THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Wilson Garner, Jr., Ruby Lee Douglas, and Hazel Hastings as statutory heirs of the Estate of Nell Gaines, and on behalf of all other remaining statutory heirs who may be determined hereafter, Appellants,

v.

The Estate of Nell Gaines and John Allen Head, individually and acting as Personal Representative of the Estate of Nell Gaines, Respondents.

Appellate Case No. 2019-001028

PETITION FOR CERTIORARI ON BEHALF OF THE APPELLANTS

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QUESTION PRESENTED FOR REVIEW

Which rule of law controls the disposition of interested witness devises in South Carolina? S.C. Code Ann. § 62-2-504(a) of the South Carolina Probate Code, or the common law doctrine of Dependent Relative Revocation? Did the lower court err in applying the common law doctrine of Dependent Relative Revocation to the facts of this case in light of S.C. Code Ann. § 62-2-504(a) (1986, *amended* 2014)?

STATEMENT OF THE CASE

In over 150 years of South Carolina jurisprudence, there has been only one decision of this Court that has interpreted the legal impact of the S.C. Probate Code on interested witness devises. And the courts below have declined to follow that case. [1] The relevant facts of this case are not in dispute. Nell Gaines passed away on August 13, 2014 at the age of 96. (R. p. 192). Barely three months prior to her death, she executed a Last Will & Testament dated May 7, 2014 in which the wife and mother of two devisees named in the Will was one of the two subscribing witnesses.

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[1] *Davis v. Davis,* 208 S.C. 182, 37 S.E.2d 530 (S.C. 1946).

(R. pp. 194, 202-06). She was, under our statutes, an "interested witness." S.C. Code Ann. § 62-2-504(a) (2014), *effective* January 1, 2014.

The May 7, 2014 Will was submitted to the Greenville County Probate Court for informal probate on August 26, 2014. (R. p. 192). Appellants, as statutory heirs, petitioned the Probate Court thereafter to set aside the interested witness devises, pursuant to S.C. Code Ann. § 62-2-504(a). (R. p. 24). This was not a contest to set aside the Will, inasmuch as the statute relied upon by Appellants specifically saves the Will from being declared invalid because of an incompetent witness. [2] The action below was to enforce the statute to void the interested witness devises, as mandated by the statute. The voided portion of all affected devises pass by intestacy, according to the statute, but the Will itself remains valid.

In her Order of October 26, 2015, (R. p. 7-14) Judge Debora A. Faulkner declined to apply S.C. Code Ann. § 62-2-504(a) holding that the common law rule of Dependent Relative Revocation (DRR) applied to the facts of the case, thereby permitting the probate of an earlier Will dated

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[2] Although Appellants originally captioned their original Petition as one to "Set Aside the Will," they promptly amended their pleadings to state their claim was to Set Aside the Devise pursuant to S.C. Code Ann. § 62-2-504.

January 9, 2008, which did not suffer from the same defect in witnessing. (R. pp. 7-14). DRR is a rule of construction that holds a revocation of a prior Will may be seen as conditional, and that such conditions causing a testamentary disposition to fail then gives rise to DRR, sometimes known as "conditional revocation." In so holding, Judge Faulkner avoided the effects of the statute, while at the same time relying upon the statute itself to find grounds for the failure of the testamentary devise in the first place. (R. pp. 12 & 13).

This matter presents a unique question of law inasmuch as there has only been one decision of this or any other South Carolina appellate court on the application of our interested witness statute under the Probate Code, and it was not followed. In *affirming* the decision of the Probate Court below, Respondents and the lower courts have relied upon a single South Carolina appellate decision, which adopted DRR as the common law of this state in 1942. [3] That decision, however, did not address the application of the interested witness statute, inasmuch as the factual and legal issues before this Court at that time were very different.

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[3] *Charleston Library v. Citizens & Southern Nat. Bank,* 200 S.C. 96, 20 S.E.2d 623 (S.C. 1942).

BASES FOR GRANTING CERTIORARI

What we have, then, are two competing rules of law, the application of which would decide this case very differently. Not only will the litigants before this court benefit from a final determination of these issues, the entire citizenry and the bar at large will benefit from a much needed clarification of our probate law going forward.

The bases, therefore, for this Petition for Certiorari are twofold. (1) The case presents a novel question heretofore not decided by this Court; and (2) The decisions below appear to be in conflict with the one decision of this Court that bears upon the question of the impact of S.C. Code Ann. § 62-2-504(a) on interested witness devises.

