Belin-Burns was inconsistent and failed to satisfy the requirements of *S.C. Code Ann.* § 62-2-502. This appeal thus fails under the two-issue rule.

There is substantial legal authority to support the holding of the Probate Court that the signature by a notary, who signs to notarize the signature of a witness rather that to witness the will itself, does not satisfy *S.C. Code Ann.* § 62-2-502.

Factually speaking, the Probate Court was free to accept or reject any or all of each witness' testimony. The testimony of both witnesses was unclear and contradictory in many

respects. The test being whether there is *any* evidence which reasonable supports the findings of the Probate Court, review of the evidence as outlined above demonstrates conclusively that there is ample evidence to support that finding of the Probate Court that the testimony of *both* Ms. Jones and Ms. Belin-Burns failed to satisfy the requirements of *S.C. Code Ann.* § 62-2-502.

Respectfully submitted,



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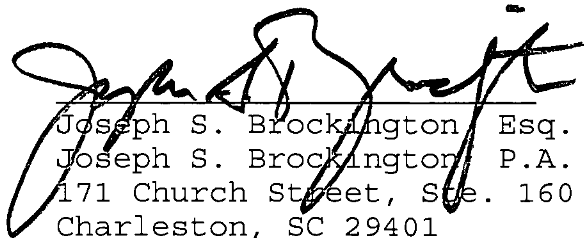
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Final Brief of Respondent* complies with Rule 211(b), SCACR.

March 26, 2014



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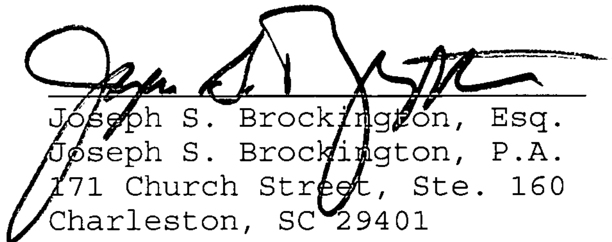
PROOF OF SERVICE

I certify that I have served the FINAL BRIEF OF RESPONDENT on Appellant Linda Reagan Shelley, by depositing a copy of it in the United States Mail postage prepaid, on March 26, 2014, addressed to David K. Haller, Esq., Haller Law Firm, P.C., 115 River Landing Dr., Ste. 102, Charleston, SC 29492., and on Respondent Ramona D. Becker, by depositing a copy of it in the United States Mail postage prepaid, on March 26, 2014,

addressed to 5824 E 48th Street Circle North, Wichita, KS, 67220.

March 26, 2014



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