

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Judge J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-02243
Appellate Case No. 2014-001085

Popie Lown Roberts,

Respondent,

v.

The Health Sciences Foundation of The Medical
University of South Carolina and The Franke Home,
Inc., d/b/a The Franke Home at Seaside, Appellant.

RECORD ON APPEAL

Robert M. Kunes, Esq. (SC Bar #3579)
Andrew W. Chandler, Esq. (SC Bar #69388)
David H. Kunes, Esq. (SC Bar #76310)
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)
Attorney for Appellant

James B. Richardson, Jr., Esq. (SC Bar #4718)
1229 Lincoln Street
Columbia, S.C. 29201
(803) 799-9412
(803) 799-9628 (fax)
Attorney for Respondent

Michael R. Daniel, Esq. (SC Bar #1537)
336 Cardinal Rd.
Elloree, SC 29047
(803) 897-4600
(803) 897-4606 (fax)
Attorney for Respondent

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF CHARLESTON

Popie Lown Roberts,

Petitioner

-vs-

ORDER OF CONSTRUCTION
OF WILL

The Health Sciences Foundation of The Medical
University of South Carolina, The Lutheran Homes
of South Carolina, Inc, as successor by merger to
The Franke Home, Inc., Elizabeth

Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,
William Frederick Schneider, Joseph Emil Schneider,
Katherine Delaine, Marcia Molinari, Mark D.

Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls,

Charles H. Rumpel, III, John D. Rumpel, Barbara P.

Brown, Carol Odesky and Georgina Louise Pace

a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,

Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.

Kirlpatrick, Erlene Arnolda Lide Hayden Vaughan,

Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes

Kathleen Lide Saussy, Caroline Lide Ogburn, Lamar Harper,

Helen H. Cook, Gwendolyn H. Barnes, Arnold K.

Harper, Jr., Caroline Harper Rivers, Arnolda K. Peterson,

Rev. Douglas Kornahrens, Julie Ann George, Amy Tuten,

Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson,

Eleanor M. Rogers and Waldemar White Kornahrens,

The Estate of Caroline Bischoff Lown and

JOHN DOE, a fictitious name used herein to designate

the unknown heirs at law, distributees, and/or devisees of

all persons claiming under or through the heirs of Amelia

Ahrens Bischoff and J.C.W. Bischoff and Caroline Albers

Fischer and Henrich August Fisher and any such persons

who are minors or members of the Armed Forces of the

United States of America, as contemplated by the Service

Members Relief Act, collectively designated as RICHARD

ROE and all persons entitled to claim under and through

any of them,

Respondents.

IN THE MATTER OF THE ESTATE OF
CAROLINE BISCHOFF LOWN

Date of Hearing:
Presiding Judge:
Petitioner:
Petitioner's Attorney:
Guardian Ad Litem

January 31, 2012
Tamara C. Curry
Popie Lown Roberts
Michael R. Daniel
Robert C. Stone

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This matter was brought before this Court by a Petition filed by the Devisee, Popie Lown Roberts (in her individual capacity as a Devisee and not as the Personal Representative of this Estate) through her Attorney, Michael R. Daniel and Counterclaims filed by the other named Devisees. The matter was heard on January 31, 2012, before the Honorable Tamara C. Curry. Present at the hearing were Popie Lown Roberts (Petitioner) and her husband Randy Roberts, Petitioner's attorney, Michael R. Daniel, Robert C. Stone, Esquire, as Guardian Ad Litem for the unknown heirs and heir under disability, Nicholas C. Sottile (Personal Representative's attorney), and Robert M. Kunes and Andrew W. Chandler (attorneys for Defendants The Health Sciences Foundation of The Medical University of South Carolina and The Lutheran Homes of South Carolina, Inc, as successor by merger to The Franke Home, Inc.) The parties request an Order pursuant to S.C. Code §15-53-10 (2011), et. seq., declaring the rights, status and other legal relations between the various parties as they pertain to Item FOURTH of the Last Will and Testament of the decedent, Caroline Bischoff Lown.

The Amended Summons and Amended Petition were filed July 13, 2011. All the named Defendants were properly served as evidenced by the Acceptances and Affidavits of Service on file with the Clerk of Court. The Health Sciences Foundation of The Medical University of South Carolina, The Lutheran Homes of South Carolina, Inc, as successor by merger to The Franke Home, Inc., Caryl Doscher Morgan and Elizabeth Kepley filed Answers. The latter two withdrew their Answers prior to the hearing and consent to an Entry of Default. Pursuant to

Court orders, a Guardian ad Litem was appointed and the pleadings were advertised in accordance with state law. The Court has jurisdiction over the parties and the subject matter.

Testimony was taken and exhibits submitted. From the evidence presented the Court finds, concludes and orders as follows:

FINDINGS OF FACT

1. Petitioner was at all times mentioned, and still is, a resident of Pickens County, South Carolina.
2. Respondent, The Lutheran Homes of South Carolina, Inc, as successor by merger to The Franke Home, Inc, was at all times mentioned, and still is, a South Carolina corporation doing business in Charleston County, South Carolina.
3. Respondent, Health Sciences Foundation of The Medical University of South Carolina, was at all times mentioned, and still is, a South Carolina nonprofit organization maintaining offices in Charleston County, South Carolina. This Defendant as well as The Lutheran Homes of South Carolina, Inc, as successor by merger to The Franke Home, Inc are hereafter referred to as "the charities". They have appeared jointly in this action by the same attorneys.
4. Respondent, John Doe, was at all times mentioned as an unknown potential intestate heir. The Guardian ad Litem has advised the Court that no heirs have come forward after the advertising of the Summons and Notice of Filing Complaint as required by statute. The Court hereby finds that the intestate heirs are conclusively presumed to be all named and any others claiming such an interest in this Estate are barred.
5. Elizabeth Ann Doscher Kepley, Caryl Gilmore Doscher Morgan, William Frederick Schneider, Joseph Emil Schneider, Katherine Delaine, Marcia Molinari, Mark D.

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Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls, Charles H. Rumpel, III, John D. Rumpell, Barbara P. Brown, Carol Odesky and Georgina Louise Pace a/k/a Gina Pace, Edward Fischer Kornahrens, Jr., Donovan Paul Kornahrens, Byrle Kornahrens, Paula K. Kirlpatrick, Erline Arnolda Lide Hayden Vaughan, Kathleen Lide Saussy, Caroline Lide Ogburn, Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson, Eleanor M. Rogers, Waldemar White Kornahrens, Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes, Arnold K. Harper, Jr., Caroline Harper Rivers, Arnolda K. Peterson, Rev. Douglas Kornahrens, Julie Anne George, Caryl Doscher Morgan, Elizabeth Kepley and Amy Tuten are all potential intestate heirs residing in various locations in and outside Charleston County, South Carolina. They are referred to hereafter as "intestate heirs".

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6. Carolina Bischoff Lown, the decedent, at the time of her death resided at 2 Bishop Gadsden Way, Apartment 1045, Charleston, Charleston County, South Carolina, and died on February 5, 2011.
 7. At the time of her death, the decedent owned and possessed personal property situated within Charleston County, South Carolina.
 8. The decedent left a Last Will and Testament dated June 1, 2005. The decedent's will was duly admitted to probate as a valid will by the Probate Court of Charleston County, South Carolina, on February 18, 2011. Petitioner was named as the Personal Representative in the decedent's Last Will and Testament, and on February 18, 2011, Petitioner was duly appointed Personal Representative and qualified as the Personal Representative.
 9. Popie Lown Roberts, as a beneficiary (the "Petitioner"), filed a Petition to Construe a Will (the "petition") on April 25, 2011.

10. Items SECOND, THIRD and FOURTH of the decedent's Last Will and Testament

provide as follows:

"SECOND: I hereby give and bequeath all of my tangible personal property, including furniture, jewelry, personal effects, and any vehicles registered in my name, to my niece-in-law, POPIE LOWN ROBERTS, of Easley, South Carolina.

THIRD: I give and bequeath to my niece-in-law, POPIE LOWN ROBERTS, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, but should she predecease me or we should die simultaneously or as the result of a common tragedy, I give and bequeath the said sum to her issue then living at the time of my death.

FOURTH: I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses and taxes, be divided and I bequeath and devise as follows:

(a) One-Third (1/3) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest.

(b) One-Third (1/3) to the FRANKE HOME AT SEASIDE, Mt. Pleasant, S.C., to be used to establish an endowment to known as the 'BISCHOFF-LOWN RESIDENT ASSISTANCE FUND, to be held in trust, nevertheless, with the income to be used to assist those with a demonstrated financial need in paying the costs of residence in the said Franke Home in Mt. Pleasant, or its successor. It is further my desire that preference be given to South Carolina residents in choosing the recipients of such assistance.

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c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, in trust, nevertheless, to establish an endowment with the income to be used to be known as the 'BISCHOFF-LOWN SCHOLARSHIP' and to be awarded to those students pursuing a degree of Doctor of Medicine (MD) and who have shown ability and dedication to the study and practice of medicine and who have demonstrated financial need. It is my request that preference be given to residents of South Carolina with the above qualifications."

11. Petitioner, Popie Lown Roberts, is the surviving niece-in-law of Caroline Bischoff Lown, deceased, and is the person above-mentioned as the legatee and devisee in Items SECOND, THIRD and FOURTH of the last will of the decedent.

12. There are three issues presented:

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- a) Is there a latent ambiguity with regard to the terms of Mrs. Lown's will as they pertain to the computation of the sums to be distributed among the Devisees requiring the court to consider extrinsic evidence of the testator's intent?
 - b) Is the testimony of Joseph W. Cabaniss, Esq., decedent's attorney and drafter of the Will as to the specific instructions from her to him inadmissible hearsay or barred by the Dead Man's statute or the Parol Evidence Rule or is it properly admitted?
 - c) If there is no latent ambiguity what is the Court's construction of the terms of the Will when reviewed in its entirety?

CONCLUSIONS OF LAW

I) There is a latent ambiguity with regard to the terms of Mrs. Lown's will as it pertains to the computation of the sums to be distributed among the Devises requiring the court to consider extrinsic evidence of the testator's intent.

Pursuant to South Carolina Probate Code 62-1-102(b)(2), the purpose of the Probate Code is to discover and make effective the intent of a decedent in the distribution of his property. However, the intent of a decedent is not clear when the Will contains a latent ambiguity.

"Ambiguities in a Will may be patent or latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the instrument as looked at in themselves and before any attempt is made to apply them to the object which they describe, while in the later case uncertainty arises, not upon the words of the instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe." In re: Estate of

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Prioleau, 361 S.C. 627, 632, 606 S.E.2d 769, 773 (2004). A Court may admit extrinsic evidence to determine whether a latent ambiguity exists in a Will. *Id.* Moreover, if the Court finds that a latent ambiguity exists in a Will, extrinsic evidence is permitted to help determine the Testator's intent. *Id.* See also Bob Jones University v. Strandell, 543 S.E.2d 251, 344 S.C. 224 (2001).

In this case, a latent ambiguity exists when considering the circumstances as a whole and the documents that were executed to carry out Ms. Lown's intent. As such, the Court considered the testimony of the witnesses concerning Ms. Lown's intent. The Charities argue there is no ambiguity and that the following excerpt of the Will controls the distribution among the three Devises: "FOURTH: I direct that the rest and residue of my estate, *the payment of the specific bequests*, with all debts, expenses and taxes, be divided and I bequeath and devise as follows: (emphasis provided)

(a) One-Third (1/3) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death *less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest.* (Emphasis added)

(b) One-Third (1/3) to the FRANKE HOME AT SEASIDE...

(c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina..."

It is the position of the charities that this residuary clause, by reason of the language "*the payment of the specific bequests*" requires Ms. Roberts to share in equal thirds the cost of the two specific bequests to her. They assign a value to the personal property gleaned from the Estate's inventory and deduct that amount from the stated value of the Estate (\$5,277,734.00). They deduct the \$1,000,000.00 bequest in like fashion. Taxes, costs and fees are then deducted (Note that Petitioner does not contest these costs are payable prior to any residuary distribution) Then they add these back into the residuary clause, bringing the value of the "residual" assets to \$5,277,734.00. Dividing the Estate in thirds gives each Devisee the sum of \$1,725,911.66. Then they debit the value of the personal property and the \$1,000,000.00 bequest from Ms. Roberts' share to reflect payment to her of that amount under Items SECOND and THIRD of the Will. The net effect is that all three Devisees share the entire Estate in equal 1/3 shares. At the hearing the Charities moved for the introduction of a flow chart created by their attorney to illustrate this mathematical procedure which they assert to be the clear and unambiguous method of distribution called for by the terms of the Will. The Court reviewed the document but did not enter it in evidence. The Court is filing a copy as a Court's Exhibit.

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The Charities analysis fails in two respects. It fails to consider all four corners of the document, specifically the fact that there were two very specific gifts to Mrs. Roberts before the residuary clause that the Charities focus on. Their process results in an equal splitting of the estate among the three Devisees, namely Mrs. Roberts, MUSC Foundation and the Franke Home. If this indeed was the intention of Mrs. Lown, this could have been accomplished in a simpler more direct manner. The Court notes it was an experienced attorney who drafted the Will.

Secondly, their argument ignores the provision in Item FOURTH (a). By the Charities analysis we are to first deduct all costs and expenses, including the two specific bequests of Items Two and Three and then divide the Estate in equal thirds per Item 4(a), (b) & (c).

Regarding Mrs. Roberts' share, the instructions state "less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest. (Emphasis added)" The Will does not say what to do with this \$1,000,000.00. If there is no stated devisee for that asset, it passes by intestacy. In the case of Harriette S. Bahan v Citizens and Southern National Bank of South Carolina, 267 S.C. 303, 227 S.E.2d 671 the Court stated "If the gift which fails is itself a part of the residuary it passes by intestacy. 80 Am.Jur. (2d) Wills, Section 1695; Page on Wills, Section 33:56. We have recognized the above principle where ... there was no provision for a substitute legatee or devisee, Padgett v. Black, 229 S.C. 142, 92 S.E.2d 153. These decisions were based upon the finding by the court as to the intent of the testator." There is a presumption against partial intestacy. Id.

Furthermore, we do not agree with the Charities' reliance on Section 62-2-604. The devise to Mrs. Roberts did not fail. At worst, it did not convey all of residuary to any named beneficiaries thereby creating a partial intestacy.

The Court also considered the testimony of Mrs. Roberts in concluding a latent ambiguity exists which is an allowable use of extrinsic testimony. Bob Jones University, Supra. Mrs. Roberts testified that she frequently visited Mrs. Lown in her home and saw her on most major holidays and never heard of or from any other heir or relative of Mrs. Lown and in fact, the obituary declared Mrs. Lown had no other living relatives. Based on the facts and applicable law, this Court concludes a latent ambiguity exists and extrinsic evidence is needed to resolve the latent ambiguity.

II) The testimony of Joseph W. Cabaniss, Esq., decedent's attorney and drafter of the Will as to the specific instructions from her to him is not inadmissible hearsay nor is it barred by the Dead Man's Statute is properly admitted.

Having determined to allow the extrinsic evidence, the Court accepted the deposition testimony of Joe Cabaniss, a member of the Charleston County bar for over 50 years. He conferred with the decedent and drafted the Will (Cabaniss Depo. Pg 9, Lns 13-20). Mr. Cabaniss testified the Will is clear and reflects what he was instructed to prepare, that is Mrs. Roberts was to get the personal property and \$1,000,000.00 and she and the Charities were to evenly split what was left after taxes, costs and fees. (Cabaniss Depo. Pg 16, Ln 3 through Page 17, Ln. 7)

The Charities object to this testimony claiming the testimony concerning Mrs. Lown's statements and instructions to Mr. Cabaniss are hearsay. Even though the testimony is hearsay, it falls within one of the exceptions to hearsay the hearsay rule. "RULE 804. Hearsay Exceptions; Declarant Unavailable"

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant—

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. (Emphasis provided) SCRE Rule 804(a)(4)

The Respondent further objects on the grounds that the testimony of Mr. Cabaniss is barred by the Dead Man's Statute and the Parol Evidence Rule. The Dead Man's Statute of South Carolina, § 19-11-20, as it applies in this case, states that any interested party may not serve as a witness and testify in regard to any transaction or communication between him/her and the decedent prior to the decedent's death, when their interest can be affected by the testimony. See, e.g., Hanahan v. Simpson, 326 S.C. 140, 151, 485 S.E. 2d 903, 909.

The Charities further argue that if the Court finds in favor of the Charities or the intestate heirs that Mr. Cabaniss is exposed to a malpractice claim by Mrs. Roberts and this potential malpractice claim gives Mr. Cabaniss a sufficient "legal or equitable interest" which may be affected by the event of the action' to satisfy that requirement. The Court disagrees. The general rule is stated in 98 C.J.S. Witnesses § 231. "The attorney who drafted the Will is not an 'interested person' for purposes of a Dead Man's Statute accordingly, his or her testimony is ordinarily admissible." Second, testimony of the attorney preparing the will is generally held admissible on the ground that the attorney is not an "interested person." Havird v. Schissell, 252 S.C. 404, 166 S.E.2d 801 (1969)

The Respondent further argues that the Parol Evidence Rule is inapplicable in this case; however, the Petitioner argues that the evidence is admissible to resolve a latent ambiguity in the language of the document, not to alter or amend otherwise clear and unambiguous terms. The Rule is stated as early as 1812 in Rothmahler V J. Myers, et. al. 4 Des 215, 4 S.C. Eq. 215 (S.C.), 1812 WL 407 (S.C. Ct. App 1812): Parol evidence then, is not wanted to explain what is clear. But if the will was not so clear, the ambiguity is not of that kind which the court suffers to be

explained by parol evidence. It is not an *ambiguitas latens*, which is explainable by evidence, but *ambiguitas patens*, which is not so explainable." Extrinsic evidence relating to the conditions surrounding the parties, the circumstances under which the contract was executed and the negotiation between the parties leading to the execution thereof is admissible to aid the jury in determining the intent of the parties if the contract is ambiguous. Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 128 S.E.2d 171 (1962); see Columbia East Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 386 S.E.2d 259 (Ct.App.1989). "

(III) Regardless of whether there is a latent ambiguity in the will which requires the court to consider extrinsic evidence with regard to the testator's intent, the Court makes a factual finding that the testator intended to make a single bequest to Popie Roberts in the amount of \$1,000,000.00. (Item THIRD of the Will), and a single bequest to Popie Roberts of the personal property (Item SECOND of the Will) with all remaining residual property divided equally among the three named devisees (Item FOURTH of the Will).

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In determining the testator's intent, the court should read the will as a whole and attempt to harmonize all of its provisions. An interpretation that fits into the whole scheme or plan of the will is the most apt to be the correct interpretation of the intent of the testator. Kemp v. Rawlings, 358 S.C. 28, 34, 594 S.E.2d 845, 849 (2004) (emphasis added). When the provisions of the will are doubtful or inconsistent, the court prefers an interpretation that will give force and effect to the intention of the testator according to the ordinary meaning the will, which will render effective the expressed language thereof, other than a conjecture arising from a supposed omission. Dent v. Dent, 113 S.C. 416, 418, 102 S.E. 715, 717 (1920). A court may not consider a will piecemeal, but must give due weight to all its language and its provisions, giving effect to every part when, under a reasonable interpretation, all the provisions may be harmonized with

each other and with the will as a whole. Epworth Children's Home v. Beasley, 365 S.C. 157, 166, 616 S.E.2d 710, 715 (2005). Arriving at the intent of the testator requires that every item in a will be considered in relation to the other portions of the will. Black v. Gettys, 238 S.C. 167, 174, 119 S.E.2d 660, 663 (1961). The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself. Id.

If the language in Paragraph 4 of the will is unambiguous, it is obvious from reviewing the entire document the true and legal intent and effect of the last will of the decedent was to devise all personal property and One Million and 00/100 (\$1,000,000.00) Dollars to Petitioner and the remainder after debts, taxes costs and fees, split equally among Petitioner, The Lutheran Homes of South Carolina, Inc, as successor by merger to The Franke Home, Inc, and Health Sciences Foundation of The Medical University of South Carolina, so that all of decedent's estate in total passes through her Last Will and Testament, leaving no residual estate to pass through intestacy.

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In summary, the Court finds and concludes the Will contains a latent ambiguity requiring the aid of extrinsic evidence to interpret the Will. That it is necessary that the terms and provisions of the Last Will and Testament of the decedent, relating to the SECOND, THIRD and FOURTH ITEMS of the Will be construed by the Court. In so doing, the Court concludes that the Petitioner has proven that the intent of the Testatrix was that Mrs. Roberts was to get the personal property and \$1,000,000.00 and she along with the Charities were to evenly split what was left after debts, taxes, costs and fees. In the alternative, the Court concludes that if it be ultimately determined no latent ambiguity exists, a review of the entire document and all its terms leads to the same conclusion as to the Testatrix's intent. Now therefore, it is

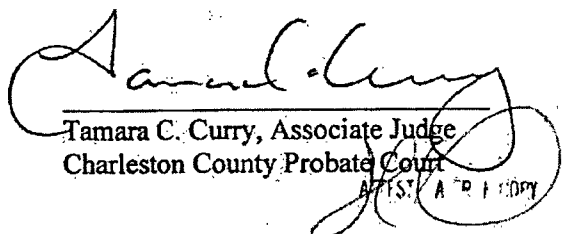
ORDERED, ADJUDGED AND DECREED that the legal effect of the Last Will and Testament of Caroline Bischoff Lown, deceased, was a specific devise of \$1,000,000.00 and the personal property to Popie Lown Roberts, one-third of the remainder of the estate to the Popie Lown Roberts, one-third of the remainder of the estate to the The Lutheran Homes of South Carolina, Inc, as successor by merger to The Franke Home, Inc. and one-third of the remainder of the estate to the Health Sciences Foundation of the Medical University of South Carolina so that all of the decedent's estate passes through testacy with no remainder of her estate passing through intestacy, it is further

ORDERED, ADJUDGED AND DECREED that the testimony of Attorney Joseph W. Cabaniss, Esq., decedent's attorney and drafter of the Last Will and Testament, is admissible and accepted by this court as an exception to the Hearsay Rule, it is further

ORDERED, ADJUDGED AND DECREED that all parties are bound by the declarations of this Order; and

IT IS SO ORDERED!

June 26, 2012.



Tamara C. Curry, Associate Judge
Charleston County Probate Court

DEPUTY CLERK PROBATE COURT
CHARLESTON COUNTY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Popie Lown Roberts,
Petitioner.

vs.

the Health Sciences Foundation of The Medical
University of South Carolina, The Franke Home,
Inc., d/b/a The Franke Home at Seaside, Elizabeth
Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,
William Frederick Schneider, Joseph Emil Schneider,
Katherine Delaine, Marcia Molinari, Mark D.
Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls,
Charles H. Rumpel, III, John D. Rumpell, Barbara P.
Brown, Carol Odesky and Georgina Louise Pace
a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,
Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.
Kirlpatrick, Erlene Arolda Lide Hayden Vaughan,
Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes
Kathleen Lide Saussy, Caroline Lide Ogburn, Arnold K.
Harper, Jr., Caroline Harper Rivers, Arnold K. Peterson
Rev. Douglas Kornahrens, Julie Ann George, Amy Tuten,
Anne Delette Kornahrens, Ruther Pierrene Coleman
Johnson, Eleanor M. Rogers and Waldemar White
Kornahrens, The Estate of Caroline Bischoff Lown and
JOHN DOE, a fictitious name used herein to designate
the unknown heirs at law, distributees, and/or devisees of
all persons claiming under or through the heirs of Amelia
Ahrens Bischoff and J.C.W. Bischoff and any such persons
who are minors or members of the Armed Forces of the
United States of America, as contemplated by the Service
Members Relief Act, collectively designated as
RICHARD ROE and all persons entitled to claim under
and through any of them,

Respondents.

IN THE MATTER OF THE ESTATE OF
CAROLINE BISCHOFF LOWN

IN THE PROBATE COURT

CASE NO.: 2011-ES10-0276

ORDER GRANTING IN PART
AND DENYING IN PART,
THE MOTION FOR
RECONSIDERATION

Date of Hearing:

October 31, 2012

Presiding Judge:

Tamara C. Curry

Petitioner:

Popie Lown Roberts

Petitioner's Attorney:

Michael R. Daniel, Esq.

Respondents:

the Health Sciences Foundation of The Medical University of South Carolina, The Franke Home at Seaside, Elizabeth Ann Doscher Kepley, Caryl Gilmore Doscher Morgan, William Frederick Schneider, Joseph Emil Schneider, Katherine Delaine, Marcia Molinari, Mark D. Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls, Charles H. Rumpel, III, John D. Rumpell, Barbara P. Brown, Carol Odesky and Georgina Louise Pace a/k/a Gina Pace, Edward Fischer Kornahrens, Jr., Donovan Paul Kornahrens, Byrle Kornahrens, Paula K. Kirlpatrick, Erline Arolda Lide Hayden Vaughan, Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes, Kathleen Lide Saussy, Caroline Lide Ogburn, Arnold K. Harper, Jr., Caroline Harper Rivers, Arnolda K. Peterson, Rev. Douglas Kornahrens, Julie Ann George, Amy Tuten, Anne Delette Kornahrens, Ruther Pierrene Coleman Johnson, Eleanor M. Rogers and Waldemar White Kornahrens, The Estate of Caroline Bischoff Lown and JOHN DOE, a fictitious name used Herein to designate the unknown heirs at law, distributees, and/or Devisees of all persons claiming under or through the heirs of Amelia Ahrens Bischoff and J.C.W. Bischoff and any such persons Who are minors or members of the Armed Forces of the United States of America, as contemplated by the Service Members Relief Act, collectively designated as RICHARD ROE and all persons Entitled to claim under and through any of them Robert M. Kunes, Esq.
Andrew W. Chandler, Esq.
David H. Kunes, Esq.
Lora McDaniel

Respondents' Attorneys:

Court Reporter:

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This matter came before this Court on Respondents' Motion for Reconsideration of the Court's Order, issued on June 26, 2012 (the "Order"). A hearing on the Motion for Reconsideration was held on October 31, 2012 in the Charleston County Probate Court before the Honorable Judge Tamara C. Curry. The Court, after having reconsidered its Order, the testimony and arguments at the hearings, and after review of the pleadings and supporting evidence submitted by the parties, finds and orders as follows:

BACKGROUND

- ACC
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1. Caroline Bishoff Lown (the "Decedent"), at the time of her death, resided at 2 Bishop Gadsden Way, Apartment 1045, Charleston, Charleston County, South Carolina, and died February 5, 2011.
 2. At the time of her death, the Decedent owned and possessed property situated within Charleston County, South Carolina.
 3. At the time of her death, the Decedent left a last will and testament dated June 1, 2005 (the "Will").
 4. The Decedent's Will was duly admitted to probate as a valid will by the Charleston County Probate Court on February 18, 2011.
 5. Popie Lown Roberts was named as Personal Representative in the Will; and on February 18, 2011, Popie Lown Roberts was duly appointed Personal Representative and qualified as Personal Representative.
 6. Popie Lown Roberts, as Personal Representative of the Estate of Caroline Bischoff Lown, filed the Initial Inventory and Appraisement on May 24, 2011. Subsequently, it was amended on June 10, 2011 (as amended, the "Inventory").

7. Popie Lown Roberts, as a beneficiary (the "Petitioner"), filed a Petition to Construe a Will (the "Petition") on April 25, 2011.
8. Health Sciences Foundation of the Medical University of South Carolina, now known as The Medical University of South Carolina Foundation ("MUSC") and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc. ("Franke Home," and together with MUSC, the "Respondents") have responded to the Petition.
9. A hearing on the Petition was held on January 31, 2012.
10. The Court issued its Order on June 26, 2012. The Order stated that "the legal effect of the Last Will and Testament of Caroline Bischoff Lown, deceased, was a specific devise of \$1,000,000.00 and the personal property to Popie Lown Roberts, one-third of the remainder of the estate to Popie Lown Roberts, one-third of the remainder of the estate to the The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc. and one-third of the remainder of the estate to the Health Sciences Foundation of the Medical University of South Carolina so that all of the decedent's estate passes through testacy with no remainder of her estate passing through intestacy." The Court further held that "the testimony of Attorney Joseph W. Cabiness, Esq., decedent's attorney and drafter of the Last Will and Testament, is admissible and accepted by this court as an exception to the Hearsay Rule."
11. Respondents filed a Motion for Reconsideration of the Order, and the hearing on the Motion was held on October 31, 2012.