ARGUMENT / CITATIONS OF AUTHORITY

It appears that South Carolina jurisprudence has contained some version of the interested witness statute since 1857, going back to § 2479 G.S. (1857). The statutory enactments were all in an effort to codify the English common law that voided devises to witnesses who were legatees. Our legislature, in an effort to avoid the controversy of a failed testamentary devise due to incompetent witnesses, adopted the rule that

saved the Will, but voided the devise to the legatee who subscribed the Will. Every iteration of our "interested witness" statute has had that provision in it specifically saving the Will. It should be kept in mind that DRR was a rule derived in equity in England to avoid intestacy. It remains such a rule of contruction today. Appellants make no argument that DRR is no longer viable in South Carolina jurisprudence. It clearly is, inasmuch as the decision of *Charleston Library v. Citizens & Southern Nat. Bank,* 200 S.C. 96, 20 S.E2d 623 (S.C. 1942) has never been overruled. But Appellants have argued that while DRR is viable, it is not applicable in this case since the statute now occupies the field when it comes to how we address "interested witness" devises. The *Charleston Library* case simply was not one that involved our "interested witness" statute at all. The deficiency causing the testamentary disposition to fail in *Charleston Library* was a violation of the rule against perpetuities. 20 S.E.2d at p. 634-35. No "interested witness" statute was pled either for or against *Charles Library,* and Appellants contend that distinction is critical.

The dispositive language in Charleston Library is as follows:

"While the intention to revoke may be conditional, if the revocation is subject to a condition which is not fulfilled the revocation does not take effect. This doctrine is known as that of dependent relative revocation, and is usually applied where the testator cancels or destroys a will or executes

an instrument intended to revoke a will with a present intention to make a new testamentary disposition as a substitute for the old, and the new disposition is not made, or, if made, fails of effect for some reason." *Id.*, 20 S.E.2d at 626. (emphasis added).

The only "some reason" for the failure of the devises in this case is the imposition of the "interested witness statute." That is so because there is no longer any common law rule addressing "interested witnesses," inasmuch as the prior common law against legatees taking when they are subscribing witnesses has long since been codified in this State going back to 1857. The current revision of that statute is now codified in S.C. Code Ann. § 62-2-504(a) (2014). That statute now occupies the field when dealing with "interested witnesses" subscribing Wills in this State.

> A subscribing witness to any will is not incompetent to attest or prove the same by reason of any devise therein in favor of the witness, the witness's spouse, or the witness's issue. If there are two disinterested witnesses to a will in addition to the interested witness, then the devise is valid and effectual, if otherwise effective. If there are not two disinterested witnesses to a will in addition to an interested witness, then the devise is null and void to the extent of the value of the excess property, estate or interest to which the witness, the witness's spouse, or the witness's issue would be entitled upon the failure to establish the will. The voided portion of the devise shall pass by intestacy in accordance with Section 62-2-101 et seq., provided the share of the interested witness, the witness's spouse, or the witness's issue shall not increase due to the devise passing by intestacy." (emphasis added).

The General Assembly made no exceptions for DRR in the statute. *"Expressio unius est exclusio alterius."* In statutory construction, when one or more things of a class are expressly mentioned, others of the same class are excluded. Applying this principle then, there are no devisees of an interested witness who can take more that the statute permits.

In order to meet the threshold requirement that the testamentary disposition must "fail for some reason," as required in *Charleston Library,* the Probate Judge had no other option than to rely upon this particular statute as the basis of the failure of the intended testamentary disposition. At page 7 of her Order dated October 26, 2015, Judge Faulkner says:

"Therefore, because the 2014 will provisions were in effect nullified by the interested witness statute, the condition of her revocation was not fulfilled such that the 2008 will was not effectively revoked." (R. p. 13). [4]

Appellants respectfully submit that what the Probate Judge did was to improperly bifurcate the statute. Having first found that our "interested witness" statue established the threshold failure for "some reason," the Probate Judge then declined to follow the legislative intent on

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[4] Indeed, the Respondents own counsel admitted below that the only basis for the failure of the testamentary disposition was the "interested witness" statute found at S.C. Code Ann. § 62-2-504(a). (See, R. p. 143, ll. 4-7).

what the remedy is for such a infraction of the statute. That simply cannot be how statutes are interpreted and applied. If the statute applies, it applies in whole, not in part.

Again, there is no longer any common law violation for "interested witnesses" subscribing Wills in this State. We now have a codification of that prior common law rule. Appellants respectfully submit the statute cannot be used to invoke DRR, but then avoided altogether for purposes of recourse. The "interested witness" statute and DRR are clearly in conflict in this case. The Probate Judge herself acknowledged that conflict when she noted that the impact of the statute will change the heirs of the estate. (R. p. 13), and nowhere in her opinion does the Probate Judge hold that S.C. Code Ann. § 62-2-504(a) can coexist with DRR. There's no harmonious way to interpret the two.

In the case of *University of Southern California v. Moran,* 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005), the court said that statutory matters relevant to matters before the probate court are controlling. They held that "legislative intent must prevail if it can reasonably be discovered in the language used and that language must be construed in light of the intended purpose of the statute." (emphasis added). Clearly, the intended

purpose of S.C. Code Ann. 62-2-504(a) was to void the devise and have it pass by intestacy.

That brings us to the only case that has spoken directly on point regarding the "interested witness" statute now in question. Appellants have consistently argued that the case of *Davis v. Davis,* 208 S.C. 182, 37 S.E. 2d 530 (S.C. 1946) is dispositive of the case at bar. In that case, the issue squarely before the court was the impact of the "interested witness" statute in view of the fact that the only two witnesses to the Will were spouses of the named devisees. The "interested witness" statute was applied by this Court saying: "To construe a will in conformity with the intentions of the testator [common law DRR] is much favored by the courts but such intention cannot prevail when in conflict with some statute or rule of law."

