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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the 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

REPLY TO RESPONDENT'S RETURN ON BEHALF OF THE APPELLANTS

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The case presented on Petition for Writ of Certiorari is indeed a case of first impressions that presents a novel question of law.

This Reply will be brief and to the point. Respondents have argued that the instant case presents no novel question for the court, when the record below demonstrates that there is not a single case in our jurisprudence that has addressed the impact of the SC "interested witness" statute on the applicability of the common law rule of Dependent Relative Revocation. *See,* SC Code Ann. § 62-2-504(a). Respondents, as did the Probate Court below, are forced to go outside the jurisdiction and appeal to a Connecticut case as persuasive (not binding) authority, in order to prevail.

The case of *La Croix v. Senecal,* 99 A.2d 115, 140 Conn. 311 (Conn. 1953) is the **sole** case cited by the Respondents for the proposition that an "interested witness" statute can exist harmoniously with the common law doctrine of Dependent Relative Revocation [DRR]. It was the sole case cited by the Probate Judge to support her conclusion that our "interested witness" statute is not in conflict with the doctrine of DRR in this state. It should be clear, then, that this is a case of first impressions whenever the lower courts cite no authority for the impact of our "interested witness" statute, other than caselaw from another jurisdiction.

This is not a case wherein the common law rule of DRR is challenged as good law in this state. DRR remains good law since *Charleston Library Soc. v. Citizens & Southern Nat. Bank,* 200 S.C. 96, 20 S.E.2d 623 (1942). That case, however, is simply not applicable in this case because of the direct impact of the statutory law now in question. There must be a failure *"for some reason"* before DRR can be asserted. *Charleston Library,* 20 S.E. at p. 627. The ONLY failure *"for some reason"* cited in the lower courts is the violation of our "interested witness statute."

Respondents make much of the testator's intent being the paramount law of Wills. In fact, the cases cited by Respondents for that proposition of law have established that "The first and great rule in the expression of wills, to which all others must bend, is that the intention of the testator expressed in his will shall prevail, **provided it be consistent with the rules of law."** Smith v. Bell. 6 Pet. 68, 8 L.Ed 322 (1832) (*quoting*

Chief Justice Marshall).[1] *See also, Rountree v. Rountree,* 26 S.C. 450. 2 S.E. 474 (S.C. 1910).

The caveat that Respondents will not acknowledge is that the "interested witness" statute found at S.C. § 62-2-504(a) is wholly inconsistent with common law DRR when it comes to the remedy for a violation of the statute. DRR vitiates the improperly witnessed Will resorting thereafter to an earlier Will, while the statute saves the Will and vitiates only the devise affected by the statutory violation. DRR looks to an entirely different Will, while our statute mandates that the affected devise(s) will pass by intestacy leaving the remainder of the errantly witnessed Will intact. Those are not differences without a distinction. They are material differences, all of which are mandated by our General Assembly:

> "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." (consequently, the Will stands) (emphasis supplied).
>
> "... The voided portion of the devise **shall pass by intestacy** in accordance with Section 62-2-101 et seq.,

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[1] The United States Supreme Court case of *Smith v. Bell* case goes on the say "These intentions are to be collected from his [the testator's] words, and ought to be carried into effect **if they be consistent with law."** *Id.* at p. 68.

> provided the share of the interested witness, the witness's spouse, or the interested witness's issue shall not increase die to the devise passing by intestacy." S.C. Code Ann. 62-2-504(a) (*citing with emphasis supplied* the mandatory consequence of the statute's violation).

As cited by Appellants in their *Petition for Writ of Certiorari,* the only case in South Carolina jurisprudence to take up the impact of the interested witness statute in South Carolina at all is the case of *Davis v. Davis,* 208 S.C. 182, 37 S.E.2d 530 (S.C. 1946). No other case has or can be cited in all our jurisprudence to provide guidance on how the interested witness statute affects the common law rule of DRR, if at all. The lower courts did not follow the holding in *Davis* (enforcing the statutory remedy in the face of an improperly witnessed Will) on the basis that *Davis* did not discuss or consider DRR. Appellants' counsel is unaware of any appellate decision that says the trial court's ruling can go outside the four corners of the case law to consider that which the appellate courts did not. That analysis would open Pandora's box to all kinds of challenges to well-established case law on the basis of perceived absence of facts or legal theories.

This is, therefore, a case ripe for adjudication as well as a case of first impressions, worthy of this Court's consideration. *Charleston County Library* certainly did not address the impact of our "interested witness" statute because the statute was not the basis for the challenge before the court. The basis in that case was a violation of the rule against perpetuities. *Davis* does prevent this case from being seen as novel because *Davis* did not address DRR at all. *La Croix* is inapposite because the Connecticut statute had no forfeiture language in it directing the devise to pass by intestacy.[2] Our statute does.

For these reasons, the parties are in need of a clear determination in South Carolina law on the impact of the "interested witness" statute when the assertion of DRR is based upon the very premise of the statute, i.e., an interested witness signs the Will in violation of the

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[2] Section 6952 of the General Statutes of Connecticut provided as follows: "Every devise or bequest given in any will or codicil to a subscribing witness, or to the husband or wife of such subscribing witness, shall be void unless such will or codicil shall be legally attested without the signature of such witness." [Notice the statute does not provide what is to be done with the voided devise. Our General Assembly, on the other hand, included language mandating how the devise is to be distributed.

statute.[3] This is, therefore, precisely a case of first impressions that presents a novel question of law.

This case presents questions of law, not facts, which may be reviewed without deference to the lower court. *Moriarty v. Garden Sanctuary Church of God, 341 S.C. 32, 327, 534 S.E.2d 672, 675 (S.C. 2000).* For all the reasons stated herein, as well as those set forth in Appellant's original Petition for Writ of Certiorari, the undersigned counsel respectfully requests that this Honorable Court GRANT the Petition so that the interests of justice may be served, not only for these parties but for those who come hereafter.

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[3] It cannot be argued that the violation of the state isn't the basis that gives rise to DRR in this case. It was acknowledged to be the basis in the Probate Judge's Order at R. p.13: "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." In addition, it is also acknowledged by the Respondents in their Return to this Court: "In fact, the Probate Court found the common law doctrine of DRR and SC Code 62-2-504 work together in the case below as the Court found that **because of the interested witness statute**, DRR was applicable to the case below." *See,* Response at p. 14. *See also* R. p. 143, ll. 4-7.

Respectfully Submitted:

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August 1, 2019
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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 Supreme Court and served the within REPLY to the Respondents' Return by depositing a copy of the same into the United States Mail with sufficient postage addressed to:

Marcus W. Meetze, Esq.
PO Box 81118
Simpsonville, SC. 29680

This 1st day of August, 2019

Richard L. Patton
Attorney for Appellants.