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CONCLUSIONS OF LAW

The Respondents first asked that the Court supplement the Order's original findings of fact to include certain items from the Cabiness Deposition and find that Mr. Caginess's testimony to be inadmissible hearsay. Cabiness Deposition, Page 12, Ln. 14 through Ln. 19; Page 13, Ln. 20 through Ln. 22; Page 16, Ln. 25 through Page 17 Ln. 2; Page 22, Ln. 25 through Page 23 Ln. 2; and Page 35, Ln. 10 through Ln. 14. This Court concludes that these are not ultimate facts on which the Court relied in its Order. While the testimony may be appropriately included in an appellate transcript, it should not be included in the Order for Judgment. The Respondents' also asked the Court to re-evaluate its original conclusion and find Joseph W. Cabiness's testimony to be inadmissible hearsay. The Respondents' requests to supplement the Order's original findings of fact and find Mr. Cabiness's testimony to be inadmissible hearsay are hereby DENIED.

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Second, the Respondents requested the Court to issue a finding precisely stating what the latent ambiguity to which the Order referred. The Court finds that the ambiguity is adequately stated in the Order, and the request is hereby DENIED.

Third, the Respondents requested the Court clarify the Order's meaning of the second full paragraph on Page 9, regarding Item 4(a) of the Decedent's Will. The Court finds that the Order adequately sets forth the only reasonable interpretation of the Will. In this case, the Court finds that "less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest" is the equivalent sentence as though it said "after, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest." Thus, after deducting the specific devise, the rest and residue should be equally divided. The Court finds that the residuary clause must be reduced by One

Million and 00/100 (\$1,000,000.00) Dollars before distributing the rest and residue, and that the Will distributes the Decedent's Estate completely. The Respondents' request to find that the One Million and 00/100 (\$1,000,000.00) Dollars passes through the residuary clause is hereby DENIED.

Fourth, the Respondents requested that the Court find the FOURTH Article of Decedent's Will be ruled a residuary clause. Since the Court was not aware that this issue was contested, the Respondents are granted leave to amend the Order, to reflect this fact.

Fifth, the Respondents requested the Court amend the first full paragraph on Page 10 of the Order to include the facts presented by Mrs. Roberts that leads the Court to the conclusion that the latent ambiguity exists. The Court concludes that the Order would be clearer if the phrase "along with the other evidence set forth herein," was inserted. The Respondents' request is hereby GRANTED, and the Order shall be amended to read "the Court considered the testimony of Mrs. Roberts, along with the other evidence set forth herein."

Sixth, the Respondents asked the Court to amend the second full paragraph of page 11 of the Order. The Respondents have issue with the sentence "The Charities further argue that if the Court finds in favor of the Charities or the intestate heirs..." As the Respondents have never argued any portion of the estate passes under intestacy, the Respondents ask that the Court amend the Order by deleting the phrase "or intestate heirs." The Respondents' request is hereby GRANTED and the Order will be so amended.

The Respondents last request that the first full paragraph of Page 13 of the Order be amended and that the Order include that at the hearing the Petitioner stated that the Will can be performed "exactly as it is written and would like the Order to state the facts, which make it obvious what the "true and legal intent" was. The Respondents' requests are hereby DENIED.

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IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

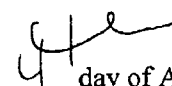
1. The legal effect of Caroline Bischoff Lown's Last Will and Testament was a specific devise of One Million and 00/100 (\$1,00,00.00) Dollars and the personal property devised to Popie Lown Roberts;
2. One-third of the remainder of the Estate devised to Popie Lown Roberts, one-third of the remainder of the Estate devised to The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc. and one-third of the remainder of the Estate devised to the Health Sciences Foundation of the Medical University of South Carolina;
3. The Decedent's entire Estate shall pass through testacy;
4. Respondents' request to supplement the Order's original findings of fact and include certain items from the Cabiness Deposition is hereby **DENIED**;
5. The testimony of Attorney Joseph W. Cabiness, Esq., Decedent's attorney and drafter of the Last Will and Testament, is admissible and accepted by this Court as an exception to the Hearsay Rule. The Respondents' request to exclude Joseph W. Cabiness' s testimony is hereby **DENIED**;
6. The Order adequately states the finding of the latent ambiguity, and the request to amend the Order to include the Court's precise finding of the ambiguity is hereby **DENIED**;
7. Respondents' request to amend the first full paragraph on Page 10 of the Order is hereby **GRANTED**, and the Order shall be amended to read "the Court considered the testimony of Mrs. Roberts, along with the other evidence set forth herein;"

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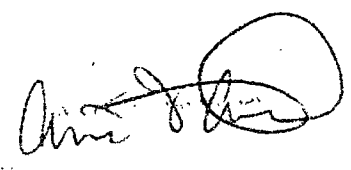
8. Respondents' request to amend the second full paragraph on Page 11 of the Order is hereby **GRANTED**, and the Order shall be amended to read "The Charities further argue that if the Court finds in favor of the Charities...;"
9. Respondents' request to amend the first full paragraph of Page 13 of the Order and that the Order include that at the hearing the Petitioner stated that the Will can be performed "exactly as it is written" is hereby **DENIED**;

IT IS SO ORDERED.


TAMARA C. CURRY
Associate Probate Judge
Charleston County Probate Court


This 4 day of April, 2013.
Charleston, South Carolina.

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Popie Lown Roberts,
Respondent,

2011-ES-10-276
2013-CP-10-02243

-vs-

ORDER

The Health Sciences Foundation of
The Medical University of South
Carolina and The Lutheran Homes of
South Carolina, Inc.,

Appellants.

In the Matter of the Estate
of Caroline Bischoff Lown.

FILED
2014 APR 11 PM 12:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

 This is an appeal from an Order of the Probate Court construing the will of the late Caroline Bishoff Lown.

A. Standard of review.

An action to construe a will is an action at law. *Kemp v. Rawlings*, 358 S.C. 28, 594 S.E.2d 845, 848 (2004). "If a proceeding in the Probate Court is in the nature of an action at law, review by the Circuit Court . . . extends merely to the correction of errors of law." *Bob Jones Univ. v. Strandell*, 344 S.C. 224, 229, 543 S.E.2d 251, 253 (Ct. App. 2001). Accord: *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710, 714 (2005).

"When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).
"In such cases, the appellate court owes no particular

deference to the trial court's legal conclusions." *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999); see also *Duke Power Co. v. Laurens Elec. Coop., Inc.*, 344 S.C. 101, 104, 543 S.E.2d 560, 561-62 (Ct. App. 2001). On appeal from the final order of the probate court, the circuit court should apply the same standard of review that the Supreme Court or Court of Appeals would apply on appeal. *In re Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993).

In re Estate of Boynton, 355 S.C. 299, 584 S.E.2d 154, 155 (Ct. App. 2003).

B. Principles of will construction.

The Probate Court applied familiar principles of will construction. "A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, would follow from such construction. *Matter of Clark*, 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992); *Love v. Love*, 208 S.C. 363, 369, 38 S.E.2d 231, 233 (1946)." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710, 715 (2005). The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions. *Allison v. Wilson*, 306 S.C. 274, 411 S.E.2d 433 (1991). An interpretation that fits into the whole scheme or plan of the will is most apt to be the correct interpretation of the intent of the testator. *Lemmon v. Wilson*, 204 S.C. 50, 28 S.E.2d 792 (1944).

"The paramount rule of will construction is to determine and give effect to the testator's intent." *Holcombe-Burdette v. Bank of America*, 371 S.C. at 655, 640 S.E.2d at 483; see S.C.Code Ann. § 62-1-102(b)(2) (2009) ("The underlying

purposes and policies of this Code are . . . (2) to discover and make effective the intent of a decedent in the distribution of his property.”) “In construing the provisions of a will, every effort must be made to determine and carry out the intentions of the testator.” *Id.* at 656, 640 S.E.2d at 483. “A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy, or inconsistency with the declared intention of the testator, as abstracted from the whole will, would follow from such construction.” *Kemp v. Rawlings*, 358 S.C. 28, 34, 594 S.E.2d 845, 849 (2004). “The rules of construction are subservient to the primary consideration of ascertaining what the testator meant by the terms used in the written instrument itself, and each item of a will must be considered in relation to other portions.” *Id.*

Estate of Gill, 397 S.C. 419, 725 S.E.2d 516, 520 (Ct. App. 2012).

These are the principles applied by the Probate Court and by this Court.

C. Construction of Mrs. Lown's will.

In the First Item of Mrs. Lown's will, she directs the payment of all her just debts,

etc.

In the Second Item, she bequeaths all her tangible personal property to her niece-in-law, Popie Lown Roberts.

In the Third Item, she bequeaths \$1,000,000.00 to Mrs. Roberts.

The Fourth Item gives rise to the controversy. In material part it reads as follows:

FOURTH: I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses and taxes, be divided and I bequeath and devise as follows:

(a) One-third ($\frac{1}{3}$) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or

her issue, under the preceding bequest.

(b) One-third ($\frac{1}{3}$) to the FRANKE HOME AT SEASIDE

(c) One-third ($\frac{1}{3}$) to the Health Sciences Foundation of the
Medical University of South Carolina

The Probate Court construed the will to devise to Mrs. Roberts the tangible personal property of the testatrix and one million dollars, and to devise the residue in equal thirds to Mrs. Roberts and the two appellants.

The appellants are The Franke Home (now The Lutheran Homes of South Carolina, Inc.) and MUSC. They contend that the testatrix intended to devise the value of her *gross* estate, not the residue, to the three devisees in equal shares. This contention is based upon the fact that there is no conjunction or adverb following the first comma in the text of Article IV. The will reads:



I direct that the rest and residue of my estate, the payment of the specific bequests, . . . be divided and I bequeath and devise as follows:

The appellants contend that this language should be construed as though worded:

I direct that the rest and residue of my estate, [and] the payment of the specific bequests, . . . be divided and I bequeath and devise as follows:

Thus, the appellants contend that the residuary clause draws back in to the residuary estate the value of the tangible personal property devised in Article II and the million dollars devised in Article III. Effectively, the residue thereby becomes the entire gross estate. As the appellants put it in their proposed order in the Probate Court: "Article

FOURTH requires that the Decedent's gross estate with all debts, expenses and taxes be calculated and divided equally among the three residuary beneficiaries." [Charities' Proposed Order, ¶ 25.] The Probate Court observed:

"The net effect [of the appellants' argument] is that all three devisees share the entire Estate in equal 1/3 shares."

Probate Court Order, p. 8. This construction would effectively strike Articles II and III, and would convert the residuary clause into a provision controlling the disposition of the entire gross estate.

Rejecting this reading of the will, the Probate Court construed this language to mean:



I direct that the rest and residue of my estate, [after] the payment of the specific bequests, . . . be divided and I bequeath and devise as follows:

The South Carolina Probate Code does not define "residue" or "residuary devise." Generally speaking, a residuary clause of a will is that clause which disposes of property, usually not specifically described, which has not been disposed of by the other provisions of the will. 96 C.J.S. *Wills* § 796, p. 215. A residuary clause commonly refers to the "rest, residue or remainder," or uses language of similar import. *Id.* at p. 217. A residuary clause is "[a] testamentary clause that disposes of any estate property remaining after the satisfaction of specific bequests and devises." BLACK'S LAW DICTIONARY 1311 (7th ed. 1999). "Residue" means "[s]omething that is left over

after a part is removed or disposed of; a remainder." *Id.* Article IV of Mrs. Lown's will is plainly a residuary clause. It was not intended effectively to nullify the specific bequests of the preceding two articles, as the construction proposed by the appellants would do. The residue consists of what is left after the specific bequests are made and after the expenses of the estate are paid.

 In like manner, the appellants contend that the introductory language of Article IV means that not only the earlier specific devises but also *the expenses* of the estate are a part of the residue. This is a contradiction in terms. By definition the residue of an estate consists of assets not specifically devised, not liabilities. The expenses are not property of the estate but liabilities of the estate which, by law, must be satisfied before the property remaining can be devised. Debts, expenses and taxes are not "divided and distributed". They are paid before anything is devised. The appellants nonetheless contend that this negative number, whatever it may turn out to be, is intended to be included in the residue because Article IV directs that "the rest and residue of my estate, . . . with all debts, expenses and taxes, be divided" and distributed in the prescribed way. The testatrix meant to define her residuary estate as being what was left "[**after**] the payment of the specific bequests [**and after**] all debts, expenses and taxes". This is the only construction which makes sense.¹ The court will not

¹ When a typographical error is apparent in the document being construed, the court can and should correct the error. See, e.g., *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) ("This meaning is not obscured by the phrase 'of any cause whatsoever' at the end of the sentence. The 'of' is most likely a typographical error that should read 'or.'"). A typographical error occurs not only when

construe a will in an absurd way.

Regarding the "less, however" clause of Article IV(a), the appellants contend that if the testatrix intended to subtract one million dollars from the one-third share of the residue devised to Mrs. Roberts, this million dollars would constitute a "failed devise" within the meaning of Section 62-2-604(b), and would go to the appellants. This section, generally known as an "anti-lapse statute," provides as follows:

SECTION 62-2-604. Failure of testamentary provision.

* * * * *

(b) Except as provided in Section 62-2-603 if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.



The Probate Code does not define a failed devise, but the South Carolina reporter's comments supply the meaning:

The rule preserves from intestacy devises failing for any reason, *e.g.*, because of the indefiniteness of the devise, illegality, a violation of the Rule Against Perpetuities, incapacity of the devisee, or the failure of the devisee to survive to take the devise

REPORTER'S COMMENTS, 1986 Act No. 539, § 1. Thus, a "failed devise" is a devise which never takes effect, as where the devisee predeceases the testatrix or where the devise is precluded by a rule of law.

The devise to Mrs. Roberts of a share of the residue is not a "failed devise".

a word is misspelled but where it is omitted by mistake. *See, e.g., Connelly v. Earl Frazier Special Sch. Distr.*, 167 Ark. 49, 266 S.W. 929 (1924).

Mrs. Roberts did not predecease the testatrix nor is the devise to her of a share of the residue precluded by some rule of law. The question is not whether the devise failed since clearly it did not. Mrs. Roberts is certainly entitled to a share of the residue. The only question is the amount of the gift. The question is whether the testatrix intended to leave Mrs. Roberts her tangible personal property under Article II, plus one million dollars under Article III, plus one-third of the residue under Article IV; or whether she intended to leave Mrs. Roberts her tangible personal property under Article II, plus one million dollars under Article III, plus one-third of the residue *minus one million dollars* under Article IV.

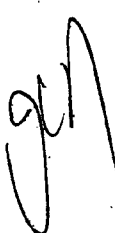


If the testatrix intended to leave Mrs. Roberts one-third of the residue minus one million dollars, then the million dollars withheld from Mrs. Roberts' third of the residue would not go to the appellants under Section 62-2-604(b) since it is not a failed devise. Each of the appellants is entitled to one-third of the residue and no more. The million dollars, if withheld from Mrs. Roberts' share of the residue, would pass by intestate succession. This is the rule of the common law, the so-called "English rule".² See *Padgett v. Black*, 229 S.C. 142, 92 S.E.2d 153 (1956) (generally a lapsed legacy falls into the residuum, but where the lapsed legacy is part of the residuum itself, it is

² The common law rule is often called the "residue of the residue" rule, since it applies where the residuary clause does not fully dispose of the residue of the estate. See, e.g., *Ex parte Byrom*, 47 So.3d 791, 793 (Ala. 2010).

distributed as intestate property (unless the later-enacted "failed devise" provision of § 62-2-604(b) applies)).³ This is a result not advocated by the appellants or by any of the potential intestate heirs.⁴ On the contrary, the appellants are adamant that nothing passes under Mrs. Lown's will by intestate succession.

The testatrix' intent should be discerned from a consideration of the entire will. The presumption against intestacy for one who leaves a will is a strong one. *Pate v. Ford*, 293 S.C. 268, 285, 360 S.E.2d 145, 156 (Ct. App. 1987) ("The law abhors intestacy") It seems unlikely that Mrs. Lown, who was a widow with no children, would intend for a substantial part of her estate to pass by intestacy to a large number of nieces and nephews, and their issue. See Complaint, ¶¶ 15-16. The "less, however" proviso may be seen as a misplaced repetition of the clause which begins Article IV, emphasizing that the residue is that which remains "[after] the payment of the

 ³ See S.C. Code Ann. § 62-2-101 (1987) ("Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed [by the sections concerning intestate succession]."); *Cornelson v. Vance*, 220 S.C. 47, 58, 66 S.E.2d 421, 426 (stating that if the testator does not choose to devise property by express provision in the testator's will, the testator may dispose of assets by use of a residuary clause — when no such clause exists, disposition will be accomplished via the laws of intestacy). Although the law engages a presumption against intestacy, this presumption may be overcome by the facts and plain language of the testator's will. *Albergotti v. Summers*, 203 S.C. 137, 26 S.E.2d 395 (1943); *In re Estate of Blankenship*, 336 S.C. 103, 518 S.E.2d 615 (Ct.App.1999).

Bob Jones Univ. v. Strandell, *supra*, 344 S.C. at 231, 543 S.E.2d at 254-55.

⁴ The heirs at law of the testatrix were all made parties to this action and none have appeared to advocate this construction of their ancestor's will.

specific bequests" and the payment of expenses.

Be that as it may, the sole question before this Court on appeal is whether the appellants' construction of the will is the correct one, not whether some other possible construction not advocated by any party may be a better one. Since the appellants' proposed construction cannot be upheld, the appeal must fail.

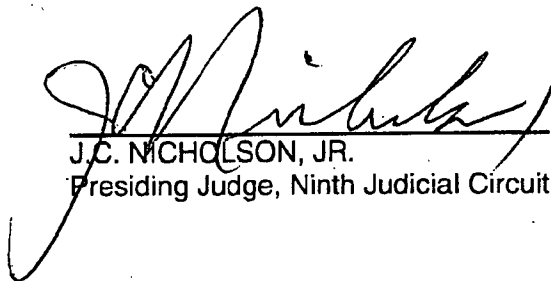
Mr. Cabaniss testified regarding the instructions given him by his client concerning how to draft her will. This Court agrees with the appellants that the testimony was inadmissible hearsay. The error was harmless, however. This Court has reached the same conclusion as did the Probate Court in the construction of the will, without considering the testimony of Mr. Cabaniss.

CONCLUSION

The appellants contend that Mrs. Lown's will should be read as though it contained only one item, leaving her entire estate in equal thirds to Mrs. Roberts and the two appellants. The construction urged by the appellants would rewrite the will.

For these reasons the judgment of the Probate Court is affirmed.

IT IS SO ORDERED.


J.C. NICHOLSON, JR.
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina

April 10, 2014.

STATE OF SOUTH CAROLINA)

IN THE PROBATE COURT

COUNTY OF CHARLESTON)

Popie Lown Roberts,)

Petitioner)

-vs-)

the Health Sciences Foundation of The Medical)
University of South Carolina, The Franke Home,)
Inc., d/b/a The Franke Home at Seaside, Elizabeth)
Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,)
William Frederick Schneider, Joseph Emil Schneider,)
Katherine Delaine, Marcia Molinari, Mark D.)
Hollingsworth, Jr., Kay Staples , Wendell Rawls,)
Charles H. Rumpel, III, John D. Rumpell, Barbara P.)
Brown, Carol Odesky and Georgina Louise Pace)
a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,)
Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.)
Kirlpatrick, Erline Arnolda Lide Hayden Vaughan,)
Anne Delette Kornahrens, Ruth Pierre Coleman Johnson,)
Eleanor M. Rogers and Waldemar White Kornahrens,)
The Estate of Caroline Bischoff Lown and)
JOHN DOE, a fictitious name used herein to designate)
the unknown heirs at law, distributees, and/or devisees of)
all persons claiming under or through the heirs of Amelia)
Ahrens Bischoff and J.C.W. Bischoff and any such persons)
who are minors or members of the Armed Forces of the)
United States of America, as contemplated by the Service)
Members Relief Act, collectively designated as RICHARD)
ROE and all persons entitled to claim under and through)
any of them,)

Respondents.)

IN THE MATTER OF THE ESTATE OF)
CAROLINE BISCHOFF LOWN)

SUMMONS

CASE NUMBER: 2011-ES-10-276

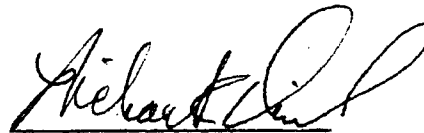
2011 APR 23 PM 5:05

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint herein served upon you and to serve a copy of your Answer to said Complaint upon the subscriber hereunder at P.O. Drawer 200, Ellore, S.C. 29047 within thirty (30) days from the date of service upon you, exclusive of the date of such service; and if you fail to answer the Complaint within said time, the Plaintiff will apply to the Court for the relief demanded in the Complaint, including the rendering of judgment by default.

Ellore, S.C.

April 20, 2011

A handwritten signature in black ink, appearing to read "Michael R. Daniel", written over a horizontal line.

Michael R. Daniel
P.O. Drawer 200
Ellore, S.C. 29047
(803) 897-4600

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF CHARLESTON

Popie Lown Roberts,

Petitioner

-vs-

the Health Sciences Foundation of The Medical
University of South Carolina, The Franke Home,
Inc., d/b/a The Franke Home at Seaside, Elizabeth
Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,
William Frederick Schneider, Joseph Emil Schneider,
Katherine Delaine, Marcia Molinari, Mark D.
Hollingsworth, Jr., Kay Staples, Wendell Rawls,
Charles H. Rumpel, III, John D. Rumpell, Barbara P.
Brown, Carol Odesky and Georgina Louise Pace
a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,
Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.
Kirlpatrick, Erlene Arnolda Lide Hayden Vaughan,
Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson,
Eleanor M. Rogers and Waldemar White Kornahrens,
The Estate of Caroline Bischoff Lown and
JOHN DOE, a fictitious name used herein to designate
the unknown heirs at law, distributees, and/or devisees of
all persons claiming under or through the heirs of Amelia
Ahrens Bischoff and J.C.W. Bischoff and any such persons
who are minors or members of the Armed Forces of the
United States of America, as contemplated by the Service
Members Relief Act, collectively designated as RICHARD
ROE and all persons entitled to claim under and through
any of them,

Respondents.

IN THE MATTER OF THE ESTATE OF
CAROLINE BISCHOFF LOWN

PETITION TO CONSTRUCT
A WILL

CASE NUMBER: 2011-ES-10-276

Petitioner, Popie Lown Roberts, alleges:

1. Petitioner was at all times mentioned, and still is, a resident of Pickens County, South Carolina.
2. Respondent, The Franke Home, Inc., d/b/a The Franke Home at Seaside, was at all times mentioned, and still is, a South Carolina corporation doing business in Charleston County, South Carolina.
3. Respondent, Health Sciences Foundation of The Medical University of South Carolina, was at all times mentioned, and still is, a South Carolina nonprofit organization maintaining offices in Charleston County, South Carolina.
4. Respondent, John Doe, was at all times mentioned, and still is an unknown potential intestate heir.
5. Elizabeth Ann Doscher Kepley, Caryl Gilmore Doscher Morgan, William Frederick Schneider, Joseph Emil Schneider, Katherine Delaine, Marcia Molinari, Mark D. Hollingsworth, Jr., Kay Staples, Wendell Rawls, Charles H. Rumpel, III, John D. Rumpell, Barbara P. Brown, Carol Odesky and Georgina Louise Pace a/k/a Gina Pace, Edward Fischer Kornahrens, Jr., Donovan Paul Kornahrens, Byrle Kornahrens, Paula K. Kirlpatrick, Erline Arnolda Lide Hayden Vaughan, Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson, Eleanor M. Rogers and Waldemar White Kornahrens are all potential intestate heirs residing in various locations in and outside Charleston County, South Carolina.
6. Carolina Bischoff Lown, the decedent, at the time of her death resided at 2 Bishop Gadsden Way, Apartment 1045, Charleston, Charleston County, South Carolina, and died on February 5, 2011.

7. At the time of her death, the decedent owned and possessed real and personal property situated within Charleston County, South Carolina.
8. At the time of her death, the decedent left a last will and testament dated June 1, 2005. The decedent's will was duly admitted to probate as a valid will by the Probate Court of Charleston County, South Carolina, on February 18, 2011. Petitioner was named as the Personal Representative in the decedent's last will and testament, and on February 18, 2011, petitioner was duly appointed Personal Representative and qualified as the Personal Representative. Copies of the decedent's last will and testament is attached as Exhibit A and incorporated by reference.
9. Paragraph two, three and four of the decedent's last will provides as follows:
- “SECOND: I hereby give and bequeath all of my tangible personal property, including furniture, jewelry, personal effects, and any vehicles registered in my name, to my niece-in-law, POPIE LOWN ROBERTS, of Easley, South Carolina.
- THIRD: I give and bequeath to my niece-in-law, POPIE LOWN ROBERTS, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, but should she predecease me or we should die simultaneously or as the result of a common tragedy, I give and bequeath the said sum to her issue then living at the time of my death.
- FOURTH: I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses and taxes, be divided and I bequeath and devise as follows:
- (a) One-Third (1/3) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death less, however, the

sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest.

(b) One-Third (1/3) to the FRANKE HOME AT SEASIDE, Mt. Pleasant, S.C., to be used to establish an endowment to known as the 'BISCHOFF-LOWN RESIDENT ASSISTANCE FUND,' to be held in trust, nevertheless, with the income to be used to assist those with a demonstrated financial need in paying the costs of residence in the said Franke Home in Mt. Pleasant, or its successor. It is further my desire that preference be given to South Carolina residents in choosing the recipients of such assistance.

(c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, in trust, nevertheless, to establish an endowment with the income to be used to be known as the 'BISCHOFF-LOWN SCHOLARSHIP' and to be awarded to those students pursuing a degree of Doctor of Medicine (MD) and who have shown ability and dedication to the study and practice of medicine and who have demonstrated financial need. It is my request that preference be given to residents of South Carolina with the above qualifications."

10. Petitioner, Popie Lown Roberts, is the surviving niece-in-law of Caroline Bischoff Lown, deceased, and is the person above-mentioned as the legatee and devisee in Paragraph two, three and four of the last will of the decedent.

11. While the language in Paragraph 4 of the will is ambiguous, the true and legal intent and effect of the last will of the decedent was to vest all tangible personal property, One Million and 00/100 (\$1,000,000.00) Dollars and one-third (1/3) of the remainder of the estate after removing the One Million and 00/100 (\$1,000,000.00) Dollars from the estate

to petitioner and two-thirds of the remainder split equally amongst the Franke Home at Seaside and the Health Sciences Foundation of the Medical University of South Carolina, establishing trusts in decedent's name, so that all of decedent's estate in total would pass through her last will and testament, leaving no residual estate to pass through intestacy. These devises are subject to the payment of all just debts of the decedent.

12. Respondents, and each of them, claim some interest, by way of remainder or otherwise, to the specific devises, under that part of Paragraph four of the last will and testament of the decedent that reads as follows:

“(b) One-Third (1/3) to The Franke Home at Seaside, Mt. Pleasant, S.C., to be used to establish an endowment to known as the ‘BISCHOFF-LOWN RESIDENT ASSISTANCE FUND,’ to be held in trust, nevertheless, with the income to be used to assist those with a demonstrated financial need in paying the costs of residence in the said Franke Home in Mt. Pleasant, or its successor. It is further my desire that preference be given to South Carolina residents in choosing the recipients of such assistance.