Judge Faulkner did not follow the *Davis* case. In fact, she did not even address the case at all in her Order of October 26, 2015. (R. pp. 7-14). Neither did the S.C. Court of Appeals in its unpublished opinion dated April 3, 2019, although the *Davis* case was fully briefed to the Probate Judge (R. pp. 43-50) and the Court of Appeals. (*See* Appendix). There is no question that *Davis* lays down a substantive rule of law regarding the disposition of "interested witness" devises. The courts below

have heretofore avoided *Davis* completely in favor of the common law rule laid down in *Charleston Library* that "the intention of the testator is the law of will." While that is ordinarily the common law rule, no common law rule can trump or otherwise ignore statutory law. *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken,* 345 S.C. 18, 24, 579 S.E.2d 334, 339 (Ct. App. 2003).

This is a compelling case for review by this Court to provide much needed guidance to the bar and our Probate Courts on whether DRR can ever be seen as "coexisting" with S.C. Code Ann. § 62-2-504(a) (2014) when the condition that causes the testamentary devise to fail concerns the very gravamen of the statute, i.e., an interested witness who should not have subscribed the Will. Given the mandatory language employed by the statute as to the consequences of that violation, there is no room for DRR to save the testator's intention.

There is a general paucity of authority on the impact of such "interested witness" statutes on the common law of DRR. If this Court decides to grant certiorari, it will be the first decision on this question in South Carolina since the inception of the statute. In an effort to find some authority, the Respondents and Judge Faulkner were forced to rely upon

La Croix v. Senecal, 99 A. 2d 115 (Conn. 1953). Of course, whenever our Probate Judges have to find caselaw from outside the jurisdiction to render their decisions, the situation is not ideal. In any event, *La Croix* is not controlling, and indeed is clearly distinguishable. Connecticut's "interested witness" statute [5] doe not provide *any* direction on what is to become of the failed testamentary disposition. Our statute, however, clearly and unambiguously does. For those reasons, this Court should not be persuaded by the decision in *La Croix.*

In a remarkably similar case to the one at bar, the Florida appellate courts - though admittedly only persuasive authority - have reached a different conclusion than our courts below. In the case of *Estate of Lubbe v. Kamoraski*, 142 So. 2d 130 (Fla. 2d DCA 1962), *overruled on other grounds, Estate of Johnson v. Morris,* 359 So. 2d 425, 426 (1978), the appellate court was faced with the exact same question. DRR was asserted as controlling against Florida's "interested witness" statute. [6] The Florida court *declined* to follow DRR holding "It is evident that the statute here involved is not a flexible rule of procedure but a stern and mandatory rule of substantive law. The courts cannot rightly pervert such rules to

[5] Conn. Gen. Stat., Section 6952, *now codified at* Conn. Gen. Stat. 45a-258 (2012).

[6] Fla. Stat. Ann. 731.07(5) F.S.A.

accommodate the occasional hardship. In this case to hold with the appellants would defeat the implicit purpose of Fla. Stat. 731.07(5) F.S.A. It is axiomatic that judicial decision prompted by temporary expediency tends to make bad law." 142 So. 2d at 137.

Though persuasive, this Court need not be persuaded by *Lubbe.* The decision of this Court in *Davis* provides all the authority this Court needs to grant certiorari and consider this case.

CONCLUSION

There are other arguments to be made in support of the Petition for Certiorari, but the Appellants are mindful of the Court's rule on brevity and conciseness. Hopefully, these are enough reasons to grant certiorari so that the courts of South Carolina and these parties may have clear direction on the issue of DRR and its effect on statutes such as the one at issue. Our courts have long held that "Once the legislature has made a choice, there is no room for the courts to impose a different judgment based upon notions of public policy." *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989). It cannot be credibly argued that our general assembly did not make a choice on how to address testamentary dispositions that fail because of an

interested witness subscribing the Will. The language of our "interested witness" statute is unambiguous and clear. Using the statute as it was below to invoke DRR, while at the same time ignoring the legislative intent on the consequences of that violation should not be endorsed or permitted to stand.

Appellants respectfully request that this Honorable Court grant Appellants' Petition for Certiorari so that the issues in this case may be fully and thoroughly briefed and thereafter argued before this Honorable Court. This is clearly a novel question of law, heretofore not considered by this Honorable Court. This Petition for Certiorari is being made in the interests of justice and to seek much needed clarity and certainty in our Probate laws so that resort to outside authorities is no longer necessary.

[Signature on next page]

Respectfully Submitted

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PROOF OF SERVICE & FILING WITH THE SC SUPREME COURT

Undersigned counsel for the Appellants certifies that he has filed with the SC Court of Appeals and the SC Supreme Court and served the within PETITION FOR CERTIORARI upon the Respondents by depositing a copy of the same into the United States Mail with sufficient postage addressed to:

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This 24th day of June, 2019

Richard L. Patton
Attorney for Appellants.