(c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, in trust, nevertheless, to establish an endowment with the income to be used to be known as the ‘BISCHOFF-LOWN SCHOLARSHIP’ and to be awarded to those students pursuing a degree of Doctor of Medicine (MD) and who have shown ability and dedication to the study and practice of medicine and who have demonstrated financial need. It is my request that preference be given to residents of South Carolina with the above qualifications.”

13. Contrary to respondents' allegations, the above-quoted Paragraph four of the decedent's will has no legal effect whatever on petitioner's entitlement under the last will

and testament of the decedent, since the whole of the estate was given and devised to Popie Lown Roberts, The Franke Home at Seaside Farms and the Health Science Foundation of the Medical University of South Carolina under Paragraphs two, three and four of the decedent's will with no intent of the decedent for any of decedent's estate to pass through intestacy as evidenced by the large gifts to each devisee. Nevertheless, the claims of respondents, and the language of the decedent's will, especially Paragraph four, have rendered the will uncertain and ambiguous.

14. It is necessary that the terms and provisions of the will and testament of the decedent, especially Paragraphs two, three and four of the will, be construed by a court of competent jurisdiction.

REGARDING MATERNAL AND PATERNAL HEIRS:

15. Mrs. Lown's paternal grandparents were Amelia Ahrens Bischoff and J.C.W. Bischoff. J.C.W. Bischoff died in September, 1912 and Amelia Bischoff died on or about January 31, 1939.

Mr. and Mrs. Bischoff's seven children (as listed in the obituary for their son William) were William Bischoff, John C. W. Bischoff, H.W. Bischoff, Catherine Bischoff Heidt, Elonore Bischoff Barlow, Caroline W. Bischoff and Rebecca G. Bischoff.

A. William Bischoff died on or about January 15, 1936, leaving two children, William Bischoff, Jr., and Caroline Lown. William Bischoff, Jr., died without issue. Caroline Lown died without issue.

B. H. W. Bischoff (Henry) died on or about April 30, 1938, leaving a daughter, Grace A. Doscher.

Grace A. Doscher died on or about May 7, 1940, leaving a son, Gustav A. Doscher, Jr., and a daughter, Grace Ann Doscher Huber.

Gustav A. Doscher, Jr. died on or about September 2, 1968, leaving two daughters, Elizabeth Ann Doscher Kepley and Caryl Gilmore Doscher Morgan. Grace Doscher Huber died on or about October 26, 1996, without issue. Elizabeth Ann Doscher Kepley is apparently still living. I have not found a current address for Caryl Gilmore Doscher Morgan.

C. John C. W. Bischoff's status is unknown.

D. Caroline W. Bischoff died on or about January 5, 1939, without issue.

E. Catherine Bischoff Heidt died on or about February 3, 1940. At the time of her death her sole surviving child appeared to be Carl C. Heidt. There was a daughter Alice Heidt listed in the estate for Catherine Heidt's husband (who predeceased her) but this child is not listed in her estate.

Carl C. Heidt died on or about October 13, 1966, leaving three daughters: Carolyn Heidt Schneider, Ruth Heidt Hollingsworth and Catherine Heidt Rawls Stewart.

Carolyn H. Schneider died on or about May 3, 1992, leaving three sons, William Frederick Schneider, Joseph Emil Schneider and Carl Heidt Schneider. William and Joseph are still living; Carl died February 26, 2008. I have no information about his children.

Ruth Heidt Hollingsworth died in October 1994, leaving three children, Katherine Delaine, Marcia Molinari, and Mark D. Hollingsworth, Jr.

Catherine Heidt Rawls Stewart died on or about April 2, 1999, leaving two children, Kay Staples and Wendell Rawls. I do not know Kay Staples' address.

John C. W. Bischoff died on or about January 21, 1964, leaving a son, John C. W. Bischoff, Jr., and two daughters, Elizabeth B. Rumpel and Regina B. Pace. I don't have any further information on the son.

Elizabeth Bischoff Rumpel died on or about February 5, 2009, leaving two sons, Charles H. Rumpel, III and John D. Rumpell.

Regina Pace died in 2005, leaving three daughters, Barbara P. Brown, Carol Odesky and Georgina Louise Pace, also known as Gina Pace. I don't have an address for Georgina Louise Pace.

F. Rebecca G. Bischoff died on or about May 3, 1964, without issue.

G. Elonore Bischoff Barlow died in 1970 without issue.

Regarding the maternal grandparents:

16. Mrs. Lown's maternal grandparents were Caroline Albers Fischer and Henrich August Fisher. Caroline Albers Fischer died in 1923 and Heinrich August Fischer died on or about March 16, 1930. They had four children: Annie Fischer Kornahrens, Charlotte Fischer Bischoff, John Heinrich Fischer and Fredrick William Fischer.

A. Frederick William Fischer died on or about October 21, 1928, without issue.

B. John Heinrich Fischer died in 1968, without issue.

C. Charlotte Fischer Bischoff died January 18, 1981, leaving two children, William Bischoff, Jr., and Caroline Bischoff Lown. William died May 5, 1995, without issue. Caroline died without issue.

D. Annie Fischer Kornahrens died May 21, 1981, leaving at least four children. The four children that are certain are Byrle Woldemar Kornahrens, Edward Fischer Kornahrens, Erline Kornahrens Lide and Kenneth Walton Kornahrens.

Edward Fischer Kornahrens died on or about February 2, 1967, leaving three sons and one daughter, Edward Fischer Kornahrens, Jr., Donovan Paul Kornahrens, Byrle Kornahrens and Paula K. Kirlpatrick. These children are all still living.

Erline Kornahrens Lide died on or about October 21, 1968, leaving a daughter, Erline Arnolda Lide Hayden Vaughan.

Kenneth Walton Kornahrens died on or about April 29, 1974, leaving three daughters, Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson and Eleanor M. Rogers.

Byrle Waldermar Kornahrens died on or about March 16, 1994, leaving a son, Waldemar White Kornahrens.

WHEREFORE petitioner requests that the court:

1. Order and decree that the legal effect of the last will and testament of Caroline Bischoff Lown, deceased, was a specific devise of one million dollars to Popie Lown Roberts, one-third of the remainder of the estate to the Popie Lown Roberts, one-third of the remainder of the estate to the Franke Home at Seaside, and one-third of the remainder of the estate to the Health Sciences Foundation of the Medical University of South Carolina so that all of the decedent's estate passed through testacy with no remainder of her estate passing through intestacy.

2. Award petitioner costs; and

3. Grant petitioner such other and further relief as the court deems just and proper.

Ellore, S.C.

April 20, 2011

A handwritten signature in black ink, appearing to read "Michael R. Daniel", written over a horizontal line.

Michael R. Daniel
P.O. Drawer 200
Ellore, S.C. 29047
(803) 897-4600
Attorney for Petitioner

IN THE PROBATE COURT

as The Medical University of South Carolina Foundation ("MUSC") and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc. ("Franke Home"), as Respondents, by and through their undersigned counsel, answering the Petition to Construe a Will of the Petitioner herein, allege as follows:

1. Respondents deny each and every allegation of the Petition not hereinafter specifically admitted.
2. Upon information and belief, Respondents admit the allegations of paragraph 1.
3. Respondents admit only so much of paragraph 2 as alleges the Franke Home, Inc. was a corporation doing business in South Carolina and admits that the Franke Home, Inc. merged into The Lutheran Homes of South Carolina, Inc., which continues to do business in Charleston County, South Carolina.
4. Respondents admit Health Sciences Foundation of the Medical University of South Carolina, which changed its name to The Medical University of South Carolina Foundation, is a South Carolina nonprofit organization maintaining offices in Charleston County, South Carolina.
5. Respondents lack knowledge and information sufficient to form a belief as to the allegations of paragraphs 4 and 5, and therefore, they deny the same.
6. Upon information and belief, Respondents admit the allegations of paragraphs 6, 7 and 8.
7. Answering paragraph 9, Respondents crave reference to the specific, plain language of the Last Will and Testament (the "Will") of Caroline Bischoff Lown (the "Decedent") and Respondents deny all allegations which vary or differ from the plain language of the Will.
8. Upon information and belief, Respondents admit the allegations of paragraph 10.
9. Answering paragraph 11, Respondents admit only so much of paragraph 11 as alleges the Decedent in her Will gave and bequeathed (1) all of her tangible personal property and (2) the sum of One Million and 00/100 (\$1,000,000) Dollars to the Petitioner. Respondents

deny the remaining allegations of said paragraph.

10. Answering paragraph 12, Respondents admit only so much of paragraph 12 as alleges they are residuary beneficiaries under Article FOURTH of the decedent's Will. Respondents deny the remaining allegations of said paragraph which vary or differ from the plain language of the Will.
11. Answering paragraph 13, Respondents admit only so much of paragraph 13 as alleges the Respondents and the Petitioner are beneficiaries under the decedent's Will. Respondents deny the remaining allegations of said paragraph which vary or differ from the plain language of the Will.
12. Respondents admit the allegations of paragraphs 14.
13. Respondents lack knowledge and information sufficient to form a belief as to the allegations of paragraphs 15 and 16, and therefore, they deny the same.

FOR A COUNTERCLAIM

(Construction of Will)

14. Respondents repeat and reiterate the foregoing portion of the within Answer and Counterclaim as fully as if set forth verbatim herein.
15. Popie Lown Roberts, as Personal Representative of the Estate of Caroline Bischoff Lown, filed the Initial Inventory and Appraisement on May 24, 2011, which was amended on June 10, 2011 (as amended, the "Inventory"), a copy of which is attached as Exhibit A and incorporated by reference.
16. The Decedent's Will is not ambiguous and should be construed based on the plain language of the Will.
17. The plain language of Article FOURTH requires that the Decedent's gross probate estate with all debts, expenses and taxes be calculated and divided equally among the three

residuary beneficiaries.

18. Using the values from the Inventory, "[t]he rest and residue of my estate" under Article FOURTH refers to the value of the gross probate estate (\$5,277,734.96) that remains after the payment of the specific bequests under Articles SECOND and THIRD (\$88,683.34+\$1,000,000.00), which equals \$4,189,051.62 ($\$5,277,734.96 - \$1,088,683.34 = \$4,189,051.62$).
19. "[T]he payment of the specific bequests" under Article FOURTH refers to the bequests of tangible personal property with a value of \$88,683.34 and the sum of \$1,000,000.00 disposed of under Articles SECOND and THIRD.
20. The phrase "with all debts, expenses and taxes" under Article FOURTH refers to a negative number determinable at the end of the administration of the estate, which for purposes of calculations may be estimated with a value of \$100,000.00.
21. "The rest and residue of my estate" (\$4,189,051.62 as determined in Paragraph 18) after the payment of "all debts, expenses, and taxes" using the estimated value of \$100,000.00 equals \$4,089,051.62 (the "Article FOURTH Residuary Property").
22. The decedent intended to divide her gross probate estate equally among the three residuary beneficiaries, and, using the numbers outlined above ($(\$4,189,051.62 + \$1,088,683.34 - \$100,000.00) / 3 = \$1,725,911.65$), each residuary beneficiary receives a total value of the gross probate estate equal to \$1,725,911.65.
23. The Petitioner's 1/3 share of the gross probate estate is comprised of (1) tangible personal property with a value of \$88,683.34 under Article SECOND, (2) the \$1,000,000.00 bequest under Article THIRD and (3) the balance of the 1/3 share of the gross probate estate, equaling \$637,228.31, is a portion of the Article FOURTH Residuary Property that flows under Article FOURTH.
24. After the devise of \$637,228.31 to Petitioner under Article FOURTH, the remaining balance of the Article FOURTH Residuary Property is \$3,451,823.31 which, when divided equally

between Franke Home and MUSC, results in a value of \$1,725,911.65, or 1/3 of the total value of the gross probate estate, as calculated above.

25. Respondents request that the Court construe the Will such that (1) the Petitioner receives the tangible personal property under Article SECOND, the sum of \$1,000,000.00 under Article THIRD and the sum of \$637,228.31 under Article FOURTH; (2) Franke Home receives \$1,725,911.65 under Article FOURTH; and (3) MUSC receives \$1,725,911.65 under Article FOURTH; provided, however, that the foregoing numbers be adjusted when the total amount of debts, expenses and taxes is determined.

FOR A COUNTERCLAIM

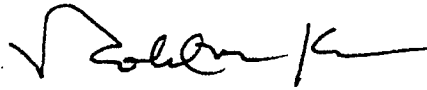
(Declaratory Judgment)

26. Respondents repeat and reiterate the foregoing portion of the within Answer and Counterclaim as fully as if set forth verbatim herein.
27. Under Section 62-2-604(b) of the South Carolina Code of Laws (the "Code"), if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.
28. Article FOURTH is a residuary devise in the Will and identifies three residuary devisees.
29. If the share, or portion of a share, of a residuary devisee under Article FOURTH fails, the share, or portion of the share, passes to the other residuary devisees.
30. Pursuant to Section 62-2-604(b) and the Uniform Declaratory Judgment Act of Section 15-53-10 *et seq.* of the Code, the Respondents request that the Court find that under the terms of the Will Article FOURTH is effective to dispose of the entire residuary estate and that no part of the residuary estate passes through intestacy.

THEREFORE, having fully answered the Petition and alleged counterclaims, Respondents hereby prays for relief as follows:

1. That the Court construe the Will such that (1) the Petitioner receives the tangible personal property under Article SECOND, the sum of \$1,000,000.00 under Article THIRD and the sum of \$637,228.31 under Article FOURTH; (2) Franke Home receives \$1,725,911.65 under Article FOURTH; and (3) MUSC receives \$1,725,911.65 under Article FOURTH; provided, however, that the foregoing numbers be adjusted when the total amount of debts, expenses and taxes is determined; and
2. That the Court find that under the terms of the Will Article FOURTH is effective to dispose of the entire residuary estate and that no part of the residuary estate passes through intestacy; and
3. Such other relief as the Court determines proper.

EVANS CARTER KUNES & BENNETT, P.A.



Robert M. Kunes, Esq.

Andrew W. Chandler, Esq.

David H. Kunes, Esq.

EVANS CARTER KUNES & BENNETT, P.A.

P.O. Box 369

Charleston, SC 29402

(843) 577-2300

(843) 577-2055 (fax)

Attorney for Respondents, The Health Sciences Foundation of the Medical University of South Carolina, now known as The Medical University of South Carolina Foundation and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc.

June 13, 2011
Charleston, South Carolina

Exhibit A

Inventory and Appraisalment

See Attached

STATE OF SOUTH CAROLINA

COUNTY OF: CHARLESTON

IN THE MATTER OF: ESTATE OF CAROLINE
BISCHOFF LOWN

IN THE PROBATE COURT

INVENTORY AND APPRAISEMENT

2011 JUN 13 PM 1:57
CHARLESTON COUNTY CASE NUMBER: 2011-ES-10-276☒ ORIGINAL (AMENDED)☐ SUPPLEMENTAL #Personal Representative (s): Popie Lown Roberts

Last Four Digits of Decedent's Social

Security Number: XXX-XX-2944Was there a will? ☒ YES ☐ NODecedent's Date of Death: February 5, 2011

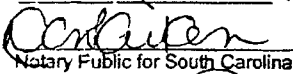
Domicile at death:

CharlestonSC

(county)

(state)

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisal of all real and personal property of this estate so far as the undersigned is informed: that he/she has estimated and/or appraised all listed property at its fair market value, according to the best of his/her knowledge and ability.

SWORN to me this 6 day of
June, 20 11

Notary Public for South Carolina
My Commission Expires December 23, 2020Signature: Popie Lown RobertsName: Popie Lown RobertsAddress: 336 Rochford DriveEasley, SC 29642

E-Mail:

Telephone (O):

(H): 864-269-5203Attorney: Nicholas C. SottileAddress: 1037 Chuck Dawley Blvd., Suite G-100Mt. Pleasant, SC 29464E-Mail: nsottile@shd-law.comTelephone: 843-884-1464

Signature

Name:

Address:

E-Mail:

Telephone (O):

(H):

For estates of decedents, the gross fair market valuation of all assets, regardless of situs, should be given as of the date of death. List all out-of-state assets on appropriate schedules. A Supplemental Inventory should be utilized for correcting, adjusting or adding to an original inventory. A qualified and disinterested appraiser may be employed to ascertain the value of any asset, the value of which may be subject to reasonable doubt. If an appraiser is employed, his/her name and address should be indicated with the item or items he/she appraised.

Within ninety (90) days following appointment, a copy of the inventory and appraisal shall be sent to each interested person who requests it, and the original inventory filed with the Probate Court.

RECAPITULATION

	Non-Probate	Probate
Schedule A - Real Estate	\$	\$
Schedule B - Stocks and Bonds		4,940,736.60
Schedule C - Notes Due Decedent and Cash		242,915.02
Schedule D - Insurance on Person's Life: Part 1 - Payable to Estate		5,400.00
Part 2 - Payable to Beneficiary	2,292.51	
Schedule E - Jointly Owned Property		
Schedule F - Other Miscellaneous		88,683.34
Other Assets Payable to Estate		
Schedule G - Transfers during Decedent's life		
Schedule H - Powers of Appointment		
Schedule I - Annuities and Retirement Accounts	33,538.08	
TOTAL GROSS VALUE	\$ 5,313,565.55	
ENCUMBRANCES	(0.00)	
TOTAL NET WORTH	\$ 5,313,565.55	

NOTE: WHEN COMPLETING THE FOLLOWING SCHEDULES, PLEASE REMEMBER TO LIST ALL ASSETS, REGARDLESS OF SITUS. ALL OUT-OF-STATE ASSETS MUST BE DISCLOSED.

SCHEDULE A - Real Estate (All interest in real property except those held with right of survivorship) (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description (include county and state)	Tax Assessor's Fair Market Value for year of Decedent's Death	Appraised Value	Appraised Value of Decedent's Interest
	NONE			

TOTAL SCHEDULE A

(also enter under recapitulation, page 1)

\$ ZERO

SCHEDULE B - Stocks and Bonds (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description	Face Value	Appraised Value
1.	See Attached List		\$4,940,736.60

TOTAL SCHEDULE B

(also enter under recapitulation, page 1)

\$ 4,940,736.60

SCHEDULE C - Notes due to Decedent, and Money on hand and in banks (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description	Value
1.	Wachovia Certificate of Deposit Account No. 414212070410438	\$38,873.51
2.	National Bank of South Carolina Checking Account No. 0736998606	\$46,925.14
3.	National Bank of South Carolina Money Market Account No. 0765467209	\$20,926.39
4.	First Federal of Charleston Money Market Cusip Account No. 60934N70I	\$6,317.17
5.	First Federal of Charleston Money Market Cusip Account No. 60934N708	\$129,872.81

TOTAL SCHEDULE C

(also enter under recapitulation, page 1)

\$ 242,915.02

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE D - Insurance (If none, so state.)**Part 1 - Life Insurance Payable to the Estate**

Item No.	Description	Value
1.	South Carolina State Retirement System	\$5,400.00

TOTAL PART 1

(also enter under recapitulation, page 1)

\$ 5,400.00

Part 2 - Life Insurance Payable to Beneficiaries

Item No.	Description	Beneficiary	Value
1.	MONY Life Insurance Policy no. 774-07-37	Popie L. Roberts	\$2,292.51

TOTAL PART 2

(also enter under recapitulation, page 1)

\$ 2,292.51

SCHEDULE E - Jointly owned Property (with right of survivorship) (If none, so state.)

NOTE: You must complete Schedule E if the Decedent owned any property jointly with right of survivorship at the time of death, whether or not the decedent's interest is included in the gross estate.

Percentage includible:

1 - Joint interest held by decedent and spouse - the amount included is one-half (50%) of the value in all cases.

2 - Other joint interest - Generally you must include the full value of the jointly owned property in the gross estate. However, the full value should not be included if you can show that a part of the property originally belonged to the other tenant(s). The amount included is the amount of the decedent's contribution to the joint account(s).

Item No.	Description	Joint Owner(s)	Percentage Includible	Appraised Value of Decedent's Interest
	NONE			

TOTAL SCHEDULE E

(also enter under recapitulation, page 1)

\$ ZERO

(If more space is required, insert tax schedules or additional sheets of same size.)

[illegible]

\$ 88,683.34

NOTE: FOR SCHEDULES G, H, AND I. LIST VALUES ONLY IF PAYABLE TO ESTATE.

Did Decedent make any transfers during lifetime as described above? ☐ YES ☒ NO

NONE

\$ ZERO

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE H - Powers of Appointment - Property, both real and personal, over which Decedent possessed a Power of Appointment whether Testamentary or otherwise.

Did Decedent possess a Power of Appointment? ☐ YES ☒ NO

If "yes", did Decedent exercise the power of appointment in favor of estate? ☐ YES ☐ NO

If "yes", please describe and list total amount payable to estate.
(If more space is required, insert additional sheets of same size.)

\$ _____

NONE

\$ _____ ZERO

TOTAL SCHEDULE H

(also enter amounts payable to estate under recapitulation, page 1)

SCHEDULE I - Annuities and retirement (IRA's, 401(k), Etc.)

Did Decedent own any accounts as described above? ☒ YES ☐ NO

If "yes", is the estate designated as the beneficiary of these accounts? ☐ YES ☒ NO

If "yes", please describe and list total amount payable to estate.
(If more space is required, insert additional sheets of same size.)

\$ _____

1. South Carolina Retirement 457 Deferred Compensation Plan

\$33,538.08

\$ _____ 33,538.08

TOTAL SCHEDULE I

(also enter amounts payable to estate under recapitulation, page 1)

(If more space is required, insert tax schedules or additional sheets of same size.)

ENCUMBRANCES - (e.g., mortgages, liens, judgments, etc., but not general debts of the estate) - List specific assets encumbered.

[illegible]

TOTAL ENCUMBRANCES

(also enter under recapitulation, page 1)

\$ ZERO

MANIFESTLY NON-TAXABLE

(To be executed by the Probate Court Judge in those cases where it appears that the estate is NOT REPORTABLE to the South Carolina Tax Commission under the provisions of the Estate Tax Laws of the State of South Carolina, i.e., the total gross value is indicated to be less than prescribed limits.)

It appears from the foregoing record of the above captioned estate on file in the Probate Court of this county, such estate is not reportable to the South Carolina Department of Revenue.

Executed this day of , 2011.

Probate Judge

(If more space is required, insert tax schedules or additional sheets of same size.)

Report Date: April 18, 2011

Time Prepared: 11:29:36 AM

Requested By: Jeremy Jutzeler

Includes: Account: 32 00 5339 0 06 CONSERVATOR FOR CAROLINE B LOWN

FIRST FEDERAL SAVINGS AND LOAN

Account Holdings as of 2/4/2011

Cusip No.	Security Name	Shares / Par	Investment	Unit Price	Market Value	Price Date
005125109	ACXION CORP	1,220.0000	19,739.48	17.25	21,045.00	02/04/2011
018531108	ALLIANCE DATA SYSTEM	255.0000	18,439.05	76.51	19,510.05	02/04/2011
042735100	ARROW ELECTRS INC	935.0000	24,749.36	41.45	38,755.75	02/04/2011
044209104	ASHLAND INC	380.0000	19,216.56	59.03	22,431.40	02/04/2011
052800109	AUTOLIV INC	136.0000	3,848.80	74.24	10,096.64	02/04/2011
053607103	AVNET INC	380.0000	23,979.91	36.92	32,489.60	02/04/2011
073302101	BE AEROSPACE INC	225.0000	8,765.98	37.42	8,419.50	02/04/2011
074345BH3	BEAUFORT 5% 12/11/17	25,000.0000	25,046.90	100.26	25,065.00	02/04/2011
074358DA7	BEAUFORT 5.0% 3/1/12	20,000.0000	19,700.00	104.833	20,966.60	02/04/2011
084215EE0	BERKELEY 5.0% 6/1/22	20,000.0000	21,528.00	104.401	20,880.20	02/04/2011
109641100	BRINKER INTERNATL	420.0000	9,067.76	23.74	9,970.80	02/04/2011
113709NF2	BROOKLAND 4.4% 3/1/20	15,000.0000	15,139.48	100.959	15,143.85	02/04/2011
126408103	CSX CORP COM	1,600.0000	20,418.88	69.70	111,520.00	02/04/2011
149123101	CATERPILLAR, INC	400.0000	8,458.20	99.59	39,836.00	02/04/2011
160073PJ0	CHAS CNTY 5% 2/1/12	10,000.0000	10,142.95	104.454	10,445.40	02/04/2011
160075OD2	CHAS CNTY 5% 2/1/12	40,000.0000	40,687.29	104.454	41,781.60	02/04/2011
16007YAQ7	CHAS CNTY 5% 8/15/19	5,000.0000	4,850.70	100.06	5,004.00	02/04/2011
16007YAR5	CHAS CNTY 5% 8/15/28	40,000.0000	40,000.74	91.965	36,785.00	02/04/2011
160429QK5	CHARLESTON 5% 1/1/20	30,000.0000	31,573.50	107.998	32,399.40	02/04/2011
160900BC9	CHS CNTY HOSP7% 10/11	5,000.0000	4,962.50	104.31	5,215.50	02/04/2011
166764100	CHEVRON CORP	758.0000	28,225.04	97.11	73,609.38	02/04/2011
171798101	CIMAREX ENERGY CO	300.0000	23,489.04	103.45	31,035.00	02/04/2011
18683K101	CLIFFS NTL RESOURCES	295.0000	19,643.87	90.27	26,629.65	02/04/2011
194208BU7	COLLEGE CHAS 4% 4/12	20,000.0000	20,088.01	103.497	20,699.40	02/04/2011
198469ET3	COLA SC PKG 5% 2/1/37	30,000.0000	30,601.99	84.507	25,352.10	02/04/2011
201003993	ASSORTED COINS	1.0000	67.00	67.00	67.00	08/26/2010
203668106	COMMUNITY HLTH SYS	245.0000	9,013.52	36.87	9,033.15	02/04/2011
211000997	CONTENTS OF 3 SDB'S	1.0000	1.00	1.00	1.00	09/22/2010
233ESC987	ESC DWS RREEF RE FD	700.0000	1.00	1.00	1.00	09/13/2010
255746108	DOLLAR TREE INC	250.0000	12,317.48	49.71	12,427.50	02/04/2011
258147NX1	DORCH CNTY 4.625%	15,000.0000	15,545.52	97.527	14,629.05	02/04/2011
258174BJ9	DORCH CNTY 5% 12/1/29	60,000.0000	60,643.98	96.448	57,868.80	02/04/2011
26441C105	DUKE ENERGY HLDG COR	2,000.0000	32,067.71	18.01	36,020.00	02/04/2011
27826L35B	EATON VANCE SC FD B	5,319.1490	55,000.00	8.32	44,255.32	02/04/2011
29264F205	ENDO PHARMACEUTICALS	1,020.0000	34,761.50	34.99	35,689.80	02/04/2011
30231G102	EXXON MOBIL CORP	800.0000	34,524.80	83.28	66,624.00	02/04/2011
303726103	FAIRCHILD SEMICON	805.0000	13,693.05	18.65	15,013.25	02/04/2011
3133722M5	FHLB 3.125% 12/14/17	20,000.0000	20,000.00	95.466	19,093.20	02/04/2011
3133729W3	FHLB 3.33% 1/10/18	35,000.0000	35,000.00	97.792	34,227.20	02/04/2011
313372ER1	FHLB 3.35% 1/25/18	25,000.0000	25,000.00	98.231	24,557.75	02/04/2011
3136FP5K9	FNMA 3.375% 12/29/17	25,000.0000	25,000.00	98.32	24,580.00	02/04/2011
3136FRAP8	FNMA 3% 8/25/16	30,000.0000	30,000.00		30,000.00	
31398KWW6	FHLMC 5% 6/15/39	9,211.4200	11,429.44	100.11	9,221.55	01/31/2011
315616102	F5 NETWORKS INC	230.0000	22,706.73	123.64	28,437.20	02/04/2011
343412102	FLUOR CORP NEW	2,000.0000	29,625.00	68.69	137,380.00	02/04/2011
360271100	FULTON FINANCIAL	2,750.0000	25,406.15	8.72	23,980.00	09/03/2010
369604103	GENERAL ELECTRIC CO	1,700.0000	55,824.70	20.56	34,952.00	02/04/2011
386475CJ4	GRAND STRND 5% 6/26	10,000.0000	10,155.30	100.509	10,050.90	02/04/2011
396028YY2	GREENVILLE 4% 4/1/15	40,000.0000	40,001.12	104.095	41,838.00	02/04/2011
396066AW2	GRNVILLE 5.5% 12/1/28	15,000.0000	15,293.77	109.706	16,455.90	02/04/2011
396066CR1	GRNVILLE 5% 12/1/28	15,000.0000	15,736.08	100.061	15,009.15	02/04/2011
396541CY8	GRNVILLE 5.1% 6/1/22	25,000.0000	25,214.78	106.003	26,500.75	02/04/2011
397090EA5	GRNWOOD 5.5% 10/1/21	45,000.0000	45,123.89	100.262	45,117.90	02/04/2011
401617105	GUESS INC	150.0000	7,114.48	45.20	6,780.00	02/04/2011

Report Date: April 18, 2011

Time Prepared: 11:29:36 AM

Requested By: Jeremy Jutzler

Includes: Account: 32 00 5339 0 06

FIRST FEDERAL SAVINGS AND LOAN

CONSERVATOR FOR CAROLINE B LOWN

Account Holdings as of 2/4/2011

Cusip No.	Security Name	Shares / Par	Investment	Unit Price	Market Value	Price Date
427865108	HERSHEY FOODS CORP	800.0000	24,737.60	50.49	40,392.00	02/04/2011
43284RBW5	HH ISLAND 4.6% 6/1/19	10,000.0000	10,053.54	103.038	10,303.80	02/04/2011
440673TS0	HORRY 5.00% 3/1/12	20,000.0000	19,800.00	104.833	20,966.60	02/04/2011
440673UQ2	HORRY 5.125% 3/1/22	25,000.0000	26,358.00	105.219	26,304.75	02/04/2011
44067HBZ2	HORRY CO HOSP 4.9%	40,000.0000	39,476.00	100.292	40,116.80	02/04/2011
44067HCF5	HORRY 5% 07/01/28	10,000.0000	9,564.84	87.067	8,706.70	02/04/2011
44106M102	HOSPITALITY PROP TR	930.0000	20,822.81	24.86	23,119.80	02/04/2011
451663108	IDEARC INC	43.0000	1,133.82		1,133.82	12/18/2009
464287226	ISHARES BCLY AG BOND	1,390.0000	150,912.04	104.26	144,921.40	02/04/2011
464287507	ISHARES TR S&P	1,370.0000	110,091.15	94.38	129,300.80	02/04/2011
464287804	ISHARES TR S&P 600	1,845.0000	110,588.19	69.93	129,020.85	02/04/2011
464288166	ISHARES AGENCY FUND	1,215.0000	135,771.88	109.07	132,520.05	02/04/2011
464288513	ISHARES IBOXX HI YLD	1,650.0000	148,384.17	91.87	151,585.50	02/04/2011
464288646	ISHARES BCLYS 1-3 CR	1,430.0000	150,268.52	104.23	149,048.90	02/04/2011
478180104	JOHNSON & JOHNSON	400.0000	14,144.30	60.84	24,336.00	02/04/2011
480200107	JONES LANG LA SALLE	350.0000	29,469.93	97.20	34,020.00	02/04/2011
48242W106	KBR INC	350.0000	10,408.97	33.16	11,602.50	02/04/2011
492508AV8	KERSHAW 5% 12/1/29	55,000.0000	55,005.00	92.849	51,066.95	02/04/2011
49460W208	KINETIC CONCEPTS	515.0000	19,286.70	44.91	23,128.65	02/04/2011
512807108	LAM RESEARCH CORP	205.0000	10,159.62	52.60	10,783.00	02/04/2011
529050BE5	LEXINGTON 5.25% '17	10,000.0000	9,777.30	100.137	10,013.70	02/04/2011
529050BG0	LEXINGTON 5.125% 11/28	20,000.0000	20,048.78	97.102	19,420.40	02/04/2011
529050BT2	LEXINGTON 5.5% 11/1/32	55,000.0000	55,298.77	111.963	61,579.65	02/04/2011
529050BL9	LEXINGTON 5.75% 11/1/33	25,000.0000	26,340.75	112.633	28,158.25	02/04/2011
53219L109	LIFEPOINT HOSPITALS	580.0000	19,717.54	35.76	20,025.60	02/04/2011
532791100	LINCARE HOLDINGS	1,435.0000	38,684.11	27.59	39,591.65	02/04/2011
549271104	LUBRIZOL CORP	390.0000	42,509.96	111.30	43,407.00	02/04/2011
579774BW9	MCCORMICK 4.125% 3/16	15,000.0000	15,192.50	105.772	15,865.80	02/04/2011
580135101	MCDONALDS CORP	1,000.0000	32,062.00	74.05	74,050.00	02/04/2011
58463RCZ9	MUSC 5.6% 7/1/13	5,000.0000	4,918.32	111.285	5,564.25	02/04/2011
58502B106	MEDNAX INC	315.0000	17,312.40	61.23	19,287.45	02/04/2011
60934N708	FED PRIME OBLIG #396	129,872.8100	129,872.81	1.00	129,872.81	02/19/2010
60934N701	FED PRIME OBLIG-I 396	36,317.1700	36,317.17	1.00	36,317.17	02/19/2010
61166W101	MONSANTO CO	176.0000	555.17	74.66	13,140.16	02/04/2011
616000998	NBSC MM	1.0000	9,187.00	20,921.94	20,921.94	12/13/2010
616001995	NBSC CHECKING	1.0000	36,189.00	44,489.49	44,489.49	12/13/2010
622634EM1	MT PLEASANT 4% 12/13	30,000.0000	31,319.60	107.905	32,371.50	02/04/2011
628560GU2	MYRTLE BCH 4.9% 3/15	20,000.0000	19,902.40	100.219	20,043.80	02/04/2011
628560HS6	MRTLE BCH 5.125% '22	15,000.0000	15,006.00	102.054	15,308.10	02/04/2011
651290108	NEWFIELD EXPLORATION	100.0000	6,028.00	74.70	7,470.00	02/04/2011
69540W108	PANERA BREAD COMPANY	100.0000	10,253.00	98.87	9,887.00	02/04/2011
699173209	PARAMETRIC TECH	1,095.0000	21,450.83	23.20	25,404.00	02/04/2011
714290103	PERRIGO COMPANY	550.0000	36,096.45	71.87	39,418.50	02/04/2011
742718109	PROCTER & GAMBLE CO	2,000.0000	25,977.81	63.61	127,220.00	02/04/2011
745220FMO	PUERTO RICO 5.5% 7/22	20,000.0000	23,467.80	99.326	19,885.20	02/04/2011
749941100	RF MICRO-DEVICES	2,480.0000	15,030.35	7.10	17,466.00	02/04/2011
754730109	RAYMOND JAMES FINL	525.0000	16,232.95	37.05	19,451.25	02/04/2011
755111507	RAYTHEON CO	500.0000	13,412.39	50.20	25,100.00	02/04/2011
758750103	REGAL BELLOIT CORP	200.0000	12,469.98	70.64	14,128.00	02/04/2011
760759100	REPUBLIC SERVICES	115.0000	1,650.34	30.10	3,461.50	02/04/2011
763793FL5	RICH-LEX 5% 11/1/28	20,000.0000	20,146.86	100.081	20,016.20	02/04/2011
78484A516	SPDR BCLY INTL BD FD	2,405.0000	148,738.19	58.73	141,245.65	02/04/2011
60585TAP6	SCAGO 5.0% 12/1/22	35,000.0000	35,181.00	102.32	35,812.00	02/04/2011
837031QD9	SC JOBS 5.625% 11/12	5,000.0000	5,313.43	108.538	5,425.90	02/04/2011

FIRST FEDERAL SAVINGS AND LOAN

Report Date: April 18, 2011

Time Prepared: 11:29:36 AM

Requested By: Jeremy Jutzeler

Includes:

Account: 32 00 5339 0 06 CONSERVATOR FOR CAROLINE B LOYN

Account Holdings as of 2/4/2011

Cusip No.	Security Name	Shares / Par	Investment	Unit Price	Market Value	Price Date
837031QG1	SC JOBS 5.625% 11/30	5,000.0000	4,691.57	92.952	4,647.60	02/04/2011
837033EV7	SC JOBS ECON 5/1/11	20,000.0000	20,000.00	100.229	20,045.80	02/04/2011
83703FBK7	SC JOBS 5% 8/15/15	40,000.0000	41,765.02	106.087	42,434.80	02/04/2011
83704LB38	SC JOBS 5.0% 4/1/18	100,000.0000	108,814.00	98.403	98,403.00	02/04/2011
83710DG93	SC ST 4.125% 4/1/27	20,000.0000	20,000.00	97.405	19,481.00	02/04/2011
83710DXB9	SC ST 4.25% 12/1/19	25,000.0000	25,282.95	107.742	26,935.50	02/04/2011
83710DYR3	SC ST 4.375% 4/1/23	65,000.0000	64,997.88	102.707	66,759.55	02/04/2011
837147E76	SC PUB 5.25% 1/1/21	80,000.0000	84,609.55	106.693	85,354.40	02/04/2011
837147W78	SC PUB AUTH 5% 1/1/42	20,000.0000	19,837.00	95.459	19,091.80	02/04/2011
837147YD3	SC AUTH 5% 1/1/21	30,000.0000	30,419.77	103.86	31,158.00	02/04/2011
837147YV1	SC ST PSA 5% 1/1/21	25,000.0000	26,256.00	104.845	26,211.25	02/04/2011
837147ZM2	SC PUB AUTH 5% 1/1/12	20,000.0000	20,393.39	104.075	20,815.00	02/04/2011
837147ZX8	SC PUB AUTH 5% 1/1/22	50,000.0000	52,058.73	104.288	52,144.00	02/04/2011
837152EP8	SC INFRA 5.1% 10/1/11	30,000.0000	30,028.60	103.055	30,916.50	02/04/2011
837152HV2	SC TRANS 5.25% 10/19	30,000.0000	31,622.10	104.229	31,268.70	02/04/2011
837152JB4	SC TRANSN 4.25% 10/25	20,000.0000	20,888.60	100.883	20,179.60	02/04/2011
837152LB1	SC TRANSN 4.25% 10/24	20,000.0000	20,000.00	92.754	18,550.80	02/04/2011
842587107	SOUTHERN CO	400.0000	10,609.54	37.34	14,936.00	02/04/2011
847082HK3	SPARTANBURG 5% 3/22	55,000.0000	55,292.37	106.607	58,633.85	02/04/2011
847113AM9	SPARTANBG 5.25% 4/25	125,000.0000	128,978.69	99.893	124,866.25	02/04/2011
847184RK6	SPRTNBG 5.25% 8/1/28	45,000.0000	43,944.66	112.863	50,788.35	02/04/2011
866611HE9	SUMTER 4.0% 12/01/11	60,000.0000	60,490.40	102.508	61,503.60	02/04/2011
878237106	TECH DATA CORP	335.0000	13,423.42	49.04	18,428.40	02/04/2011
879868107	TEMPLE INLAND INC	805.0000	15,021.22	24.40	19,642.00	02/04/2011
884315102	THOMAS & BETTS	780.0000	31,973.12	53.86	40,933.60	02/04/2011
913367BU1	UNIV SC ED 5% 6/1/31	40,000.0000	39,205.80	100.357	40,142.80	02/04/2011
92046N102	VALUECLICK INC	750.0000	10,559.92	14.29	10,717.50	02/04/2011
921928206	VANGUARD MORGAN 526	2,927.9980	138,307.34	58.55	171,434.28	02/04/2011
928002997	WACH CD 3.92% 5/28/11	35,000.0000	35,000.00	100.00	35,000.00	09/23/2010
928298108	VISHAY INTERTECH	750.0000	9,097.42	16.98	12,735.00	02/04/2011
94106L109	WASTE MNGMT INC NEW	1,350.0000	24,208.78	37.72	50,922.00	02/04/2011
980745103	WOODWARD INC	150.0000	5,698.48	34.50	5,175.00	02/04/2011
986525JJ3	YORK 5.125% 3/1/11	30,000.0000	30,230.10	101.291	30,387.30	02/04/2011
Total Securities		2,280,825.5470	4,518,580.85		5,208,519.01	
Income Cash			819.00		819.00	
Principal Cash			30,000.00		30,000.00	
Account Total			4,489,399.85		5,177,338.01 *	

*NOTE: Value listed on Schedule B excludes cash accounts from this total.
The cash account balances are listed on Schedule C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE PROBATE COURT

Popie Lown Roberts,
Petitioner

-vs-

AMENDED SUMMONS

the Health Sciences Foundation of The Medical
University of South Carolina, The Lutheran Homes
of South Carolina, Inc, as successor by merger to
The Franke Home, Inc., Elizabeth
Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,
William Frederick Schneider, Joseph Emil Schneider,
Katherine Delaine, Marcia Molinari, Mark D.
Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls,
Charles H. Rumpel, III, John D. Rumpell, Barbara P.
Brown, Carol Odesky and Georgina Louise Pace
a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,
Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.
Kirlpatrick, Erlene Arnolda Lide Hayden Vaughan,
Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes
Kathleen Lide Saussy, Caroline Lide Ogburn, Lamar Harper,
Helen H. Cook, Gwendolyn H. Barnes, Arnold K.
Harper, Jr., Caroline Harper Rivers, Arnolda K. Peterson,
Rev. Douglas Kornahrens, Julie Ann George, Amy Tuten,
Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson,
Eleanor M. Rogers and Waldemar White Kornahrens,
The Estate of Caroline Bischoff Lown and
JOHN DOE, a fictitious name used herein to designate
the unknown heirs at law, distributees, and/or devisees of
all persons claiming under or through the heirs of Amelia
Ahrens Bischoff and J.C.W. Bischoff and Caroline Albers
Fischer and Henrich August Fisher and any such persons
who are minors or members of the Armed Forces of the
United States of America, as contemplated by the Service
Members Relief Act, collectively designated as RICHARD
ROE and all persons entitled to claim under and through
any of them,

Respondents.

IN THE MATTER OF THE ESTATE OF
CAROLINE BISCHOFF LOWN

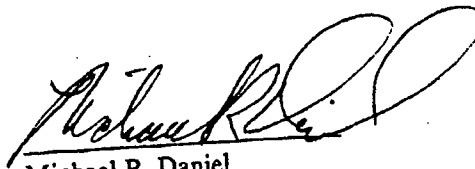
CASE NUMBER: 2011-ES-10-276

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint herein served upon you and to serve a copy of your Answer to said Complaint upon the subscriber hereunder at P.O. Drawer 200, Elloree, S.C. 29047 within thirty (30) days from the date of service upon you, exclusive of the date of such service; and if you fail to answer the Complaint within said time, the Plaintiff will apply to the Court for the relief demanded in the Complaint, including the rendering of judgment by default.

Elloree, S.C.

July 11, 2011



Michael R. Daniel
P.O. Drawer 200
Elloree, S.C. 29047
(803) 897-4600

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
)
COUNTY OF CHARLESTON)

Popie Lown Roberts,
Petitioner

-vs-

the Health Sciences Foundation of The Medical
University of South Carolina, The Lutheran Homes
of South Carolina , Inc, as successor by merger to
The Franke Home, Inc., Elizabeth
Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,
William Frederick Schneider, Joseph Emil Schneider,
Katherine Delaine, Marcia Molinari, Mark D.
Hollingsworth, Jr., Barbara Kay Staples , Wendell Rawls,
Charles H. Rumpel, III, John D. Rumpell, Barbara P.
Brown, Carol Odesky and Georgina Louise Pace
a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,
Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.
Kirlpatrick, Erline Arnolda Lide Hayden Vaughan,
Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes
Kathleen Lide Saussy, Caroline Lide Ogburn, Lamar Harper,
Helen H. Cook, Gwendolyn H. Barnes, Arnold K.
Harper, Jr., Caroline Harper Rivers, Arnolda K. Peterson,
Rev. Douglas Kornahrens, Julie Ann George, Amy Tuten,
Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson,
Eleanor M. Rogers and Waldemar White Kornahrens,
The Estate of Caroline Bischoff Lown and
JOHN DOE, a fictitious name used herein to designate
the unknown heirs at law, distributees, and/or devisees of
all persons claiming under or through the heirs of Amelia
Ahrens Bischoff and J.C.W. Bischoff and Caroline Albers
Fischer and Henrich August Fisher and any such persons
who are minors or members of the Armed Forces of the
United States of America, as contemplated by the Service
Members Relief Act; collectively designated as RICHARD
ROE and all persons entitled to claim under and through
any of them,

Respondents.

IN THE MATTER OF THE ESTATE OF
CAROLINE BISCHOFF LOWN

AMENDED
PETITION TO CONSTRUE
A WILL

CASE NUMBER: 2011-ES-10-276

Petitioner, Popie Lown Roberts, alleges:

1. Petitioner was at all times mentioned, and still is, a resident of Pickens County, South Carolina.
2. Respondent, The Lutheran Homes of South Carolina, Inc, as successor by merger to The Franke Home, Inc, was at all times mentioned, and still is, a South Carolina corporation doing business in Charleston County, South Carolina.
3. Respondent, Health Sciences Foundation of The Medical University of South Carolina, was at all times mentioned, and still is, a South Carolina nonprofit organization maintaining offices in Charleston County, South Carolina.
4. Respondent, John Doe, was at all times mentioned, and still is an unknown potential intestate heir.
5. Elizabeth Ann Doscher Kepley, Caryl Gilmore Doscher Morgan, William Frederick Schneider, Joseph Emil Schneider, Katherine Delaine, Marcia Molinari, Mark D. Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls, Charles H. Rumpel, III, John D. Rumpell, Barbara P. Brown, Carol Odesky and Georgina Louise Pace a/k/a Gina Pace, Edward Fischer Kornahrens, Jr., Donovan Paul Kornahrens, Byrle Kornahrens, Paula K. Kirlpatrick, Erline Arnolda Lide Hayden Vaughan, Kathleen Lide Saussy, Caroline Lide Ogburn, Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson, Eleanor M. Rogers, Waldemar White Kornahrens, Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes, Arnold K. Harper, Jr., Caroline Harper Rivers, Arnolda K. Peterson, Rev. Douglas Kornahrens, Julie Anne George and Amy Tuten are all potential intestate heirs residing in various locations in and outside Charleston County, South Carolina.

6. Carolina Bischoff Lown, the decedent, at the time of her death resided at 2 Bishop Gadsden Way, Apartment 1045, Charleston, Charleston County, South Carolina, and died on February 5, 2011.
7. At the time of her death, the decedent owned and possessed personal property situated within Charleston County, South Carolina.
8. At the time of her death, the decedent left a last will and testament dated June 1, 2005. The decedent's will was duly admitted to probate as a valid will by the Probate Court of Charleston County, South Carolina, on February 18, 2011. Petitioner was named as the Personal Representative in the decedent's last will and testament, and on February 18, 2011, petitioner was duly appointed Personal Representative and qualified as the Personal Representative. Copies of the decedent's last will and testament is attached as Exhibit A and incorporated by reference.
9. Paragraphs two, three and four of the decedent's last will provide as follows:

"SECOND: I hereby give and bequeath all of my tangible personal property, including furniture, jewelry, personal effects, and any vehicles registered in my name, to my niece-in-law, POPIE LOWN ROBERTS, of Easley, South Carolina.

THIRD: I give and bequeath to my niece-in-law, POPIE LOWN ROBERTS, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, but should she predecease me or we should die simultaneously or as the result of a common tragedy, I give and bequeath the said sum to her issue then living at the time of my death.

FOURTH: I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses and taxes, be divided and I bequeath and devise as

follows:

(a) One-Third (1/3) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest.

(b) One-Third (1/3) to the FRANKE HOME AT SEASIDE, Mt. Pleasant, S.C., to be used to establish an endowment to known as the 'BISCHOFF-LOWN RESIDENT ASSISTANCE FUND,' to be held in trust, nevertheless, with the income to be used to assist those with a demonstrated financial need in paying the costs of residence in the said Franke Home in Mt. Pleasant, or its successor. It is further my desire that preference be given to South Carolina residents in choosing the recipients of such assistance.

(c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, in trust, nevertheless, to establish an endowment with the income to be used to be known as the 'BISCHOFF-LOWN SCHOLARSHIP' and to be awarded to those students pursuing a degree of Doctor of Medicine (MD) and who have shown ability and dedication to the study and practice of medicine and who have demonstrated financial need. It is my request that preference be given to residents of South Carolina with the above qualifications."

10. Petitioner, Popie Lown Roberts, is the surviving niece-in-law of Caroline Bischoff Lown, deceased, and is the person above-mentioned as the legatee and devisee in Paragraphs two, three and four of the last will of the decedent.

11. While the language in Paragraph 4 of the will is ambiguous, the true and legal intent and effect of the last will of the decedent was to devise all personal property, One Million and 00/100 (\$1,000,000.00) Dollars and one-third (1/3) of the remainder of the estate after removing the One Million and 00/100 (\$1,000,000.00) Dollars from the estate to petitioner and two-thirds of the remainder split equally between the Franke Home at Seaside and the Health Sciences Foundation of the Medical University of South Carolina, establishing trusts in decedent's name, so that all of decedent's estate in total would pass through her last will and testament, leaving no residual estate to pass through intestacy. The residual devises are subject to the payment of all just debts of the decedent.

12. Respondents The Lutheran Homes of South Carolina, Inc, as successor by merger to The Franke Home, Inc, and Health Sciences Foundation of The Medical University of South Carolina, and each of them, claim some interest, by way of remainder or otherwise, to the specific devises, under that part of Paragraph four of the last will and testament of the decedent that reads as follows:

“(b) One-Third (1/3) to The Franke Home at Seaside, Mt. Pleasant, S.C., to be used to establish an endowment to known as the ‘BISCHOFF-LOWN RESIDENT ASSISTANCE FUND,’ to be held in trust, nevertheless, with the income to be used to assist those with a demonstrated financial need in paying the costs of residence in the said Franke Home in Mt. Pleasant, or its successor. It is further my desire that preference be given to South Carolina residents in choosing the recipients of such assistance.

(c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, in trust, nevertheless, to establish an endowment with the

income to be used to be known as the 'BISCHOFF-LOWN SCHOLARSHIP' and to be awarded to those students pursuing a degree of Doctor of Medicine (MD) and who have shown ability and dedication to the study and practice of medicine and who have demonstrated financial need. It is my request that preference be given to residents of South Carolina with the above qualifications."

13. Contrary to respondents' allegations, the above-quoted Paragraph four of the decedent's will has no legal effect whatever on petitioner's entitlement under the last will and testament of the decedent, since the whole of the estate was given and devised to Popie Lown Roberts, The Franke Home at Seaside Farms and the Health Science Foundation of the Medical University of South Carolina under Paragraphs two, three and four of the decedent's will with no intent of the decedent for any of decedent's estate to pass through intestacy as evidenced by the large gifts to each devisee. Nevertheless, the claims of respondents, and the language of the decedent's will, especially Paragraph four, have rendered the will uncertain and ambiguous.

14. It is necessary that the terms and provisions of the will and testament of the decedent, especially Paragraphs two, three and four of the will, be construed by a court of competent jurisdiction.

REGARDING MATERNAL AND PATERNAL HEIRS:

15. Mrs. Lown's paternal grandparents were Amelia Ahrens Bischoff and J.C.W. Bischoff. J.C.W. Bischoff died in September, 1912 and Amelia Bischoff died on or about January 31, 1939.

Mr. and Mrs. Bischoff's seven children (as listed in the obituary for their son William) were William Bischoff, John C. W. Bischoff, H.W. Bischoff, Catherine Bischoff Heidt, Elonore Bischoff Barlow, Caroline W. Bischoff and Rebecca G. Bischoff.

A. William Bischoff died on or about January 15, 1936, leaving two children, William Bischoff, Jr., and Caroline Lown. William Bischoff, Jr., died without issue. Caroline Lown died without issue.

B. H. W. Bischoff (Henry) died on or about April 30, 1938, leaving a daughter, Grace A. Doscher.

Grace A. Doscher died on or about May 7, 1940, leaving a son, Gustav A. Doscher, Jr., and a daughter, Grace Ann Doscher Huber.

Gustav A. Doscher, Jr. died on or about September 2, 1968, leaving two daughters, Elizabeth Ann Doscher Kepley and Caryl Gilmore Doscher Morgan. Grace Doscher Huber died on or about October 26, 1996, without issue. Elizabeth Ann Doscher Kepley is apparently still living. I have not found a current address for Caryl Gilmore Doscher Morgan.

C. John C. W. Bischoff's status is unknown.

D. Caroline W. Bischoff died on or about January 5, 1939, without issue.

E. Catherine Bischoff Heidt died on or about February 3, 1940. At the time of her death her sole surviving child appeared to be Carl C. Heidt. There was a daughter Alice Heidt listed in the estate for Catherine Heidt's husband (who predeceased her) but this child is not listed in her estate.

Carl C. Heidt died on or about October 13, 1966, leaving three daughters: Carolyn Heidt Schneider, Ruth Heidt Hollingsworth and Catherine Heidt Rawls Stewart.

Carolyn H. Schneider died on or about May 3, 1992, leaving three sons, William Frederick Schneider, Joseph Emil Schneider and Carl Heidt Schneider. William and Joseph are still living; Carl died February 26, 2008. I have no information about his children.

Ruth Heidt Hollingsworth died in October 1994, leaving three children, Katherine Delaine, Marcia Molinari, and Mark D. Hollingsworth, Jr.

Catherine Heidt Rawls Stewart died on or about April 2, 1999, leaving two children, Kay Staples and Wendell Rawls. I do not know Kay Staples' address.

John C. W. Bischoff died on or about January 21, 1964, leaving a son, John C. W. Bischoff, Jr., and two daughters, Elizabeth B. Rumpel and Regina B. Pace. I don't have any further information on the son.

Elizabeth Bischoff Rumpel died on or about February 5, 2009, leaving two sons, Charles H. Rumpel, III and John D. Rumpell.

Regina Pace died in 2005, leaving three daughters, Barbara P. Brown, Carol Odesky and Georgina Louise Pace, also known as Gina Pace. I don't have an address for Georgina Louise Pace.

F. Rebecca G. Bischoff died on or about May 3, 1964, without issue.

G. Elonore Bischoff Barlow died in 1970 without issue.

Regarding the maternal grandparents:

16. Mrs. Lown's maternal grandparents were Caroline Albers Fischer and Henrich August Fisher. Caroline Albers Fischer died in 1923 and Heinrich August Fischer died on or about March 16, 1930. They had four children: Annie Fischer Kornahrens, Charlotte Fischer Bischoff, John Heinrich Fischer and Fredrick William Fischer.

A. Frederick William Fischer died on or about October 21, 1928, without issue.

B. John Heinrich Fischer died in 1968, without issue.

C. Charlotte Fischer Bischoff died January 18, 1981, leaving two children, William Bischoff, Jr., and Caroline Bischoff Lown. William died May 5, 1995, without issue. Caroline died without issue.

D. Anna Fischer Kornahrens died May 21, 1981, leaving nine children, to wit: Byrle Woldemar Kornahrens, Edward Fischer Kornahrens, Erline Kornahrens Lide, Kenneth Walton Kornahrens, Caroline K. Harper, Arnolda K. Peterson, Arnold Kornahrens, Anna Louise K. Ronyecz and Pierre Margaruite Kornahrens.

Edward Fischer Kornahrens died on or about February 2, 1967, leaving three sons and one daughter, Edward Fischer Kornahrens, Jr., Donovan Paul Kornahrens, Byrle Kornahrens and Paula K. Kirlpatrick. These children are all still living.

Erline Kornahrens Lide died on or about October 21, 1968, leaving three children, Erline Arnolda Lide Hayden Vaughan, Kathleen Lidee Saussy and Caroline Lide Ogburn.

Kenneth Walton Kornahrens died on or about April 29, 1974, leaving three

daughters, Anne Delette Kornahrens, Ruth Pierrene Coleman Johnson and Eleanor M. Rogers.

Byrle Waldermar Kornahrens died on or about March 16, 1994, leaving a son, Waldemar White Kornahrens.

Caroline K. Harper died on or about January 23, 1983, leaving four children, Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes and Arnold K. Harper. Arnold Harper died on or about July 5, 1978 leaving two children, Arnold K. Harper, Jr. and Caroline Harper Rivers.

Arnolda K. Peterson resides in Ohio.

Arnold Kornahrens died leaving a son, Rev. Douglas Kornahrens.

Anna Louise K. Ronyecz died on or about September, 1983, leaving two children, Julie Anne George and Amy Tuten.

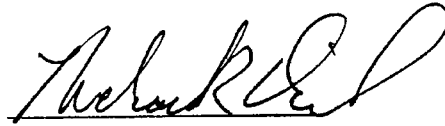
Pierrene Margaruite Kornahrens died March 3, 1933 leaving no issue.

WHEREFORE petitioner requests that the court:

1. Order and decree that the legal effect of the last will and testament of Caroline Bischoff Lown, deceased, was a specific devise of one million dollars to Popie Lown Roberts, one-third of the remainder of the estate to the Popie Lown Roberts, one-third of the remainder of the estate to the Franke Home at Seaside, and one-third of the remainder of the estate to the Health Sciences Foundation of the Medical University of South Carolina so that all of the decedent's estate passed through testacy with no remainder of her estate passing through intestacy.
2. Award petitioner costs; and
3. Grant petitioner such other and further relief as the court deems just and proper.

Elloree, S.C.

July 1, 2011

A handwritten signature in black ink, appearing to read "Michael R. Daniel", written over a horizontal line.

Michael R. Daniel

P.O. Drawer 200

Elloree, S.C. 29047

(803) 897-4600

Attorney for Petitioner

Caset: 2011ES10-02276
File 2: 2-13-11

Last Will and Testament

OF

CAROLINE BISCHOFF LOWN

I, CAROLINE BISCHOFF LOWN, a resident of Charleston, South Carolina, do hereby make, publish and declare this to be my Last Will and Testament hereby revoking all former wills or codicils by me made.

LB
FIRST: I direct that my Personal Representative hereinafter named pay all of my just debts and funeral expenses as soon as practicable after my death.

① SECOND: I hereby give and bequeath all of my tangible personal property, including furniture, jewelry, personal effects, and any vehicles registered in my name, to my niece-in-law, POPIE LOWN ROBERTS, of Easley, South Carolina.

THIRD: I give and bequeath to my niece-in-law, POPIE LOWN ROBERTS, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, but should she predecease me or we should die simultaneously or as the result of a common tragedy, I give and bequeath the said sum to her issue then living at the time of my death.

Attest: A True Copy

Deputy Clerk Probate Court
Charleston County, South Carolina

FOURTH: I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses and taxes, be divided and I bequeath and devise as follows:

(a) One-third (1/3) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest.

JB
②
(b) One-Third (1/3) to the FRANKE HOME AT SEASIDE, Mt. Pleasant, S.C., to be used to establish an endowment to be known as the "BISCHOFF-LOWN RESIDENT ASSISTANCE FUND," to be held in trust, nevertheless, with the income to be used to assist those with a demonstrated financial need in paying the costs of residence in the said Franke Home in Mt. Pleasant, or its successor. It is further my desire that preference be given to South Carolina residents in choosing the recipients of such assistance.

(c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, in trust, nevertheless, to establish an endowment with the income to be used to be known as the "BISCHOFF-LOWN SCHOLARSHIP" and to be awarded to those students pursuing a degree of Doctor of Medicine (MD) and who have shown ability and dedication to the study and practice of medicine and who have a demonstrated financial need. It is my request that preference be given to residents of South Carolina with the above qualifications.

③ FIFTH: I hereby nominate, constitute, and appoint as Personal Representative of my estate, my niece-in-law, POPIE LOWN ROBERTS, but should she predecease me or fail to qualify, I appoint as substitute Personal Representative, my brother-in-law, ALBERT BUREN LOWN, and I direct that neither my Personal Representative nor substitute Personal Representative be required to furnish any bond or other security for the faithful performance of his or her duties. I further give to my Personal Representative and substitute Personal Representative full power and authority to sell any and all of my property, real or personal, at such time or times, in such manner and upon such terms and for such purposes as such Personal Representative or substitute Personal Representative may deem proper for the best and orderly administration of my estate.

IN WITNESS WHEREOF, I have hereunto set my Hand and Seal, this the 1st. day of June, 2005.

Caroline Bischoff Lown
CAROLINE BISCHOFF LOWN

The foregoing Will consisting of five (5) typewritten pages, this included, the two (2) preceding pages thereof bearing on the margin the signature of the Testatrix was this 1st day of June, 2005, signed, sealed, published and declared by the said Testatrix as and for her Last Will and Testament, in our presence, and we, at

her request and in her presence, and in the presence of each other,
have hereunto subscribed our names as witnesses on the above date.

Carola Morley of Charleston, S. C. 2940.
Carola Morley of Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

SELF-PROVING AFFIDAVIT

Q/B
(+)
I, CAROLINA BISCHOFF LOWN, the Testatrix, sign my name to this
instrument, this the 1st day of June, 2005, and being first duly
sworn, do hereby declare to the undersigned authority that I sign
and execute this instrument as my Last Will and Testament and that
I sign it willingly, that I execute it as my free and voluntary act
for the purposes therein expressed, and that I am eighteen years of
age or older, of sound mind, and under no constraint or undue
influence.

Caroline Bischoff Lown
CAROLINE BISCHOFFLOWN

We, J. W. C. 5624155 and

CAROL A. MORLEY, the witness, sign our names
to this instrument, being first duly sworn, and do hereby declare
to the undersigned authority that the Testatrix signs and executes
this instrument as her Last Will and Testament and that she signs
it willingly, and that each of us, in the presence and hearing of
the Testatrix, hereby signs this Will as witness to the Testatrix's
signing, and that to the best of our knowledge, the Testatrix is

FILED

STATE OF SOUTH CAROLINA

11 JUL 28 PM 3:46

COUNTY OF CHARLESTON

PROBATE COURT
CHARLESTON COUNTY

IN THE PROBATE COURT

CASE NUMBER: 2011-ES-10-276

Popie Lown Roberts,

Petitioner

vs.

the Health Sciences Foundation of The Medical
University of South Carolina, The Franke Home,
Inc., d/b/a The Franke Home at Seaside, Elizabeth
Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,
William Frederick Schneider, Joseph Emil Schneider,
Katherine Delaine, Marcia Molinari, Mark D.
Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls,
Charles H. Rumpel, III, John D. Rumpell, Barbara P.
Brown, Carol Odesky and Georgina Louise Pace
a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,
Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.
Kirlpatrick, Erlene Arolda Lide Hayden Vaughan,
Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes
Kathleen Lide Saussy, Caroline Lide Ogburn, Arnold K.
Harper, Jr., Caroline Harper Rivers, Arnold K. Peterson
Rev. Douglas Kornahrens, Julie Ann George, Amy Tuten,
Anne Delette Kornahrens, Ruther Pierrene Coleman
Johnson, Eleanor M. Rogers and Waldemar White
Kornahrens, The Estate of Caroline Bischoff Lown and
JOHN DOE, a fictitious name used herein to designate
the unknown heirs at law, distributees, and/or devisees of
all persons claiming under or through the heirs of Amelia
Ahrens Bischoff and J.C.W. Bischoff and any such persons
who are minors or members of the Armed Forces of the
United States of America, as contemplated by the Service
Members Relief Act, collectively designated as
RICHARD ROE and all persons entitled to claim under
and through any of them,

Respondents.

IN THE MATTER OF THE ESTATE OF
CAROLINE BISCHOFF LOWN

AMENDED
ANSWER AND COUNTERCLAIM

The Health Sciences Foundation of the Medical University of South Carolina, now known

Amended Answer and Counterclaim
Case Number: 2011-ES-10-276

as The Medical University of South Carolina Foundation ("MUSC") and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc. ("Franke Home"), as Respondents, by and through their undersigned counsel, answering the Amended Petition to Construe a Will of the Petitioner herein, allege as follows:

1. Respondents deny each and every allegation of the Petition not hereinafter specifically admitted.
2. Upon information and belief, Respondents admit the allegations of paragraph 1.
3. Answering paragraph 2, Respondents admit The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc., is a South Carolina corporation doing business in Charleston County, South Carolina.
4. Answering paragraph 3, Respondents admit Health Sciences Foundation of the Medical University of South Carolina, which changed its name to The Medical University of South Carolina Foundation, is a South Carolina nonprofit organization maintaining offices in Charleston County, South Carolina.
5. Respondents lack knowledge and information sufficient to form a belief as to the allegations of paragraphs 4 and 5, and therefore, they deny the same.
6. Upon information and belief, Respondents admit the allegations of paragraphs 6, 7 and 8.
7. Answering paragraph 9, Respondents crave reference to the specific, plain language of the Last Will and Testament (the "Will") of Caroline Bischoff Lown (the "Decedent") and Respondents deny all allegations which vary or differ from the plain language of the Will.
8. Upon information and belief, Respondents admit the allegations of paragraph 10.
9. Answering paragraph 11, Respondents admit only so much of paragraph 11 as alleges the Decedent in her Will gave and bequeathed (1) all of her tangible personal property and (2) the sum of One Million and 00/100 (\$1,000,000) Dollars to the Petitioner. Respondents

deny the remaining allegations of said paragraph.

10. Answering paragraph 12, Respondents admit only so much of paragraph 12 as alleges they are residuary beneficiaries under Article FOURTH of the decedent's Will. Respondents deny the remaining allegations of said paragraph which vary or differ from the plain language of the Will.
11. Answering paragraph 13, Respondents admit only so much of paragraph 13 as alleges the Respondents and the Petitioner are beneficiaries under the decedent's Will. Respondents deny the remaining allegations of said paragraph which vary or differ from the plain language of the Will.
12. Respondents admit the allegations of paragraphs 14.
13. Respondents lack knowledge and information sufficient to form a belief as to the allegations of paragraphs 15 and 16, and therefore, they deny the same.

FOR A COUNTERCLAIM

(Construction of Will)

14. Respondents repeat and reiterate the foregoing portion of the within Amended Answer and Counterclaim as fully as if set forth verbatim herein.
15. Popie Lown Roberts, as Personal Representative of the Estate of Caroline Bischoff Lown, filed the Initial Inventory and Appraisal on May 24, 2011, which was amended on June 10, 2011 (as amended, the "Inventory"), a copy of which is attached as Exhibit A and incorporated by reference.
16. The Decedent's Will is not ambiguous and should be construed based on the plain language of the Will.
17. The plain language of Article FOURTH requires that the Decedent's gross probate estate with all debts, expenses and taxes be calculated and divided equally among the three

residuary beneficiaries.

18. Using the values from the Inventory, "[t]he rest and residue of my estate" under Article FOURTH refers to the value of the gross probate estate (\$5,277,734.96) that remains after the payment of the specific bequests under Articles SECOND and THIRD (\$88,683.34+\$1,000,000.00), which equals \$4,189,051.62 ($\$5,277,734.96 - \$1,088,683.34 = \$4,189,051.62$).
19. "[T]he payment of the specific bequests" under Article FOURTH refers to the bequests of tangible personal property with a value of \$88,683.34 and the sum of \$1,000,000.00 disposed of under Articles SECOND and THIRD.
20. The phrase "with all debts, expenses and taxes" under Article FOURTH refers to a negative number determinable at the end of the administration of the estate, which for purposes of calculations may be estimated with a value of \$100,000.00.
21. "The rest and residue of my estate" (\$4,189,051.62 as determined in Paragraph 18) after the payment of "all debts, expenses, and taxes" using the estimated value of \$100,000.00 equals \$4,089,051.62 (the "Article FOURTH Residuary Property").
22. The decedent intended to divide her gross probate estate equally among the three residuary beneficiaries, and, using the numbers outlined above ($(\$4,189,051.62 + \$1,088,683.34 - \$100,000.00) / 3 = \$1,725,911.65$), each residuary beneficiary receives a total value of the gross probate estate equal to \$1,725,911.65.
23. The Petitioner's 1/3 share of the gross probate estate is comprised of (1) tangible personal property with a value of \$88,683.34 under Article SECOND, (2) the \$1,000,000.00 bequest under Article THIRD and (3) the balance of the 1/3 share of the gross probate estate, equaling \$637,228.31, which is a portion of the Article FOURTH Residuary Property that flows under Article FOURTH.
24. After the devise of \$637,228.31 to Petitioner under Article FOURTH, the remaining balance of the Article FOURTH Residuary Property is \$3,451,823.31 which, when divided equally

between Franke Home and MUSC, results in a value of \$1,725,911.65, or 1/3 of the total value of the gross probate estate, as calculated above.

25. Respondents request that the Court construe the Will such that (1) the Petitioner receives the tangible personal property under Article SECOND, the sum of \$1,000,000.00 under Article THIRD and the sum of \$637,228.31 under Article FOURTH; (2) Franke Home receives \$1,725,911.65 under Article FOURTH; and (3) MUSC receives \$1,725,911.65 under Article FOURTH; provided, however, that the foregoing numbers be adjusted when the total amount of debts, expenses and taxes is determined.

FOR A COUNTERCLAIM

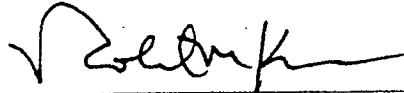
(Declaratory Judgment)

26. Respondents repeat and reiterate the foregoing portion of the within Amended Answer and Counterclaim as fully as if set forth verbatim herein.
27. Under Section 62-2-604(b) of the South Carolina Code of Laws (the "Code"), if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.
28. Article FOURTH is a residuary devise in the Will and identifies three residuary devisees.
29. If the share, or portion of a share, of a residuary devisee under Article FOURTH fails, the share, or portion of the share, passes to the other residuary devisees.
30. Pursuant to Section 62-2-604(b) and the Uniform Declaratory Judgment Act of Section 15-53-10 *et seq.* of the Code, the Respondents request that the Court find that under the terms of the Will Article FOURTH is effective to dispose of the entire residuary estate and that no part of the residuary estate passes through intestacy.

THEREFORE, having fully answered the Petition and alleged counterclaims, Respondents hereby prays for relief as follows:

1. That the Court construe the Will such that (1) the Petitioner receives the tangible personal property under Article SECOND, the sum of \$1,000,000.00 under Article THIRD and the sum of \$637,228.31 under Article FOURTH; (2) Franke Home receives \$1,725,911.65 under Article FOURTH; and (3) MUSC receives \$1,725,911.65 under Article FOURTH; provided, however, that the foregoing numbers be adjusted when the total amount of debts, expenses and taxes is determined; and
2. That the Court find that under the terms of the Will Article FOURTH is effective to dispose of the entire residuary estate and that no part of the residuary estate passes through intestacy; and
3. Such other relief as the Court determines proper.

EVANS CARTER KUNES & BENNETT, P.A.



Robert M. Kunes, Esq.

Andrew W. Chandler, Esq.

David H. Kunes, Esq.

EVANS CARTER KUNES & BENNETT, P.A.

P.O. Box 369

Charleston, SC 29402

(843) 577-2300

(843) 577-2055 (fax)

Attorney for Respondents, The Health Sciences Foundation of the Medical University of South Carolina, now known as The Medical University of South Carolina Foundation and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc.

July 28, 2011

Charleston, South Carolina

Exhibit A

Inventory and Appraisement

See Attached

STATE OF SOUTH CAROLINA

COUNTY OF: CHARLESTON

IN THE MATTER OF: ESTATE OF CAROLINE
BISCHOFF LOWN

IN THE PROBATE COURT

INVENTORY AND APPRAISEMENT

CASE NUMBER: 2011-ES-10-276

☒ ORIGINAL (AMENDED)

☐ SUPPLEMENTAL #

Personal Representative (s): Popie Lown Roberts

Last Four Digits of Decedent's Social

Security Number: XXX-XX-2944

Decedent's Date of Death: February 5, 2011

Was there a will? ☒ YES ☐ NO

Domicile at death:

Charleston

SC

(county)

(state)

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisal of all real and personal property of this estate so far as the undersigned is informed: that he/she has estimated and/or appraised all listed property at its fair market value, according to the best of his/her knowledge and ability.

SWORN to me this 16 day of
June 20 11

Notary Public for South Carolina
My Commission Expires December 23, 2020

Signature:

Name: Popie Lown Roberts

Address: 336 Rochford Drive

Easley, SC 29642

E-Mail:

Telephone (O):

(H): 864-269-5203

Attorney: Nicholas C. Sottile

Address: 1037 Chuck Dawley Blvd., Suite G-100

Mt. Pleasant, SC 29464

E-Mail: nsottile@shd-law.com

Telephone: 843-884-1464

Signature:

Name:

Address:

E-Mail:

Telephone (O):

(H):

For estates of decedents, the gross fair market valuation of all assets, regardless of situs, should be given as of the date of death. List all out-of-state assets on appropriate schedules. A Supplemental Inventory should be utilized for correcting, adjusting or adding to an original inventory. A qualified and disinterested appraiser may be employed to ascertain the value of any asset, the value of which may be subject to reasonable doubt. If an appraiser is employed, his/her name and address should be indicated with the item or items he/she appraised.

Within ninety (90) days following appointment, a copy of the inventory and appraisal shall be sent to each interested person who requests it, and the original inventory filed with the Probate Court.

RECAPITULATION

	Non-Probate	Probate
Schedule A - Real Estate	\$	\$
Schedule B - Stocks and Bonds		4,940,736.60
Schedule C - Notes Due Decedent and Cash		242,915.02
Schedule D - Insurance on Person's Life: Part 1 - Payable to Estate		5,400.00
Part 2 - Payable to Beneficiary	2,292.51	
Schedule E - Jointly Owned Property		
Schedule F - Other Miscellaneous		88,683.34
Other Assets Payable to Estate		
Schedule G - Transfers during Decedent's life		
Schedule H - Powers of Appointment		
Schedule I - Annuities and Retirement Accounts	33,538.08	
TOTAL GROSS VALUE	\$ 5,313,565.55	
ENCUMBRANCES	(0.00)	
TOTAL NET WORTH	\$ 5,313,565.55	

NOTE: WHEN COMPLETING THE FOLLOWING SCHEDULES, PLEASE REMEMBER TO LIST ALL ASSETS, REGARDLESS OF SITUS. ALL OUT-OF-STATE ASSETS MUST BE DISCLOSED.

SCHEDULE A - Real Estate (All interest in real property except those held with right of survivorship) (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description (Include county and state)	Tax Assessor's Fair Market Value for year of Decedent's Death	Appraised Value	Appraised Value of Decedent's Interest
	NONE			

TOTAL SCHEDULE A

(also enter under recapitulation, page 1)

\$ ZERO

SCHEDULE B - Stocks and Bonds (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description	Face Value	Appraised Value
1.	See Attached List		\$4,940,736.60

TOTAL SCHEDULE B

(also enter under recapitulation, page 1)

\$ 4,940,736.60

SCHEDULE C - Notes due to Decedent, and Money on hand and in banks (If none, so state.) (For jointly owned property with right of survivorship, see schedule E)

Item No.	Description	Value
1.	Wachovia Certificate of Deposit Account No. 414212070410438	\$38,873.51
2.	National Bank of South Carolina Checking Account No. 0736998606	\$46,925.14
3.	National Bank of South Carolina Money Market Account No. 0765467209	\$20,926.39
4.	First Federal of Charleston Money Market Cusip Account No. 60934N701	\$6,317.17
5.	First Federal of Charleston Money Market Cusip Account No. 60934N708	\$129,872.81

TOTAL SCHEDULE C

(also enter under recapitulation, page 1)

\$ 242,915.02

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE D - Insurance (if none, so state.)**Part 1 - Life Insurance Payable to the Estate**

Item No	Description	Value
1.	South Carolina State Retirement System	\$5,400.00

TOTAL PART 1 \$ 5,400.00
 (also enter under recapitulation, page 1)

Part 2 - Life Insurance Payable to Beneficiaries

Item No.	Description	Beneficiary	Value
1.	MONY Life Insurance Policy no. 774-07-37	Popie L. Roberts	\$2,292.51

TOTAL PART 2 \$ 2,292.51
 (also enter under recapitulation, page 1)

SCHEDULE E - Jointly owned Property (with right of survivorship) (if none, so state.)

NOTE: You must complete Schedule E if the Decedent owned any property jointly with right of survivorship at the time of death, whether or not the decedent's interest is included in the gross estate.

Percentage includible:

1 - Joint interest held by decedent and spouse - the amount included is one-half (50%) of the value in all cases.

2 - Other joint interest - Generally you must include the full value of the jointly owned property in the gross estate. However, the full value should not be included if you can show that a part of the property originally belonged to the other tenant(s). The amount included is the amount of the decedent's contribution to the joint account(s).

Item No.	Description	Joint Owner(s)	Percentage Includible	Appraised Value of Decedent's Interest
	NONE			

TOTAL SCHEDULE E \$ ZERO
 (also enter under recapitulation, page 1)

(If more space is required, insert tax schedules or additional sheets of same size.)

[illegible]

\$ 88,683.34

NOTE: FOR SCHEDULES G, H, AND I. LIST VALUES ONLY IF PAYABLE TO ESTATE.

Did Decedent make any transfers during lifetime as described above? ☐ YES ☒ NO

NONE

\$ ZERC

(If more space is required, insert tax schedules or additional sheets of same size.)

SCHEDULE H - Powers of Appointment - Property, both real and personal, over which Decedent possessed a Power of Appointment whether Testamentary or otherwise.

Did Decedent possess a Power of Appointment? ☐ YES ☒ NO

If "yes", did Decedent exercise the power of appointment in favor of estate? ☐ YES ☐ NO

If "yes", please describe and list total amount payable to estate.
(If more space is required, insert additional sheets of same size.)

\$ _____

NONE

\$ _____ ZERO

TOTAL SCHEDULE H
(also enter amounts payable to estate under recapitulation, page 1)

SCHEDULE I - Annuities and retirement (IRA's, 401(k), Etc.)

Did Decedent own any accounts as described above? ☒ YES ☐ NO

If "yes", is the estate designated as the beneficiary of these accounts? ☐ YES ☒ NO

If "yes", please describe and list total amount payable to estate.
(If more space is required, insert additional sheets of same size.)

\$ _____

\$33,538.08

1. South Carolina Retirement 457 Deferred Compensation Plan

\$ _____ 33,538.08

TOTAL SCHEDULE I
(also enter amounts payable to estate under recapitulation, page 1)

ENCUMBRANCES - (e.g., mortgages, liens, judgments, etc., but not general debts of the estate) - List specific assets encumbered.

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FIRST FEDERAL SAVINGS AND LOAN

Report Date: April 18, 2011
 Time Prepared: 11:29:36 AM
 Requested By: Jeremy Jutzeler
 Includes: Account: 32 00 5339 0 06 CONSERVATOR FOR CAROLINE B LOWE

Account Holdings as of 2/4/2011

Cusip No.	Security Name	Shares / Par	Investment	Unit Price	Market Value	Price Date
005125109	ACXIOM CORP	1,220.0000	19,739.48	17.25	21,045.00	02/04/2011
013581108	ALLIANCE DATA SYSTEM	255.0000	18,439.05	70.51	19,510.05	02/04/2011
042735100	ARROW ELECTRS INC	935.0000	24,749.36	41.45	38,755.75	02/04/2011
044209104	ASHLAND INC	380.0000	19,218.56	59.03	22,431.40	02/04/2011
052800109	AUTOLIV INC	138.0000	3,948.80	74.24	10,098.64	02/04/2011
053807103	AVNET INC	380.0000	23,979.91	38.92	32,489.60	02/04/2011
073302101	BE AEROSPACE INC	225.0000	8,765.98	37.42	8,419.50	02/04/2011
074349BH3	BEAUFORT 5% 12/1/17	25,000.0000	25,046.90	100.26	25,065.00	02/04/2011
074358DA7	BEAUFORT 5.0% 3/1/12	20,000.0000	19,700.00	104.833	20,966.60	02/04/2011
084219EE0	BERKELEY 5.0% 8/1/22	20,000.0000	21,528.00	104.401	20,880.20	02/04/2011
100641100	BRINKER INTERNATL	420.0000	9,087.78	23.74	9,970.80	02/04/2011
113709NF2	BROOKLAND 4.4% 3/1/20	15,000.0000	15,139.48	100.959	15,143.85	02/04/2011
126408103	CSX CORP COM	1,600.0000	20,418.88	69.70	111,520.00	02/04/2011
149123101	CATERPILLAR, INC	400.0000	8,458.20	99.59	39,836.00	02/04/2011
160075PJ0	CHAS CNTY 5% 2/1/12	10,000.0000	10,142.95	104.454	10,445.40	02/04/2011
160075OD2	CHAS CNTY 5% 2/1/12	40,000.0000	40,687.29	104.454	41,781.60	02/04/2011
16007YAO7	CHAS CNTY 5% 8/15/19	5,000.0000	4,850.70	100.08	5,004.00	02/04/2011
16007YAR5	CHAS CNTY 5% 8/15/28	40,000.0000	40,000.74	91.965	36,786.00	02/04/2011
160429OK3	CHARLESTON 5% 1/1/20	30,000.0000	31,573.50	107.998	32,399.40	02/04/2011
160900BC0	CHS CNTY HOSP7%10/11	5,000.0000	4,962.50	104.31	5,215.50	02/04/2011
166764100	CHEVRON CORP	758.0000	28,225.04	97.11	73,609.38	02/04/2011
171798101	CIMAREX ENERGY CO	300.0000	23,489.04	103.45	31,035.00	02/04/2011
18683K101	CLIFFS NTL RESOURCES	295.0000	19,643.67	90.27	26,629.65	02/04/2011
194208BU7	COLLEGE CHAS 4% 4/12	20,000.0000	20,088.01	103.487	20,699.40	02/04/2011
198469ET3	COLA SC PKG 5%2/1/37	30,000.0000	30,601.99	84.507	25,352.10	02/04/2011
201003993	ASSORTED COINS	1.0000	67.00	67.00	87.00	08/28/2010
203868108	COMMUNITY HLTH SYS	245.0000	9,013.52	36.87	9,033.15	02/04/2011
211000997	CONTENTS OF 3 SOB'S	1.0000	1.00	1.00	1.00	09/22/2010
233ESC987	ESC OWS RREEF RE FD	700.0000	1.00	1.00	1.00	09/13/2010
255748108	DOLLAR TREE INC	250.0000	12,317.48	49.71	12,427.50	02/04/2011
258147NX1	DORCH CNTY 4.625%	15,000.0000	15,545.52	97.527	14,629.05	02/04/2011
258174BJ9	DORCH CNTY 5%12/1/29	60,000.0000	50,843.98	96.448	57,868.80	02/04/2011
26441C105	DUKE ENERGY HLDG COR	2,000.0000	32,067.71	18.01	36,020.00	02/04/2011
27826LJ58	EATON VANCE SC FD B	5,318.1490	55,000.00	8.32	44,255.32	02/04/2011
29264F205	ENDO PHARMACEUTICALS	1,020.0000	34,781.50	34.99	35,889.80	02/04/2011
30231G102	EXXON MOBIL CORP	800.0000	34,524.80	83.28	66,624.00	02/04/2011
303726103	FAIRCHILD SEMICON	805.0000	13,693.05	18.66	15,013.25	02/04/2011
313372M5	FHLB 3.125% 12/14/17	20,000.0000	20,000.00	95.466	19,093.20	02/04/2011
3133729W3	FHLB 3.33% 1/10/18	35,000.0000	35,000.00	97.792	34,227.20	02/04/2011
313372ER1	FHLB 3.35% 1/28/18	25,000.0000	25,000.00	98.231	24,557.75	02/04/2011
3138FP5K9	FNMA 3.375% 12/29/17	25,000.0000	25,000.00	98.32	24,580.00	02/04/2011
3138FP5K9	FNMA 3.375% 12/29/17	30,000.0000	30,000.00		30,000.00	
3138FP5K9	FNMA 3% 8/25/16	9,211.4200	11,429.44	100.11	9,221.55	01/31/2011
31398KWW6	FHLMC 5% 8/15/39	230.0000	22,706.73	123.64	28,437.20	02/04/2011
315618102	FS NETWORKS INC	2,000.0000	29,625.00	88.89	137,380.00	02/04/2011
343412102	FLUOR CORP NEW	2,750.0000	25,408.15	8.72	23,980.00	09/03/2010
360271100	FULTON FINANCIAL	1,700.0000	55,824.70	20.56	34,952.00	02/04/2011
389604103	GENERAL ELECTRIC CO	10,000.0000	10,155.30	100.509	10,050.90	02/04/2011
380475CJ4	GRAND STRND 5% 6/26	40,000.0000	40,001.12	104.095	41,638.00	02/04/2011
396028YY2	GREENVILLE 4% 4/1/15	15,000.0000	15,293.77	109.706	18,455.90	02/04/2011
396066AW2	GRNVILLE 5.5%12/1/28	15,000.0000	15,736.08	100.681	15,009.15	02/04/2011
396066CR1	GRNVILLE 5% 12/1/28	25,000.0000	25,214.78	109.003	25,500.75	02/04/2011
396541CY9	GRNVILLE 5.1% 8/1/22	45,000.0000	45,123.89	100.262	45,117.90	02/04/2011
397090EA5	GRNWOOD 5.5%10/1/21	150.0000	7,114.48	45.20	5,780.00	02/04/2011
431617105	GUESS INC					

Report Date: April 18, 2011

Time Prepared: 11:29:36 AM

Requested By: Jeremy Jutzeler

Includes: Account: 32 00 5339 0 06 CONSERVATOR FOR CAROLINE B LOWE

FIRST FEDERAL SAVINGS AND LOAN

Account Holdings as of 2/4/2011

Cusip No.	Security Name	Shares / Par	Investment	Unit Price	Market Value	Price Date
427555108	HERSHEY FOODS CORP	300.0000	24,737.60	50.49	40,392.00	02/04/2011
43284RBW6	HH ISLAND 4.8%&1/19	10,000.0000	10,053.54	103.038	10,303.80	02/04/2011
440673TS0	HORRY 5.00% 3/1/12	20,000.0000	19,800.00	104.833	20,966.60	02/04/2011
440673UC2	HORRY 5.125% 3/1/22	25,000.0000	26,358.00	105.219	26,304.75	02/04/2011
44067HBZ2	HORRY CO HOSP 4.9%	40,000.0000	39,478.00	100.292	40,118.80	02/04/2011
44067HCF5	HORRY 5% 07/01/26	10,000.0000	9,964.84	87.067	8,706.70	02/04/2011
44106M102	HOSPITALITY PROP TR	930.0000	20,822.81	24.86	23,119.80	02/04/2011
451663108	IDEARC INC	43.0000	1,133.82		1,133.82	12/18/2009
464287226	ISHARES BC LY AG BOND	1,390.0000	150,912.04	104.26	144,921.40	02/04/2011
464287507	ISHARES TR S&P	1,370.0000	110,091.15	94.38	129,300.80	02/04/2011
464287904	ISHARES TR S&P 600	1,845.0000	110,588.19	69.93	129,020.85	02/04/2011
464288166	ISHARES AGENCY FUND	1,215.0000	135,771.88	109.07	132,520.05	02/04/2011
464288513	ISHARES IBOX HI YLD	1,650.0000	148,384.17	91.87	151,585.50	02/04/2011
464288646	ISHARES BC LYS 1-3 CR	1,430.0000	150,268.52	104.23	149,048.90	02/04/2011
478180104	JOHNSON & JOHNSON	400.0000	14,144.30	60.84	24,336.00	02/04/2011
480200107	JONES LANG LA SALLE	350.0000	29,489.93	97.20	34,020.00	02/04/2011
48242W106	KBR INC	350.0000	10,408.97	33.16	11,602.50	02/04/2011
492508AV8	KERSHAW 5% 12/1/29	55,000.0000	55,006.00	92.849	51,066.95	02/04/2011
49460W208	KINETIC CONCEPTS	515.0000	19,286.70	44.91	23,128.65	02/04/2011
512807108	LAM RESEARCH CORP	205.0000	10,159.82	52.60	10,783.00	02/04/2011
529050BE5	LEXINGTON 5.25% '17	10,000.0000	9,777.30	100.137	10,013.70	02/04/2011
529050BG0	LEXINGTON 5.125% 11/26	20,000.0000	20,048.78	97.102	19,420.40	02/04/2011
529050BT2	LEXINGTON 5.5% 11/1/32	55,000.0000	55,298.77	111.963	61,579.85	02/04/2011
529050BU9	LEXINGTON 5.75% 11/13	25,000.0000	26,340.75	112.833	28,158.25	02/04/2011
53219L109	LIFEPOINT HOSPITALS	580.0000	19,717.54	35.78	20,025.60	02/04/2011
532791100	LINCARE HOLDINGS	1,435.0000	38,664.11	27.59	39,591.85	02/04/2011
549271104	LUBRIZOL CORP	390.0000	42,509.96	111.30	43,407.00	02/04/2011
579774BW9	MCCORMICK 4.125% 3/16	15,000.0000	15,192.50	105.772	15,865.80	02/04/2011
580135101	MCDONALDS CORP	1,000.0000	32,062.00	74.05	74,050.00	02/04/2011
58463RC29	MUSC 5.6% 7/1/13	5,000.0000	4,918.32	111.285	5,584.25	02/04/2011
58502B106	MEDNAX INC	315.0000	17,312.40	61.23	19,287.45	02/04/2011
58934N708	FED PRIME OBLG #396	129,872.8100	129,872.81	1.00	129,872.81	02/19/2010
58934N701	FED PRIME OBLG-I 396	36,317.1700	36,317.17	1.00	36,317.17	02/19/2010
51166W101	MONSANTO CO	178.0000	555.17	74.68	13,140.16	02/04/2011
61600C998	NBSC MM	1.0000	9,187.00	20,921.94	20,921.94	12/13/2010
616001998	NBSC CHECKING	1.0000	38,189.00	44,489.49	44,489.49	12/13/2010
622634EM1	MT PLEASANT 4% 12/13	30,000.0000	31,319.60	107.905	32,371.50	02/04/2011
628560GU2	MYRTLE BCH 4.9% 3/15	20,000.0000	19,902.40	100.219	20,043.80	02/04/2011
628560HS6	MRTLE BCH 5.125% '22	15,000.0000	15,006.00	102.054	15,308.10	02/04/2011
651290108	NEWFIELD EXPLORATION	100.0000	6,028.00	74.70	7,470.00	02/04/2011
65840W108	PANERA BREAD COMPANY	100.0000	10,253.00	98.87	9,887.00	02/04/2011
699173209	PARAMETRIC TECH	1,095.0000	21,450.83	23.20	25,404.00	02/04/2011
714290103	PERRIGO COMPANY	550.0000	36,096.45	71.87	39,418.50	02/04/2011
742718109	PROCTER & GAMBLE CO	2,000.0000	25,977.81	63.61	127,220.00	02/04/2011
745220FM0	PUERTO RICO 3.5% 7/22	20,000.0000	23,467.80	99.326	19,885.20	02/04/2011
749941100	RF MICRO-DEVICES	2,480.0000	15,030.35	7.10	17,486.00	02/04/2011
754730109	RAYMOND JAMES FINL	525.0000	16,232.95	37.05	19,451.25	02/04/2011
755111507	RAYTHEON CO	500.0000	13,412.39	50.20	25,100.00	02/04/2011
758750103	REGAL BELOIT CORP	200.0000	12,459.98	70.64	14,128.00	02/04/2011
750759100	REPUBLIC SERVICES	115.0000	1,650.34	30.10	3,481.50	02/04/2011
753793FL5	RICH-LEX 5% 1/1/26	20,000.0000	20,146.88	100.081	20,016.20	02/04/2011
75464A516	SPDR BC LY INTL BD FD	2,405.0000	148,738.19	58.73	141,245.65	02/04/2011
80585TAP8	SCAGO 5.0% 12/1/22	35,000.0000	35,181.00	102.32	35,812.00	02/04/2011
837031QD9	SC JOBS 5.625% 11/12	5,000.0000	5,313.43	108.538	5,428.90	02/04/2011

FIRST FEDERAL SAVINGS AND LOAN

Report Date: April 18, 2011
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Account Holdings as of 2/4/2011

Cusip No.	Security Name	Shares / Par	Investment	Unit Price	Market Value	Price Date
837031QG1	SC JOBS 5.625% 11/30	5,000.0000	4,691.57	92.952	4,647.60	02/04/2011
837033EV7	SC JOBS ECON 5/1/11	20,000.0000	20,000.00	100.229	20,045.80	02/04/2011
83703FBK7	SC JOBS 5% 8/15/15	40,000.0000	41,765.02	106.087	42,434.80	02/04/2011
83704LB38	SC JOBS 5.0% 4/1/18	100,000.0000	108,814.00	98.403	98,403.00	02/04/2011
837100G93	SC ST 4.125% 4/1/27	20,000.0000	20,000.00	97.405	19,481.00	02/04/2011
837100XB9	SC ST 4.25% 12/1/19	25,000.0000	25,282.95	107.742	26,935.50	02/04/2011
837100YR3	SC ST 4.375% 4/1/23	55,000.0000	64,997.88	102.707	66,759.55	02/04/2011
837147E78	SC PUB 5.25% 1/1/21	80,000.0000	84,609.55	106.693	85,354.40	02/04/2011
837147E78	SC PUB AUTH 5% 1/1/21	20,000.0000	19,837.00	95.459	19,091.80	02/04/2011
837147YD3	SC AUTH 5% 1/1/21	30,000.0000	30,419.77	103.86	31,158.00	02/04/2011
837147YW1	SC ST PSA 5% 1/1/21	25,000.0000	26,256.00	104.845	26,211.25	02/04/2011
837147ZM2	SC PUB AUTH 5% 1/1/12	20,000.0000	20,393.39	104.075	20,815.00	02/04/2011
837147ZX8	SC PUB AUTH 5% 1/1/22	50,000.0000	52,058.73	104.288	52,144.00	02/04/2011
837152EP8	SC INFRA 5.1% 10/1/11	30,000.0000	30,028.60	103.055	30,918.50	02/04/2011
837152HV2	SC TRANS 5.25% 10/19	20,000.0000	31,622.10	104.229	31,268.70	02/04/2011
837152JB4	SC TRANSN 5.25% 10/25	20,000.0000	20,888.60	100.883	20,178.60	02/04/2011
837152LD1	SC TRANSN 4.25% 10/24	20,000.0000	20,000.00	92.754	18,550.80	02/04/2011
842587107	SOUTHERN CO	400.0000	10,609.64	37.34	14,935.00	02/04/2011
847082HK3	SPARTANBURG 5% 3/22	55,000.0000	55,292.37	106.607	58,633.85	02/04/2011
847113AM9	SPARTANBG 5.25% 4/25	125,000.0000	128,978.69	99.893	124,866.25	02/04/2011
847184RK6	SPRTNBG 5.25% 8/1/28	45,000.0000	43,944.66	112.863	50,788.35	02/04/2011
866611HE9	SUMTER 4.0% 12/01/11	60,000.0000	80,490.40	102.508	61,503.60	02/04/2011
678237106	TECH DATA CORP	335.0000	13,423.42	49.04	18,428.40	02/04/2011
879868107	TEMPLE INLAND INC	805.0000	15,021.22	24.40	19,842.00	02/04/2011
884315102	THOMAS & BETTS	780.0000	31,973.12	53.86	40,933.80	02/04/2011
913367BU1	UNIV SC ED 5% 6/1/31	40,000.0000	39,205.80	100.357	40,142.80	02/04/2011
92046N102	VALUECLICK INC	750.0000	10,569.92	14.29	10,717.50	02/04/2011
921928206	VANGUARD MORGAN 528	2,927.9980	138,307.34	58.55	171,434.28	02/04/2011
928002997	WACH CD 3.92% 5/28/11	35,000.0000	35,000.00	100.00	35,000.00	09/23/2010
928298108	VISHAY INTERTECH	750.0000	9,097.42	16.98	12,735.00	02/04/2011
94106L109	WASTE MNGMT INC NEW	1,350.0000	24,208.78	37.72	50,922.00	02/04/2011
980745103	WOODWARD INC	150.0000	5,698.48	34.50	5,175.00	02/04/2011
986525JU3	YORK 5.125% 3/1/11	30,000.0000	30,230.10	101.291	30,387.30	02/04/2011
Total Securities		2,280,825.5470	4,518,580.85		5,208,519.01	
Income Cash			819.00		819.00	
Principal Cash			-30,000.00		-30,000.00	
Account Total			4,489,399.85		5,177,338.01 *	

*NOTE: Value listed on Schedule B excludes cash accounts from this total.
 The cash account balances are listed on Schedule C.

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF CHARLESTON	)	CASE NUMBER: 2011-ES-10-276

Popie Lown Roberts,	)
	)
Petitioner	)

vs.	)
-----	---

the Health Sciences Foundation of The Medical	)
University of South Carolina, The Franke Home,	)
Inc., d/b/a The Franke Home at Seaside, Elizabeth	)
Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,	)
William Frederick Schneider, Joseph Emil Schneider,	)
Katherine Delaine, Marcia Molinari, Mark D.	)
Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls,	)
Charles H. Rumpel, III, John D. Rumpell, Barbara P.	)
Brown, Carol Odesky and Georgina Louise Pace	)
a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,	)
Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.	)
Kirlpatrick, Erlene Arolda Lide Hayden Vaughan,	)
Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes	)
Kathleen Lide Saussy, Caroline Lide Ogburn, Arnold K.	)
Harper, Jr., Caroline Harper Rivers, Arnolda K. Peterson	)
Rev. Douglas Kornahrens, Julie Ann George, Amy Tuten,	)
Anne Delette Kornahrens, Ruther Pierrene Coleman	)
Johnson, Eleanor M. Rogers and Waldemar White	)
Kornahrens, The Estate of Caroline Bischoff Lown and	)
JOHN DOE, a fictitious name used herein to designate	)
the unknown heirs at law, distributees, and/or devisees of	)
all persons claiming under or through the heirs of Amelia	)
Ahrens Bischoff and J.C.W. Bischoff and any such persons	)
who are minors or members of the Armed Forces of the	)
United States of America, as contemplated by the Service	)
Members Relief Act, collectively designated as	)
RICHARD ROE and all persons entitled to claim under	)
and through any of them,	)

MEMORANDUM OF LAW
IN SUPPORT OF RESPONDENT'S
PROPOSED ORDER

Respondents.	)
	)
IN THE MATTER OF THE ESTATE OF	)
CAROLINE BISCHOFF LOWN	)

COMES NOW, the Respondents, Health Sciences Foundation of the Medical University

of South Carolina, now known as The Medical University of South Carolina Foundation ("MUSC") and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc. ("Franke Home"), by and through their undersigned counsel, who would present the following Memorandum of Law.

I. STATEMENT OF FACT

Caroline Bischoff Lown (the "Decedent"), at the time of her death, resided at 2 Bishop Gadsden Way, Apartment 1045, Charleston, Charleston County, South Carolina, and died on February 5, 2011. At the time of her death, the Decedent owned and possessed real and personal property situated within Charleston County, South Carolina. At the time of her death, the Decedent left a last will and testament dated June 1, 2005 (the "Will"). The Decedent's Will was duly admitted to probate as a valid will by the Probate Court of Charleston County, South Carolina, on February 18, 2011. Popie Lown Roberts was named as the Personal Representative in the Decedent's Will, and on February 18, 2011, was duly appointed Personal Representative and qualified as the Personal Representative. Popie Lown Roberts, as Personal Representative of the Estate of Caroline Bischoff Lown, filed the Initial Inventory and Appraisal on May 24, 2011, which was amended on June 10, 2011 (as amended, the "Inventory").

The Petitioner has asserted the language of the Will is ambiguous and has introduced extrinsic evidence to assist the Court in determining whether an ambiguity exists. The Respondents, MUSC and the Franke Home, have asserted that the language of the Will speaks for itself, that it is not ambiguous and that the Court's construction of the Will should be based on the plain language of the Will and not on any extrinsic evidence.

Further, in the Petition to Construe the Will, the Petitioner has raised the issue of whether an intestacy exists. An exhaustive search was conducted to identify and to serve those potential heirs with the Petition and to allow an opportunity for those heirs to represent their interests. Additionally, the Court appointed a Guardian Ad Litem to represent any minor, incompetent, or disabled potential heirs and the Guardian Ad Litem appeared at the Hearing. On September 20, 2011, Angela Kirby, Esq., of Rogers Townsend & Thomas, P.C., filed an Answer on behalf of

one or more of the intestate heirs of the Decedent. On January 30, 2012, Darra James Coleman, Esq. of Rogers Townsend & Thomas, P.C., on behalf of its clients, Elizabeth Ann Doscher Kempley and Caryl Gilmore Doscher Morgan, withdrew the Answer previously filed on September 20, 2011 and confirmed to the Court that these intestate heirs do not intend to attend or otherwise participate in the hearing scheduled for Tuesday, January 31, 2012. At the hearing, no evidence was presented to support the conclusion that an intestacy exists.

II. LEGAL ARGUMENTS AND ANALYSIS

A. Application of Section 62-2-602 Prevents Any Intestacy

As an initial matter, the Petitioner has raised in his Petition to Construe the Will the issue of whether an intestacy exists. Section 62-2-602 of the South Carolina Code of Laws (the "Code") provides "A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will." This is South Carolina's "presumption against intestacy." S.C. Code Ann. § 62-2-602 (Reporter's Comments).

The Petitioner suggests that the phrase in Article Fourth (a) reading in part, "...less, however, the sum of One Million and 00/100 \$1,000,000.00) Dollars...", results in there not be an effective disposition of the One Million Dollars. However, under Section 62-2-604(b) of the Code, if the residue of an estate is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue. Article FOURTH of the Will is a residuary devise which identifies two or more persons as the residuary devisees. If the share of a residuary devisee fails, his share passes to the two other residuary devisees in proportion to their interests.

Section 62-2-604(b) is applicable to Article FOURTH to prevent the share of a residuary devisee that fails for any reason from passing pursuant to intestacy. In other words, all of the shares passing to the residuary devisees must fail in order for an intestacy to exist. None of the potential heirs or the Guardian Ad Litem have presented any evidence to support the conclusion that the residuary devise fails in its entirety. The Petitioner, a named beneficiary under the Will,

is the only party to have asserted that a portion of the estate is not disposed of under the Decedent's will as an effort to create an artificial ambiguity.

Since there is a strong presumption against intestacy and since Section 62-2-604(b) provides a statutory savings mechanism for preventing a residuary devise to fail and cause an intestacy, the Decedent's residuary devise in her Will should be given effect. Nevertheless, the Petitioner has suggested that the sum of One Million Dollars (\$1,000,000) is not disposed of by the Decedent's Will. The Petitioner further asserts that Section 62-2-604(b) does not apply to the disposition of this sum of money and that the Will does not direct the disposition of this sum of money. This assertion is contrary to the Probate Code's strong presumption against intestacy and the statutory savings mechanism that prevents an intestacy from arising when a share of residuary devisee fails. Accordingly, if the residuary devise to the Petitioner fails for any reason, her share, or the portion of her share that fails, must pass to the other residuary beneficiaries pursuant to Section 62-2-604(b).

B. A Court's First Reference in a Construction Action is the Language of the Decedent's Will Itself

The guiding principles for the construction of a will are set forth in the South Carolina Probate Code.

Section 62-1-102. Purposes; rules of construction.

(b) The underlying purposes and policies of this [Probate] Code are: . . . (2) to discover and make effective the intent of a decedent in the distribution of his property. . . S.C. Code. Ann Section 62-1-102(b).

Section 62-2-601. Rules of construction and intention. "The intention of the testator as expressed in his will controls the legal effects of his disposition." The Reporter's Comments note: "Section 62-2-601 states the first principle of the construction of wills, that the testator's intention as expressed in the will controls, a codification of South Carolina case law." The statute could not be clearer in its language as to how to construe a will and the case law is consistent with this mandate.

The Court of Appeals in the *Estate of Hyman*, 606 S.E.2d 205, 207, 362 S.C. 20 (Ct. App.

2004) set forth the procedure for how courts should construe a will as follows:

In construing a will, a court should give effect to the expressed intention of the testator. In ascertaining this intent, a court's first reference is always to the will's language itself. When construing this language, the reviewing tribunal must give the words contained in the document their ordinary and plain meaning. Where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. Only when the will's terms or provisions are ambiguous may the court resort to extrinsic evidence to resolve the ambiguity. (internal citations omitted; emphasis added).

Furthermore, for an ambiguity to exist, the words of the will, when applied to the object or subject which they describe must be "incapable of application as they stand." Boykin v. Capehart, 205 S.C. 276, 31 S.E.2d 506, 508 (1944). "The mere showing that a testator may have intended a testamentary construction in direct contradiction to the plain meaning of the will's language is not enough. As the supreme court has stated, '[a] will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy or inconsistency with the declared intention of the testator' should follow." Hyman, 606 S.E.2d at 208-209 (internal citations omitted).

In the Estate of Fabian, 326 S.C. 349, 483 S.E.2d 474, 476 (Ct. App. 1997), the Court of Appeals stated "where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. We can neither 'redraft the [w]ill, nor may we doctor a crucial part.'" (citing Limehouse v. Limehouse, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971)). In construing the language of a will, we must give words their ordinary plain meaning unless it is clear the testator intended a different sense, or unless such meaning would lead to an inconsistency with the testator's declared intention. Id.

In light of the Probate Code's underlying purposes and policies, and following the reasoning and analysis of the Court of Appeals in Hyman and Fabian, this Court's first reference in determining the Decedent's intent, as expressed in the Will, must be the actual language of the Will itself.

Notably, the Petitioner acknowledges that the Will can be performed exactly as it is written:

That is, you give Popie the \$1 million and give Popie the tangible personal property, and then under Item 4 you take all that property back and you put it back into the till and you split it up into thirds. You could do all that. But what you can't do, or what is unfathomable to us, is that after you've done all that, then of Popie's one-third, which would be about \$1.7 million, you take \$1 million away from her, but that same provision in the will doesn't say what to do with the million dollars. It just says, less and except that \$1 million from the Item 3, and with no instruction as to what to do with it. Well, without any instruction what to do with it, it would pass, arguably, to the heirs of her estate. (Daniel, Hearing at 16-18.)

As the basis for their argument that the Will is ambiguous, the Petitioner asserts that this \$1,000,000 passes pursuant to intestacy. As explained above, this reasoning is flawed and ignores the application of Section 62-2-604(b) which causes the \$1,000,000 to pass to the remaining two residuary devisees if it indeed fails.

Although a failure of the \$1,000,000 would result in an increased share to the Respondents, an analysis of the key dispositive provisions of the Decedent's Will reveals why the Petitioner's analysis is flawed and a proper construction of the Decedent's Will, based on the Will's plain language.

1. Dispositive Provisions under Article SECOND

Article SECOND of the Decedent's Will provides as follows: "I hereby give and bequeath all of my tangible personal property, including furniture, jewelry, personal effects, and any vehicles registered in my name, to my niece-in-law, POPIE LOWN ROBERTS, of Easley, South Carolina."

The plain language of this Article disposes of all of the Decedent's tangible personal property. According to the Inventory filed with the Court (the "Inventory"), the value of the tangible personal property is \$88,683.34, which the Petitioner receives as a specific bequest.

2. Dispositive Provisions under Article THIRD

Article THIRD of the Decedent's Will provides, in pertinent part, as follows: "I give and bequeath to my niece-in-law, POPIE LOWN ROBERTS, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, ..."

The plain language of this Article disposes of the sum of \$1,000,000, which the Petitioner receives as a specific bequest.

3. Dispositive Provisions under Article FOURTH

Article FOURTH disposes of the residue of the Decedent's estate but also serves to confirm the Decedent's expressed intent of ensuring that her niece-in-law, Popie Lown Roberts, receives not more than one-third (1/3) of the Decedent's estate if Decedent's assets consisted of more than \$3,000,000.

When examining the Decedent's intent as expressed in the language of her Will, it is important to examine the possible scenarios that might have applied at the Decedent's death. Essentially, there are three possible "asset" scenarios that could have existed at the Decedent's death: (1) the Decedent's net assets, after expenses, are less than \$3,000,000, (2) the Decedent's net assets, after expenses, are equal to \$3,000,000 and (3) the Decedent's net assets, after expenses, are more than \$3,000,000, which are the facts before this Court. The third scenario contains the factual scenario before the Court in this matter but it is important to note that the language of the Will is also not ambiguous when applied to the first two scenarios.

Under the first scenario, if the Decedent's estate consisted of only \$1,500,000 of cash (no tangible personal property and net of expenses), Mrs. Roberts would receive the sum of \$1,000,000 under Article THIRD and, under the analysis set forth below, Mrs. Roberts would not receive anything under Article FOURTH and MUSC and the Franke Home each would receive \$250,000. The specific devise under Article THIRD would be fulfilled and the residue would consist of only \$500,000.

Under the second scenario, if the Decedent's estate consisted of exactly \$3,000,000 of cash (no tangible personal property and net of expenses), Mrs. Roberts would not receive anything under Article FOURTH and MUSC and the Franke Home each would receive \$1,000,000. Again the specific devise under Article THIRD would be fulfilled and the residue would consist of \$2,000,000.

The third scenario contains the facts that are before the court and is explained below. Upon an examination of each of the three scenarios, it is clear that the Decedent intended for each of the residuary beneficiaries to receive an equal one-third (1/3) share of the Decedent's estate provided that, in any event, the Petitioner receives at least the tangible personal property and the sum of \$1,000,000 as a specific devise under Articles SECOND and THIRD.

(i) First full paragraph of Article FOURTH

The first paragraph of Article FOURTH of the Decedent's Will provides as follows: "I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses, and taxes, be divided and I bequeath and devise as follows:"

Using the ordinary and grammatical sense of the words employed in the foregoing paragraph, the Decedent refers to "the rest and residue of [her] estate," which is the balance of the estate's assets that have not been previously disposed of in the Will. To determine the balances of the estate's assets, it is necessary to assume an amount for the category of debts, expenses and taxes.¹ Assuming this value is \$100,000 and using the values from the Inventory, the "rest and residue of [her] estate is equal to \$4,089,051.62.

The phrase "the payment of the specific bequests" refers to the bequests made under Articles Second and Third, which have been previously determined to be, in total, \$1,088,683.34.

¹We have assumed for the purposes of calculations that the debts, expenses and taxes will be equal to \$100,000. This number will be finally determined at the end of the estate's administration but does not change the present analysis.

The phrase “with all debts, expenses, and taxes,” refers to the estate’s debts, expenses and taxes, which, for purposes of this analysis, has been assumed to be \$100,000. This number will be finally determined at the end of the estate’s administration.

When parsing through the phrase as a whole, the Decedent intended that these foregoing amounts be divided into shares, and based on the remaining language of Article FOURTH, there should be three shares. Mathematically, this analysis is represented as follows:

$$\begin{array}{rcl}
 \$4,089,051.62/3 & = & 1,363,017.21 \\
 \$1,088,683.34/3 & = & 362,894.45 \\
 \$100,000.00/3 & = & \underline{33,333.33} \\
 & & 1,759,244.99
 \end{array}$$

(ii) Subparagraph (a) of Article FOURTH

Subparagraph (a) of Article FOURTH provides, in pertinent part, as follows: “one-third (1/3) to my niece-in-law, POPIE LOWN ROBERTS, . . . less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her . . . under the preceding bequest.” The plain language requires the amount calculated above, which is equal to \$1,759,244.99, be allocated to the Petitioner.

The phrase continues by stating “less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her . . . under the preceding bequest.” Giving these words their ordinary and plain meaning, this phrase can have no meaning or effect other than a reduction in the amount calculated above by the sum of \$1,000,000. Mathematically, the amount calculated above, reduced by the \$1,000,000, equals \$759,244.99.

Each residuary beneficiary shares the burden of the expenses of administration. Therefore, Popie Lown Roberts has been allocated one-third (1/3) share of the expenses which is equal to \$33,333.33. Reducing \$759,244.99 by \$33,333.33 results in \$725,911.66.

As part of the Petitioner’s one-third (1/3) share of the gross probate estate, the Decedent

directed that the Petitioner be allocated the tangible personal property with a value of \$88,683.34 under Article SECOND.

The balance of the Petitioner's one-third (1/3) share consists of \$637,228.32 of residual cash that comprises the residuary assets. In other words, the Petitioner receives a total of \$1,725,911.66, which consists of the tangible personal property of \$88,683.34, the sum of \$1,000,000.00 and the residual cash of \$637,228.32.

(iii) Subparagraph (b) of Article FOURTH

Subparagraph (b) of Article FOURTH provides, in pertinent part, as follows: "one-third (1/3) to the FRANKE HOME AT SEASIDE, ..." The plain language requires the amount calculated above, which is equal to \$1,759,244.99, be allocated to the Franke Home. Again, each residuary beneficiary shares the burden of the expenses of administration. Therefore, Franke Home has been allocated one-third (1/3) share of the expenses which is equal to \$33,333.33, which results in a total of \$1,725,911.66 being devised to the Franke Home.

(iv) Subparagraph (c) of Article FOURTH

Subparagraph (c) of Article FOURTH provides, in pertinent part, as follows: "one-third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, ..." The plain language requires the amount calculated above, which is equal to \$1,759,244.99, be allocated to MUSC. Again, each residuary beneficiary shares the burden of the expenses of administration. Therefore, MUSC has been allocated one-third (1/3) share of the expenses which is equal to \$33,333.33, which results in a total of \$1,725,911.66 being devised to MUSC.

C. A Court May Not Use Extrinsic Evidence to Rewrite the Plain, Unambiguous Language of the Will

In essence, the Petitioner has asked the Court to "re-write the plain language of the will" so that the Petitioner receives the tangible personal property, the sum of \$1,000,000 and one-third (1/3) of the residuary assets. *Fabian*, 483 S.E.2d at 476. The Petitioner would have the court "doctor the part" of the Will that reduces her share by the \$1,000,000, as explained in

Section B, 3 (ii), above. *Id.* To achieve this result, the Petitioner has asserted an ambiguity exists and that extrinsic evidence should be introduced to aid the Court in the construction of the Will but does not identify the language of the Will that is ambiguous.

1. Admissibility of Extrinsic Evidence

The Respondents object to the introduction of the deposition testimony of Mr. Cabaniss and the testimony of Mrs. Roberts on two grounds: (1) the Dead Man's Statute excludes testimony by a witness incompetent to testify and (2) the testimony is hearsay.

(i) The Dead Man's Statute Excludes Testimony by a Witness Incompetent to Testify

S.C. Code Ann. § 19-11-20, known commonly as the Dead Man's Statute, is directed at the competency of certain witnesses to testify about transactions or communications with a decedent. The bar is not directed at the testimony itself; rather, the bar is directed at a witness's competency. In *Estate of Mason v. Mason*, the Court of Appeals elucidated the crucial distinction between the Dead Man's Statute and the Hearsay Rule: "By preface to discussion of the Dead Man's Statute, we note that this statute is directed not to the admissibility of evidence but to the competency of the witness; the testimony, otherwise admissible, of non-interested persons is inadmissible perforce of Section [19-11-10]... ."

The rules which determine the admissibility of evidence, and the Dead Man's Statute is not one of them, include, among others, Rules 801 through 806 of the South Carolina Rules of Evidence ("SCRE"), i.e. the Hearsay Rules. In no event does the Dead Man's Statute abrogate the applicability of the Hearsay Rules. Both the Dead Man's Statute and the Hearsay Rules must be analyzed to determine (1) if a witness is competent to testify, and (2) if the testimony of an otherwise competent witness is admissible.

In addition, the Dead Man's Statute is a bar to the competency of Mr. Cabaniss to testify about the [Decedent's intent]. The Statute provides:

...no party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him. S.C. Code Ann. § 19-11-20.

In this case, Mr. Cabaniss, who was the Decedent's lawyer that drafted the Will, was in an attorney-client relationship with her. He has offered deposition testimony, as well as a sworn affidavit, regarding the Decedent's purported testamentary intent that is contrary to the plain language of the Will. If the Court rules that the Decedent's Will expresses a different intent than what Mr. Cabaniss has testified was the Decedent's purported testamentary intent, the Petitioner will have a malpractice claim against Mr. Cabaniss. Thus, Mr. Cabaniss has an "interest that may be affected by the direct, legal operation and effect" of the Court's construction action. Havird v. Schissell, 252 S.C. 404, 412, 166 S.E.2d 801, 805 (1969). Because Mrs. Lown is deceased and Mr. Cabaniss's claims cannot be contradicted, Mr. Cabaniss is not a competent witness and his testimony is barred by the Dead Man's Statute. In addition to Mr. Cabaniss being incompetent to testify by application of the Dead Man's Statute, Mr. Cabaniss's testimony must also be analyzed under the Hearsay Rules, which also act as a bar to the admission of the evidence.

(ii) SCRE 802 and 804 Exclude Hearsay Testimony

Pursuant to South Carolina Probate Code §62-1-107, the Rules of Evidence in courts of general jurisdiction are applicable to proceedings in the probate court unless specifically displaced by the Probate Code.

SCRE 801 defines Hearsay as "a statement, other than one made by the Declarant while

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." SCRE 802 provides that hearsay is not admissible unless an exception so allows. SCRE 804 operates to exclude hearsay testimony offered by a witness regarding statements made by an Unavailable Declarant. SCRE 804(a)(4) defines an Unavailable Declarant as a witness "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."

Limited exceptions under SCRE 804(b) allow into evidence certain hearsay testimony. However, none of the exceptions under SCRE 804(b) apply in this case. Under S.C. Code Ann. § 19-11-20, the Dead Man's Statute is directed at the competency of the witness to testify, whereas SCRE 801 through 806 are directed at the admissibility of out of court statements.

For purposes of elucidation, Petitioner has attempted to admit extrinsic evidence by his witness, Mr. Cabaniss, which is excluded by the Hearsay Rules, regardless of whether Mr. Cabaniss is competent to testify under the Dead Man's Statute. Mr. Cabaniss attempted to testify that the Decedent intended to dispose of her property in a manner that is contrary to what the Decedent's Will expressly provides. Even though the Dead Man's Statute makes him incompetent to testify, SCRE 802 bars hearsay testimony unless an exception applies. SCRE 804(a) defines Mrs. Lown as an Unavailable Declarant because she is deceased. Obviously, the Hearsay Rules apply to situations in which the Declarant is deceased. Since none of the exceptions under SCRE 804(b) apply to the statements allegedly made by Mrs. Lown to Mr. Cabaniss, the testimony offered by Mr. Cabaniss is textbook hearsay, and must be excluded by the Court.

Therefore, in all instances in which proper objection by the Respondents was made in this case, SCRE 802 and SCRE 804 operate to exclude hearsay testimony offered by a witness regarding statements made by the Decedent, Mr. Cabaniss, to the testifying witness, for which none of the exceptions in SCRE 804(b) apply, regardless of the application or non-application of the Dead Man's Statute.

2. Determination of Ambiguity

Despite these objections as to the admissibility of the extrinsic evidence, the Court has determined to allow the extrinsic evidence to be introduced to assist it in the determination of whether any ambiguity exists. Although *Hyman* appears to authorize a court to consider such extrinsic evidence in the determination of whether an ambiguity exists, the weight of such extrinsic evidence supports the conclusion that the Decedent understood what the Will provided, that the language of the Will speaks for itself, and that there is no ambiguity in the Will.

The Petitioner has failed to identify what language in the Decedent's Will is ambiguous. In paragraph 11 of the Petition to Construe the Will, the Petitioner states "While the language in Paragraph 4 of the will is ambiguous, the true and legal intent" Further, in paragraph 13, the Petition provides, in pertinent part, "Nevertheless, the claims of respondents, and the language of the decedent's will, especially Paragraph four, have rendered the will uncertain and ambiguous." Nowhere does the Petitioner actually identify how the language of the Will is ambiguous.

The deposition testimony of Joe Cabaniss, who drafted the Decedent's Will, confirms in numerous places that the Will speaks for itself and that there is no ambiguity. For instance, Mr. Cabaniss testified that the provisions of Article FOURTH "speak for themselves, and that's what Mrs. Lown wanted done at the time. (Cabaniss, Deposition at 13). Mr. Cabaniss testified that he did not think there is any ambiguity in the Will. (Cabaniss, Deposition at 16-17). Mr. Cabaniss testified that the Decedent "read the [will] and knew what it contained. She was an intelligent woman, and she understood, I'm sure everything that was in it." (Cabaniss, Deposition at 22-23) Mr. Cabaniss further testified that the language of the will is clear and the language set forth in subparagraph A speaks for itself. (Cabaniss, Deposition at 35).

Consistent with the rules set forth in the *Estate of Hyman*, after reviewing the extrinsic evidence, unless the Court finds that specific language in Decedent's Will is ambiguous, the Court must exclude such extrinsic evidence and allow the plain language of the Will control.

III. CONCLUSIONS

The Petitioner has suggested two theories, each of which fails. First, the Petitioner has suggested that the drafting lawyer omitted a word that would have altered the disposition of the property under Article FOURTH. Although the Petitioner acknowledges that the Will can be performed as is, the Petitioner would have this court rewrite Article FOURTH in order to obtain a better result than the Decedent intended, as expressed in her Will. Second, the Petitioner has suggested that the reduction of the Petitioner's share calculated under Article FOURTH by \$1,000,000 is "unfathomable." As explained above, under the Respondent's construction of the language of the Will, the Petitioner receives the \$1,000,000 under Article THIRD but does not receive more than one-third (1/3) of the net probate estate. This result is certainly not "unfathomable"; rather, it is exactly what the Decedent intended.

In essence, the Petitioner has sought to introduce extrinsic evidence in an effort to redraft the Decedent's Will to achieve a more favorable result than what the actual, plain language of the Will requires. The Petitioner does not dispute that the Decedent's Will can be performed exactly as it is written. The Respondents have offered a very detailed explanation of how the Decedent's Will is performed exactly as it is written and the Petitioner has not provided any explanation to the contrary. In the absence of any language that is ambiguous, South Carolina law requires that the plain language of the Decedent's Will be given effect.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE PROBATE COURT

CASE NUMBER: 2011-ES-10-276

Popie Lown Roberts,

Petitioner

vs.

the Health Sciences Foundation of The Medical
University of South Carolina, The Franke Home,
Inc., d/b/a The Franke Home at Seaside, Elizabeth
Ann Doscher Kepley, Caryl Gilmore Doscher Morgan,
William Frederick Schneider, Joseph Emil Schneider,
Katherine Delaine, Marcia Molinari, Mark D.
Hollingsworth, Jr., Barbara Kay Staples, Wendell Rawls,
Charles H. Rumpel, III, John D. Rumpell, Barbara P.
Brown, Carol Odesky and Georgina Louise Pace
a/k/a Gina Pace, Edward Fischer Kornahrens, Jr.,
Donovan Paul Kornahrens, Byrle Kornahrens, Paula K.
Kirlpatrick, Erline Arolda Lide Hayden Vaughan,
Lamar Harper, Helen H. Cook, Gwendolyn H. Barnes
Kathleen Lide Saussy, Caroline Lide Ogburn, Arnold K.
Harper, Jr., Caroline Harper Rivers, Arnold K. Peterson
Rev. Douglas Kornahrens, Julie Ann George, Amy Tuten,
Anne Delette Kornahrens, Ruther Pierrene Coleman
Johnson, Eleanor M. Rogers and Waldemar White
Kornahrens, The Estate of Caroline Bischoff Lown and
JOHN DOE, a fictitious name used herein to designate
the unknown heirs at law, distributees, and/or devisees of
all persons claiming under or through the heirs of Amelia
Ahrens Bischoff and J.C.W. Bischoff and any such persons
who are minors or members of the Armed Forces of the
United States of America, as contemplated by the Service
Members Relief Act, collectively designated as
RICHARD ROE and all persons entitled to claim under
and through any of them,

Respondents.

IN THE MATTER OF THE ESTATE OF
CAROLINE BISCHOFF LOWN

ORDER

This matter is currently before this Court on a Petition to Construe the Last Will and Testament of Caroline Bischoff Lown. A hearing on the Petition was held on January 31, 2012 in the Charleston County Probate Court before the Honorable Judge Tamara C. Curry. The Court, after considering the testimony taken at the hearing, and after review of the pleadings and supporting evidence submitted by the parties, finds and orders as follows:

A. Background

1. Caroline Bischoff Lown (the "Decedent"), at the time of her death, resided at 2 Bishop Gadsden Way, Apartment 1045, Charleston, Charleston County, South Carolina, and died on February 5, 2011.
2. At the time of her death, the Decedent owned and possessed property situated within Charleston County, South Carolina.
3. At the time of her death, the Decedent left a last will and testament dated June 1, 2005 (the "Will").
4. The Decedent's Will was duly admitted to probate as a valid will by the Probate Court of Charleston County, South Carolina, on February 18, 2011.
5. Popie Lown Roberts was named as the Personal Representative in the Decedent's Will, and on February 18, 2011, was duly appointed Personal Representative and qualified as the Personal Representative.
6. Popie Lown Roberts, as Personal Representative of the Estate of Caroline Bischoff Lown, filed the Initial Inventory and Appraisement on May 24, 2011, which was amended on June 10, 2011 (as amended, the "Inventory").
7. Popie Lown Roberts, as a beneficiary (the "Petitioner"), filed a Petition to Construe a Will (the "Petition") on April 25, 2011.
8. Health Sciences Foundation of the Medical University of South Carolina, now known as The Medical University of South Carolina Foundation ("MUSC") and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc. ("Franke Home", and together with MUSC, the "Respondents") have responded to the Petition.

9. In essence, the Petition raises two issues for the Court's determination in the construction of the Decedent's Will: (1) whether an intestacy exists under the Decedent's Will and (2) whether the language of the Will is ambiguous.

B. Intestacy

10. The Petitioner went to great lengths to identify all maternal and paternal heirs of the Decedent, as outlined in the Petition.
11. At the request of the Petitioner, this Court appointed a Guardian ad Litem to represent any minor, incompetent, disabled heirs who would otherwise be unable to defend the Petition.
12. On September 20, 2011, Angela Kirby, Esq., of Rogers Townsend & Thomas, P.C., filed an Answer on behalf of one or more of the intestate heirs of the Decedent.
13. On January 30, 2012, Darra James Coleman, Esq. of Rogers Townsend & Thomas, P.C., on behalf of its clients, Elizabeth Ann Doscher Kempley and Caryl Gilmore Doscher Morgan, withdrew the Answer previously filed on September 20, 2011 and confirmed to the Court that these intestate heirs do not intend to attend or otherwise participate in the hearing scheduled for Tuesday, January 31, 2012.
14. At the Hearing, the Guardian ad Litem presented no evidence of any intestacy.
15. Section 62-2-604(b) of the South Carolina Code of Laws (the "Code") provides that if the residue of an estate is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.
16. Article FOURTH of the Decedent's Will is a residuary devise with three residuary devisees, and, pursuant to Section 62-2-604, if a share fails, it passes to the other residuary devisees.
17. I find that no part of the Decedent's estate passes pursuant to intestacy.

C. Construction of a Will

18. Section 62-1-102 of the Probate Code, entitled "Purposes; Rules of construction," provides, in part, as follows:

(b) The underlying purposes and policies of this [Probate] Code are: . . . (2) to discover and make effective the intent of a decedent in the distribution of his property. . . S.C. Code. Ann Section 62-1-102(b).

19. Section 62-2-601 of the Probate Code, entitled "Rules of construction and intention," provides, in part, as follows: "The intention of the testator as expressed in his will controls the legal effects of his disposition."
20. The Reporter's Comments to this Section note: "Section 62-2-601 states the first principle of the construction of wills, that the testator's intention as expressed in the will controls, a codification of South Carolina case law."
21. The Court of Appeals in the *Estate of Hyman*, 606 S.E.2d 205, 207, 362 S.C. 20 (Ct. App. 2004) set forth the procedure for how courts should construe a will as follows:

In construing a will, a court should give effect to the expressed intention of the testator. In ascertaining this intent, a court's first reference is always to the will's language itself. When construing this language, the reviewing tribunal must give the words contained in the document their ordinary and plain meaning. Where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. Only when the will's terms or provisions are ambiguous may the court resort to extrinsic evidence to resolve the ambiguity. (internal citations omitted; emphasis added).

22. Although the Petitioner has asserted that the Will is ambiguous and that extrinsic evidence should be introduced to ascertain the Decedent's intent, the Court must first look to the language of the Will, give the words of the Will their ordinary and plain meaning, and ascertain the intent from these words. Only if the Court finds that the terms or provisions of the Will are ambiguous may it resort to extrinsic evidence to resolve this ambiguity.
23. Having reviewed the terms and provisions of the Will, I find that the Petitioner receives all of the Decedent's tangible personal property with a value of \$88,683.34 under Article SECOND and that these terms are not ambiguous.
24. I find that the plain language of Article THIRD requires that the Petitioner receive the sum of \$1,000,000 and that these terms are not ambiguous.

25. I find that the plain language of the first full paragraph of Article FOURTH requires that the Decedent's gross probate estate with all debts, expenses and taxes be calculated and divided equally among the three residuary beneficiaries.
26. Using the values from the Inventory, "[t]he rest and residue of my estate" under Article FOURTH refers to the value of the gross probate estate (\$5,277,734.96) that remains after the payment of the specific bequests under Articles SECOND and THIRD (\$88,683.34+\$1,000,000.00), which equals \$4,189,051.62 ($\$5,277,734.96 - \$1,088,683.34 = \$4,189,051.62$).
27. "[T]he payment of the specific bequests" under Article FOURTH refers to the bequests of tangible personal property with a value of \$88,683.34 and the sum of \$1,000,000.00 disposed of under Articles SECOND and THIRD.
28. The phrase "with all debts, expenses and taxes" under Article FOURTH refers to a negative number determinable at the end of the administration of the estate, which for purposes of calculations may be estimated with a value of \$100,000.00.
29. "The rest and residue of my estate" (\$4,189,051.62 as determined above) after the payment of "all debts, expenses, and taxes" using the estimated value of \$100,000.00 equals \$4,089,051.62 (the "Article FOURTH Residuary Property").
30. The Decedent intended to divide her gross probate estate equally among the three residuary beneficiaries, and, using the numbers outlined above ($(\$4,189,051.62 + \$1,088,683.34 - \$100,000.00) / 3 = \$1,725,911.65$), each residuary beneficiary receives a total value of the gross probate estate equal to \$1,725,911.65.
31. The Petitioner's 1/3 share of the gross probate estate is comprised of (1) tangible personal property with a value of \$88,683.34 under Article SECOND, (2) the \$1,000,000.00 bequest under Article THIRD and (3) the balance of the 1/3 share of the gross probate estate, equaling \$637,228.31, which is a portion of the Article FOURTH Residuary Property that flows under Article FOURTH.
32. After the devise of \$637,228.31 to Petitioner under Article FOURTH, the remaining balance of the Article FOURTH Residuary Property is \$3,451,823.31 which, when

divided equally between Franke Home and MUSC, results in a value of \$1,725,911.65, or 1/3 of the total value of the gross probate estate, as calculated above.

D. Ambiguity

33. In the Petition and at the Hearing, the Petitioner asserted the language of the Will is ambiguous and, at the Hearing, sought to introduce extrinsic evidence to show that an ambiguity exists.
34. Under the *Estate of Hyman*, the Court is allowed to consider extrinsic evidence to determine whether an ambiguity exists, and if the Court determines that an ambiguity does not exist, must exclude such extrinsic evidence in determining the Decedent's intent.
35. The Court admitted the testimony of the Joe Cabaniss, the drafting lawyer of the Decedent's Will and the testimony of Popie Lown Roberts, to assist in the determination of whether an ambiguity exists.
36. The deposition testimony of Joe Cabaniss, who drafted the Decedent's Will, confirms in numerous places that the Will speaks for itself, the Decedent knew what the Will stated, and that there is no ambiguity.¹
37. Mr. Cabaniss also testified that the Will is clear that the "[the Petitioner] is to get the first million and everybody else, including [the Petitioner], that is, the [Respondents] plus [the Petitioner], would equally split up what's left over."²
38. The testimony of Mr. Cabaniss, however, does not address what the Decedent intended by the statement "less, however, the sum of \$1,000,000," which was included in Section 4(a) of the residuary clause of Article FOURTH.

¹ Mr. Cabaniss testified that the provisions of Article FOURTH "speak for themselves, and that's what Mrs. Lown wanted done at the time. (Cabaniss, Deposition at 13). Mr. Cabaniss testified that he did not think there is any ambiguity in the Will. (Cabaniss, Deposition at 16-17). Mr. Cabaniss testified that the Decedent "read the [will] and knew what it contained. She was an intelligent woman, and she understood, I'm sure everything that was in it." (Cabaniss, Deposition at 22-23) Mr. Cabaniss further testified that the language of the will is clear and the language set forth in subparagraph A speaks for itself. (Cabaniss, Deposition at 35).

² Cabaniss, Deposition at 17.

39. In the *Estate of Fabian*, 326 S.C. 349, 483 S.E.2d 474, 476 (Ct. App. 1997), the Court of Appeals stated "where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. We can neither 'redraft the [w]ill, nor may we doctor a crucial part.'"
40. The ordinary and plain meaning of the words "less, however, the sum of \$1,000,000" requires a reduction in the amount determined under Article FOURTH, paragraph (a) by such amount.
41. Although Mr. Cabaniss's testimony suggests that Mr. Cabaniss thinks the Decedent may have intended a testamentary construction in direct contradiction to the plain meaning of the will's language, this testimony is not enough to show that an ambiguity exists or that the language "less, however, the sum of \$1,000,000" should be ignored.
42. I find that the Decedent's will must be read in the ordinary and grammatical sense of the words employed, as set forth above, and that there is no obvious absurdity, repugnancy or inconsistency with the declared intention of the Decedent.
43. Having reviewed the extrinsic evidence and the language of the Decedent's Will, I find that the extrinsic evidence must be excluded and the Decedent's intent is ascertainable from the plain language of the Decedent's Will and not counter to law.

E. Admissibility of Evidence

44. I find that Mr. Cabaniss is a witness incompetent to testify under the Dead Man's Statute because the Petitioner has a vested claim against Mr. Cabaniss that depends on the outcome of this action.
45. I find that Mr. Cabaniss's testimony is excludable hearsay under the Rule 802 of the South Carolina Rules of Evidence and does not fall within one of the exceptions under Rule 804(b).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That no part of the Decedent's estate passes pursuant to intestacy;
2. That the Petitioner receives the tangible personal property under Article SECOND, the sum of \$1,000,000.00 under Article THIRD and the sum of \$637,228.31 under Article

FOURTH provided, however, that the foregoing number under Article FOURTH be adjusted when the total amount of debts, expenses and taxes is determined;

3. That the Franke Home and MUSC each receives \$1,725,911.65 under Article FOURTH; provided, however, that the foregoing numbers be adjusted when the total amount of debts, expenses and taxes is determined; and

IT IS SO ORDERED!

Tamara C. Curry, Judge of Probate
For Charleston County

Charleston, South Carolina

_____, 2012

THE STATE OF SOUTH CAROLINA
In The Circuit Court

APPEAL FROM CHARLESTON COUNTY
Probate Court

Honorable Judge Tamara C. Curry, Probate Judge

Case No. 2011-ES-10-276

FILED

13 MAY 15 PM 3:09

PROBATE COURT
CHARLESTON COUNTY

Popie Lown Roberts,

Respondent,

v.

**The Health Sciences Foundation of The Medical
University of South Carolina and The Franke Home,
Inc., d/b/a The Franke Home at Seaside,**

Appellant.

**_____
GROUNDS OF APPEAL**

**Robert M. Kunes, Esq.
Andrew W. Chandler, Esq.
David H. Kunes, Esq.
EVANS CARTER KUNES & BENNETT, P.A.
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)**

**Attorney for Appellant, The Health Sciences Foundation
of the Medical University of South Carolina, now known
as The Medical University of South Carolina Foundation
and The Lutheran Homes of South Carolina, Inc., as
successor by merger to The Franke Home, Inc.**

On April 25, 2011, Popie Lown Roberts (the "Respondent") filed a Petition to Construe a Will in the Estate of Caroline Bischoff Lown (the "Decedent") for which the Appellants filed an Answer and Counterclaim on June 28, 2011. A hearing on the Petition and pleadings submitted in connection therewith was held on January 31, 2012 ("January 31, 2012 Hr'g"). The Appellants submitted their proposed order and a memorandum of law in support of the proposed order on February 21, 2012 and the Court issued its order on June 26, 2012 (the "Order"). Appellants filed a Motion for Reconsideration of the Order and a hearing was held on October 31, 2012. The Probate Court, having reconsidered its Order, the testimony and arguments at the hearings, and after review of the pleadings and supporting evidence submitted by the parties, issued an Order Granting in Part and Denying in Part the Motion for Reconsideration, dated April 4, 2013 (the "Amended Order").

Appellants filed a Notice of Intent to Appeal on April 17, 2013. Appellants herewith file the Grounds for Appeal.

- I. The Probate Court erred in finding that the testimony of Joseph W. Cabaniss, Esq., the decedent's attorney and drafter of the Will, is admissible hearsay and is not barred by either the Dead Man's Statute or the Parol Evidence Rule.**

A. Hearsay

Rule 801(c) of the South Carolina Rules of Evidence ("SCRE") defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 802 of SCRE provides that "hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."

Rule 804 of SCRE provides as follows:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

In its Order, dated June 26, 2012, the Probate Court finds that "the testimony [by Mr. Joseph W. Cabaniss, Esq.] concerning Mrs. Lown's statements and instructions to Mr. Cabaniss . . . is hearsay." However, the Court finds that "[e]ven though the testimony is hearsay, it falls within one of the exceptions to the hearsay rule," specifically, Rule 804(a)(4) which addresses a situation in which a witness is unavailable because of death.

Appellants do not contend that Mrs. Lown is "unavailable as a witness;" rather, Appellants contend that when a declarant is unavailable, there are four exceptions to the general rule that hearsay is inadmissible:

(1) former testimony, (2) a statement under belief of impending death, (3) a statement against interest, and (4) a statement of personal or family history. Mrs. Lown's statements and instructions to Mr. Cabaniss do not constitute former testimony, do not constitute a statement under belief of impending death, do not constitute a statement against her interest and do not constitute a statement of personal or family history. Accordingly, the Court's ruling that the testimony by Mr. Joseph W. Cabaniss, Esq. is admissible as an exception to the Hearsay Rule is erroneous and such evidence must be excluded in the Probate Court's construction of the Decedent's Last Will and Testament ("Last Will").

B. Dead Man's Statute

Appellants contend that the Court erred in concluding that Mr. Joseph W. Cabaniss, Esq. is not an "interested person" within the meaning of the Dead Man's Statute. S.C. Code Ann. § 19-11-20, known as the "Dead Man's Statute" provides, in relevant part, as follows:

[N]o person who has a legal or equitable interest which may be affected by the event of the action or proceeding, . . . shall be examined in regard to any . . . communication between such witness and a person at the time of such examination deceased . . . as a witness against a party then prosecuting or defending the action as . . . devisee or survivor of such deceased person . . . , when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness

Put simply, if the Probate Court finds that the Decedent's testamentary intent is contrary to what Mr. Cabaniss has testified is the Decedent's purported testamentary intent, the Respondent may have a legal malpractice claim against the drafting attorney. Thus, by signing an affidavit that directly contradicts the plain language of the Decedent's Last Will, Mr. Joseph W. Cabaniss, Esq. has an "interest that may be affected by the direct, legal operation and effect" of the Probate Court's construction action. Havird v. Schissell, 252 S.C. 404, 412, 166 S.E.2d 801, 805 (1969).

Because Mrs. Lown is deceased and Mr. Cabaniss's claims cannot be contradicted, Mr. Cabaniss is not a competent witness and his testimony is barred by the Dead Man's Statute.

C. Parol Evidence Rule

The parol evidence rule operates to prevent the introduction of extrinsic evidence to contradict, vary, or explain the otherwise clear and unambiguous terms of the Decedent's Last Will. In its Amended Order, the Probate Court finds the testamentary phrase in Item FOURTH (a) "less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars paid to her, or her issue, under the preceding bequest" is the equivalent sentence as though it said "after, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars paid to her, or her issue, under the preceding bequest." (emphasis added).

Appellants contend that the Court used the testimony by Mr. Joseph W. Cabaniss, Esq. as the basis for varying the otherwise clear and unambiguous terms of the Decedent's Last Will. The word "less" and the word "after" have very different meanings and the Parol Evidence Rule prohibits the Court from substituting a different word ("after") for an otherwise clear and unambiguous term ("less") of the Decedent's Last Will.

II. The Probate Court erred in its construction of the Last Will by relying on extrinsic evidence to determine the Decedent's testamentary intent instead of first construing

the plain language of the Last Will itself.

The guiding principles for the construction of the Last Will are set forth in the South Carolina Probate Code.

Section 62-1-102. Purposes; rules of construction.

(b) The underlying purposes and policies of this [Probate] Code are: . . . (2) to discover and make effective the intent of a decedent in the distribution of his property. . . S.C. Code. Ann. Section 62-1-102(b).

Section 62-2-601. Rules of construction and intention. "The intention of the testator as expressed in his will controls the legal effects of his disposition." The Reporter's Comments note: "Section 62-2-601 states the first principle of the construction of wills, that the testator's intention as expressed in the will controls, a codification of South Carolina case law." The statute could not be clearer in its language as to how to construe a will and the case law is consistent with this mandate.

The Court of Appeals in the *Estate of Hyman*, 606 S.E.2d 205, 207, 362 S.C. 20, 25-26 (Ct. App. 2004) set forth the procedure for how courts should construe a will as follows:

In construing a will, a court should give effect to the expressed intention of the testator. In ascertaining this intent, a court's first reference is always to the will's language itself. When construing this language, the reviewing tribunal must give the words contained in the document their ordinary and plain meaning. Where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. Only when the will's terms or provisions are ambiguous may the court resort to extrinsic evidence to resolve the ambiguity. (internal citations omitted; emphasis added).

In the *Estate of Fabian*, 326 S.C. 349, 483 S.E.2d 474, 476 (Ct. App. 1997), the Court of Appeals stated "where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. We can neither 'redraft the [w]ill, nor may we doctor a crucial part.'" (citing *Limehouse v. Limehouse*, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971)). In construing the language of a will, the Court must give words their ordinary plain meaning unless it is clear the testator intended a different sense, or unless such meaning would lead to an inconsistency with the testator's declared intention. *Fabian*, 326 S.C. at 353, 483 S.E.2d at 476. The Court of Appeals in the *Estate of Gill*, 397 S.C. 419, 427, 725 S.E.2d 516, 520 (Ct. App. 2012) emphasized that a court, "in construing the provisions of a will," must make "every effort . . . to determine and carry out the intention of the testator." (emphasis added).

For an ambiguity to exist, the words of the will, when applied to the object or subject which they describe must be "incapable of application as they stand." *Boykin v. Capehart*, 205 S.C. 276, 279, 31 S.E.2d 506, 508 (1944). "The mere showing that a testator may have intended a testamentary construction in direct contradiction to the plain meaning of the will's language is not enough. As the supreme court has stated, '[a] will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy or inconsistency with the declared intention of the testator' should follow." *Hyman*, 606 S.E.2d at 208-209 (internal citations omitted).

In light of the Probate Code's underlying purposes and policies, and following the reasoning and analysis of the Court of Appeals in *Hyman* and *Fabian*, the Probate Court's first reference in determining the Decedent's intent, as expressed in the Last Will, must be the actual language of the Last Will itself. Instead of first reading the Last Will and employing the ordinary and grammatical sense of the Decedent's

words, the Probate Court allowed extrinsic evidence to assist it in the determination of the Decedent's testamentary intent. (January 31, 2012 Hr'g at 12, 32-33, and 53). By failing to ascertain "what the [Decedent] meant by the terms used in the written instrument itself" and by failing to consider each item of the Decedent's Last Will in relation to other portions, the Probate Court misapplied the applicable law and reached its conclusion based on an error of law. *Kemp v. Rawlings*, 594 S.E.2d 845, 849, 358 S.C. 28, 34 (2004); *Estate of Gill*, 397 S.C. at 426, 725 S.E.2d at 520; See also *Polson v. Craig*, 351 S.C. 433, 437-438, 570 S.E.2d 190, 192 (stating "[a]n action involving the construction or interpretation of will is an action at law and the findings of the trial judge will only be disturbed on appeal when they are based on an error of law")(emphasis added).

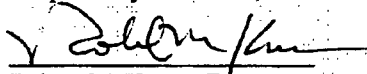
Notwithstanding the objections to and the inadmissibility of such extrinsic evidence, the weight of such evidence supports the conclusion that the Decedent understood what the Last Will provided, that the language of the Last Will speaks for itself, and that there is no ambiguity in the Last Will. Consistent with the rules set forth in the *Estate of Hyman*, after reviewing the extrinsic evidence, unless the Court finds that specific language in Decedent's Last Will is ambiguous, the Court must exclude such extrinsic evidence and allow the plain language of the Last Will to control.

Appellants have previously offered a construction of the Decedent's Last Will that gives the Decedent's words their ordinary and plain meanings without the need for extrinsic evidence. Notably, the Respondent acknowledges that the Last Will can be performed exactly as it is written but then argues that extrinsic evidence should be admitted to determine the Decedent's true testamentary intent. (January 31, 2012 Hr'g at 16-18.) In spite of the Appellants' construction of the Decedent's words, the Probate Court finds that, based on the inadmissible extrinsic evidence, the words "less" and "after" are interchangeable and in essence re-writes the plain language of the Decedent's Last Will.

CONCLUSION

The Probate Court improperly admitted testimony that should have been excluded as inadmissible hearsay and is otherwise barred by the Dead Man's Statute and Parol Evidence Rule. Using this improperly admitted extrinsic evidence without first employing the Decedent's words in an ordinary and grammatical sense, the Probate Court altered the clear and unambiguous language of the Decedent's Last Will and Testament. For these foregoing reasons, the Probate Court erred in its June 26, 2012 Order and April 4, 2013 Amended Order.

Respectfully submitted,



Robert M. Kunes, Esq.

Andrew W. Chandler, Esq.

David H. Kunes, Esq.

EVANS CARTER KUNES & BENNETT, P.A.

P.O. Box 369

Charleston, SC 29402

(843) 577-2300

(843) 577-2055 (fax)

Attorney for Appellant, The Health Sciences Foundation
of the Medical University of South Carolina, now known
as The Medical University of South Carolina Foundation
and The Lutheran Homes of South Carolina, Inc., as
successor by merger to The Franke Home, Inc.

May 15, 2013

THE STATE OF SOUTH CAROLINA
In The Circuit Court

APPEAL FROM CHARLESTON COUNTY
Probate Court

Honorable Judge Tamara C. Curry, Probate Judge

Case No. 2011-ES-10-276

Popie Lown Roberts,

Respondent,

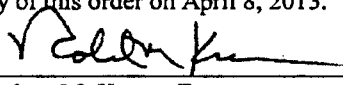
v.

The Health Sciences Foundation of The Medical
University of South Carolina and The Franke Home,
Inc., d/b/a The Franke Home at Seaside,

Appellant.

NOTICE OF APPEAL

Pursuant to S.C. Code Ann. §62-1-308(a), the Health Sciences Foundation of the Medical University of South Carolina, now known as The Medical University of South Carolina Foundation ("MUSC") and The Lutheran Homes of South Carolina, Inc., as successor by merger to The Franke Home, Inc. ("Franke Home") hereby give notice of their intention to appeal the order of the Honorable Judge Tamara C. Curry dated April 4, 2013. Appellant received written notice of entry of this order on April 8, 2013.


Robert M. Kunes, Esq.
Andrew W. Chandler, Esq.
David H. Kunes, Esq.
EVANS CARTER KUNES & BENNETT, P.A.
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)

Attorney for Appellant, The Health Sciences Foundation
of the Medical University of South Carolina, now known
as The Medical University of South Carolina Foundation
and The Lutheran Homes of South Carolina, Inc., as
successor by merger to The Franke Home, Inc.

April 17, 2013
Charleston, South Carolina

Other counsel of record:

Michael R. Daniel
P.O. Drawer 200
Elloree, S.C. 29047
Attorney for Respondent
(803) 897-4600
(803) 897-4606 (fax)

STATE OF SOUTH CAROLINA IN THE PROBATE
COURT
COUNTY OF CHARLESTON CASE NO.:
2011-ES-10-276

POPIE LOWN ROBERTS,
Petitioner,

-vs-

THE HEALTH SCIENCES FOUNDATION OF THE
MEDICAL
UNIVERSITY OF SOUTH CAROLINA, THE FRANKE
HOME, INC.,
d/b/a THE FRANKE HOME AT SEASIDE, ELIZABETH
ANN DOSCHER
KEPLEY, CARYL GILMORE DOSCHER MORGAN,
WILLIAM FREDERICK
SCHNEIDER, JOSEPH EMIL SCHNEIDER, KATHERINE
DELAINE,
MARCIA MOLINARI, MARK D. HILLINGSWORTH,
JR., KAY

STAPLES, WENDELL RAWLS, CHARLES H. RUMPEL,
III, JOHN D.

RUMPELL, BARBARA P. BROWN, CAROL ODESKY
AND GEORGINA

LOUISE PACE a/k/a GINA PACE, EDWARD FISHER
KORNAHRENS,

JR., DONOVAN PAUL KORNAHRENS, BYRLE
KORNAHRENS, PAULA

K. KIRLPATRICK, ERLINE ARNOLDA LIDE HAYDEN
VAUGHAN,

ANNE DELETTE KORNAHRENS, RUTH PIERRENE
COLEMAN JOHNSON,

ELEANOR M. ROGERS AND WALDEMAR WHITE
KORNAHRENS, THE

ESTATE OF CAROLINE BISCHOFF LOWN AND JOHN
DOE, a

fictitious name used herein to designate the unknown
heirs at law, distributees, and/or devisees of all
persons claiming under or through the heirs of AMELIA
AHRENS BISCHOFF AND J.C.W. BISCHOFF and any
such

persons who are minors or members of the Armed Forces
of the United States of America, as contemplated by the
Service Members Relief Act, collectively designated as
RICHARD ROE, and all persons entitled to claim under
and through any of them,

Respondents.

B E F O R E: Honorable Tamara C. Curry

THE PROBATE HEARING taken on behalf of the
Petitioner, on January 31, 2012, commencing at 1:00
p.m., at the Historic Courthouse, 84 Broad Street,
Charleston, South Carolina, 29401.

Reported by: Douglas K. Liperote

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APPEARANCES

2

3 FOR THE PETITIONER:

4 MICHAEL R. DANIEL, Esq.
Attorney at Law
5 P.O. Box Drawer 200
Elloree, SC 29407
6 (803) 897-4600

7
8 FOR THE RESPONDENT LUTHERAN/MUSC:

9 ROBERT M. KUNES, Esq.
ANDREW W. CHANDLER, Esq.
DAVID KUNES, Esq.
10 Evans, Carter, Kunes & Bennett
11 115 Church Street
Charleston, SC 29401
(843) 577-2300
12 Kunes@ECKB.com

13
14 FOR THE ESTATE OF CAROLINE BISCHOFF LOWN:

NICHOLAS C. SOTTILE, Esq.
15 Sottile & Hopkins
1037 Chuck Dawley Blvd., Bldg G
16 Mt. Pleasant, SC 29464
(843) 884-1464
17 nsottile@shd-law.com

5.45

18 ALSO PRESENT: ROBERT C. STONE, Esq.

Guardian ad Litem

19 1037 Chuck Dawley Blvd, Bldg G

Mt. Pleasant, SC 29464

20 (843) 284-5786

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3 EXHIBITS

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5 Page

6

7 1 Inventory and Appraisement 19

8 2 Affidavit 42

9 3 Affidavit 42

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1 THE COURT: Ladies and gentlemen,

2 this is the estate of Caroline -- is it Lown?

Page 7

3 MR. KUNES: Lown.

4 THE COURT: And we have a petition
5 to construe a will. We have the petitioner listed as
6 Popie Roberts who's being represented by Attorney
7 Michael Daniel, and we have the Medical University of
8 South Carolina who's being represented by Attorney --
9 is it Robert Kunes?

10 MR. KUNES: Yes, ma'am.

11 THE COURT: Are you all ready to
12 proceed?

13 MR. KUNES Your Honor, if I may, our
14 firm also represents the Lutheran Homes, another
15 beneficiary in the document.

16 THE COURT: Okay. Do you all have

17 opening remarks, statements or any preliminary matters

18 we need to address before we begin?

19 MR. KUNES: Your Honor, I presume

20 your file reflects the receiving a fax yesterday from

21 the other party, Ms. Coleman, who withdrew her answer,

22 so it will only be Mr. Daniel and I here today.

23 THE COURT: Correct.

24 MR. KUNES: Ms. Coleman represents

25 two of the intestate heirs.

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1 THE COURT: Okay. Thank you. Yes,

2 sir?

3 MR. SOTILLE: If I may, Your Honor,
4 I'm Nick Sottile and I represent the personal
5 representative in her capacity as such and not
6 individually as a devisee regarding the will
7 construction, but I'm here and I thought you should
8 know it.

9 THE COURT: Do you want to sit up
10 here?

11 MR. SOTTILE: Pardon?

12 THE COURT: Would you like to sit up
13 here?

14 MR. SOTTILE: Oh, I'm fine. Thank
15 you.

16 THE COURT: Yes, sir.

17 MR. DANIEL: And, Your Honor, I'm
 18 Mike Daniel and I do represent Popie Roberts who is the
 19 Petitioner and Plaintiff in this matter. Mr. Kunes is
 20 going to correctly identify the two charities he
 21 represents because I think I've misidentified them, or
 22 there's been some change in the identity.

23 MR. KUNES: Your Honor, that's
 24 correct. It's the Medical University of South Carolina
 25 Foundation and the Lutheran Homes. They're indicated

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1 in the will as The Franke Home. The Franke Home, of
 2 course, is in Mt. Pleasant. Lutheran Homes is the

3 statewide umbrella organization charity.

4 THE COURT: Okay.

5 MR. DANIEL: And we have agreed to
6 substitute those as the proper parties and respondents
7 in this matter.

8 THE COURT: Okay.

9 MR. DANIEL: Your Honor, have you
10 had the occasion to read the will in this case?

11 THE COURT: I have not.

12 MR. DANIEL: Perhaps I'll just --
13 it's not a long will, and according to its drafter, Joe
14 Cabaniss, it's not a complex will, it's a simple will.
15 And, therefore, maybe I can paraphrase to Your Honor's
16 satisfaction. But this is a matter -- Ms. Lown died in

17 February of last year, and she had left a will, a last
18 will and testament that you have a copy of, I believe I
19 saw in front of you, dated June 1, 2005. And in that
20 will there are three specific devisees. There's Popie
21 Roberts and the two charities. What Mr. Cabaniss had
22 done in the will was to provide for, according to the
23 testator's intentions and desires, that Ms. Roberts,
24 under the second item of the will, leave -- would get
25 all the tangible personal property. Then in the third

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1 item she was to get \$1 million. Then the fourth is the
2 residuary clause, and in that clause it is the preamble

3 to that fourth. It says says, "I direct the rest and
4 residue" --

5 THE COURT: What section are you
6 referring to?

7 MR. DANIEL: Section 4, the one
8 paragraph preamble at the top before you start 4 a, b
9 and c.

10 "I direct that the rest and residue of my
11 estate, the payment of the specific bequests, with all
12 debts, expenses and taxes, be divided and I bequeath
13 and devise as follows." Then you've got 4 a, b and c.
14 And in each of those a, b and c, he leaves the three
15 devisees one-third of the residuary estate with one
16 further glitch, that being in Popie's part of that,

17 4a, he included "less, however, the sum of \$1 million."

18 So, Your Honor, I think what the

19 charities have argued here is that this will is clear

20 and unambiguous in that in the residuary clause and the

21 preamble, the testator has itemized those things that

22 are to, quote, "be divided," and that's the rest and

23 residue, the specific bequest, which would include

24 tangible personal property and the \$1 million, and the

25 debts, expenses and taxes. So their theory of this

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1 will, that they claim to be clear and unambiguous, is

2 that Ms. Roberts and the two charities would all end up

3 with exactly the same amount of money; that everything
4 is going to be divided evenly, debts and expenses,
5 including the specific bequest that preceded Item 4.
6 So what they're saying in essence is, let's take the
7 tangible personal property, or the value of it, let's
8 take the \$1 million that we just gave her, take it back
9 away from her, and throw it all back into the kitty and
10 then divide everything equally three ways. That's what
11 they would have the court do.

12 Your Honor, and I refer to Mr. Sottile
13 who does a lot more of the estate work than I do, but I
14 am convinced after reading this thing that, literally,
15 you could do -- Mr. Sottile agrees, I believe, and tell
16 me if I'm wrong, but you could perform this will

17 exactly as it's written. That is, you give Popie the
18 \$1 million and give Popie the tangible personal
19 property, and then under Item 4 you take all that
20 property back and you put it back into the till and you
21 split it up into thirds. You could do all that. But
22 what you can't do, or what is unfathomable to us, is
23 that after you've done all that, then of Popie's
24 one-third, which would be about \$1.7 million, you take
25 \$1 million away from her, but that same provision in

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1 the will doesn't say what to do with the million
2 dollars. It just says, less and except that \$1 million

3 from the Item 3, and with no instruction as to what to
4 do with it. Well, without any instruction what to do
5 with it, it would pass, arguably, to the heirs of her
6 estate. Popie was not an heir, per se. She's not a
7 blood relative of the testator. She is the
8 niece-in-law, but was very, very close as it is obvious
9 and is evidenced by the fact that she was so well
10 provided for in this will.

11 But as the Court knows, there's a strong
12 presumption against any portion of property going --
13 passing by intestacy when there's a will which purports
14 to dispose of the property. A strong presumption that
15 that shouldn't happen. Well, in this case, Your Honor,
16 these heirs, and we have evidence, and we'll submit the

17 evidence, will show that these heirs were all very
18 distant relatives; they had no relationship with the
19 testator. There was no regular communications, no
20 family reunions. And, in fact, in her obituary, it's
21 recited that she died leaving no other heirs. All that
22 being said, we believe that creates in all this
23 language that some of it's superfluous, some it appears
24 maybe to have left out a word -- had Joe Cabaniss put
25 the word "after" before he started reciting these

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1 things that are being divided after the payment of the
2 specific bequest, then the property -- the rest of the

3 estate be divided would make a lot more sense. Or if
4 the specific bequest was to the third party and not one
5 of the devisees themselves it would make more sense.
6 You might use that language if we're bequeathing Joe
7 Blow and Jane Row a certain amount and then everything
8 else to these other three devisees, but it makes no
9 real sense, and raises a flag about the possibility of
10 an ambiguity when you taketh with the left hand and
11 give it back with the right hand. If you want to leave
12 this estate evenly in thirds, then one item will do:
13 "I divide all my estate equally three ways after the
14 payment of taxes and expenses, et cetera," but it
15 wasn't done that way.

16 So we then look to see whether or not

17 there is, in fact, an ambiguity, and whether or not we
18 need this extrinsic evidence to prove what her true
19 intent was, which, as you know, Your Honor, is what
20 we're all here for. And to our good fortune, Joe
21 Cabaniss is a healthy 90-plus-year-old lawyer who's
22 been practicing for 60 years and is still with us,
23 still healthy, still of very sound mind, and he's the
24 one who drafted the will, and he's the one who
25 conferred with Ms. Lown, and he's got to be the only

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1 person walking on the face of this earth who knows
2 exactly what Ms. Lown wanted straight from the horse's

3 mouth so to speak.

4 And so we, in order to defer to his age,

5 we took his deposition, and I have the original here,

6 Your Honor, and I'll pass up a sealed copy.

7 Interestingly, enough, Mr. Cabaniss is of the opinion

8 that there's no ambiguity in this will, it's as simple

9 as it can possibly be, and that Popie was supposed to

10 get the property -- personal property. She was

11 supposed to get the \$1 million, and the three of them

12 were supposed to split what was left over. Simple as

13 that. And if that be the case, and if the Court finds

14 that, in fact, Mr. Cabaniss is right, well, then the

15 discussion ends right there. However, if the Court

16 finds that there's a question of, did this testator

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17 mean to carve out this \$1 million and then just leave
18 it floating without specifying where it should go, then
19 I believe if you look at Mr. Cabaniss' deposition
20 you'll see that clearly was not her intent, and he
21 should know because he spoke to her directly.

22 So we're asking in this declaration, Your
23 Honor, that the Court, A, determine whether there's an
24 ambiguity or whether it's, as Mr. Cabaniss states, it's
25 perfectly clear. And if there is this ambiguity

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1 concerning this \$1 million and what to do with the \$1
2 million, then we need to look beyond the corners of the

Page 23

3 will and at the -- to determine the intent of the
4 testator and look at the extrinsic evidence, which
5 would include Ms. Roberts' testimony and Mr. Cabaniss'
6 testimony. I implore the Court not to myopically focus
7 just on that Item 4 preamble, which is what I think the
8 charities would have you do, and say there's no
9 ambiguity, because this phrase and this little portion
10 here is clear and doesn't need an interpretation.
11 Well, I've got case law, Your Honor, that says that you
12 can't look at one little paragraph or one phrase of the
13 entire document and decide because it doesn't appear to
14 be ambiguous here, then the whole will is not
15 ambiguous. You have to look at the entire document.
16 When you look at this document as a whole and the

17 provisions for Item 2 and the provisions for Item 3,
 18 it's clear what was intended here, and we're asking the
 19 Court to adhere to the testator's wishes and do what
 20 the testator wanted done.

21 THE COURT: Mr. Kunes?

22 MR. KUNES: Your Honor, my name is
 23 Bob Kunes and I represent, as I indicated, both
 24 Lutheran Homes and the Medical University of South
 25 Carolina.

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1 The state's statutes in South Carolina,
 2 the Probate code, Your Honor, we believe are very

3 clear. They clearly indicate that the purpose of the
4 Probate code is to ascertain the decedent's intent with
5 regard to the disposition of property. This is a
6 construction action to determine the construction of
7 the will. Our state's statutes, again, are clear,
8 indicating that the intention of the testator as
9 expressed in his will controls legal effect of
10 dispositions. So we would ask the Court to examine the
11 statutes to consider whether or not any testimony is
12 even pertinent. We would also ask the Court to
13 consider the Hyman case heard by the Court of Appeals
14 here in South Carolina a number of years ago.

15 THE COURT: You said -- what's the
16 name of the case?

27'45

17 MR. KUNES: Hyman, H-y-m-a-n. And I
18 have a copy of the statutes and this case that I'd like
19 to present to Your Honor, if I may, at the appropriate
20 time.

21 THE COURT: Yes, sir.

22 MR. KUNES: Your Honor, this statute
23 clearly indicates that the underlying purpose and
24 policies of the code are to discover and make effective
25 the intent of the decedent in the distribution of his

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1 property. Section 62-601 indicates the intention of
2 the testator as expressed in his will controls the

Page 27

3 legal effect of his disposition. These statutes could
4 not be clearer with regard to how a court approaches a
5 construction proceeding. I'll also ask the Court to
6 consider the Hyman case, and I have a copy I'd like to
7 give to the Court.

8 The Hyman case involved a case not
9 dissimilar from this case in one sense, Your Honor, in
10 that there was an action brought to concerning whether
11 or not there would be a construction of the will and
12 whether or not the will was ambiguous. I'd like to
13 call the Court's attention to the language on page 2 of
14 this opinion, because I think it cuts to the heart of
15 the matter initially in terms of how the Court disposes
16 this case.

17 Under the section "Law/Analysis," I've
18 highlighted the Court's language which says, "In
19 construing a will, a court should give effect to the
20 expressed intention of the testator. In ascertaining
21 this intent, a court's first reference is always to the
22 will's language itself. When construing this language,
23 the reviewing tribunal must give the words contained in
24 the document their ordinary and plain meaning. Where
25 the testator's intent is ascertainable from the will

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15

1 and not counter to law, we will give it effect. Only
2 when the will's terms or provisions are ambiguous may

3 the court resort to extrinsic evidence to resolve the
4 ambiguity."

5 Your Honor, I have here a copy of the
6 will that I've annotated showing how the assets shown
7 in the probate inventory would be applied under the
8 provisions of the will. I do not believe the will is
9 ambiguous. Therefore, the provisions of the will
10 should govern the disposition. At the appropriate
11 time, I'd like to ask Your Honor to allow me to submit
12 a copy of this will with the data showing the
13 disposition of assets under the provisions of the will.

14 THE COURT: Okay. Your response?

15 MR. DANIEL: Well, Your Honor, I've
16 looked quickly at this Hyman case and I do have a

17 plethora of cases that deal with ambiguity and the
18 court's duties and what their goal is. And it all to
19 me goes back to this wonderful book right here, Coleman
20 Karesh's book on wills, which is ancient. It was
21 ancient when I got it in law school and it's still
22 ancient. And yet all of the law that has come since
23 this with regard to ambiguity and latent and patent
24 ambiguities as discussed in this Hyman case, and the
25 need to introduce extrinsic evidence is all in a

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1 two-page summary in Coleman Karesh's book, and I
2 couldn't do a better job of summarizing the applicable

3 law here.

4 I don't dispute any of what Mr. Kunes
 5 says with regard to the law to be applied here. It's
 6 in the application of the law itself that we believe
 7 that we can show you that there's a problem here that
 8 needs to be resolved through the reference to Mr.
 9 Cabaniss' deposition and the testimony of Ms. Roberts.
 10 So, on those grounds, Your Honor, we are ready to
 11 proceed. We have a very short testimony from Ms.
 12 Roberts, and then the deposition of Mr. Cabaniss
 13 himself, so.

14 MR. KUNES: Your Honor, again, I
 15 would object to any witnesses being called until the
 16 Court makes a determination that under the principles

17 set forth in the Hyman case that the Court cannot apply
 18 the facts to the will without any ambiguity. I'd like
 19 to ask the Court's indulgence to allow me to present a
 20 copy of the will with the data from the inventory and
 21 have the Court examine how the data in the will --
 22 excuse me, how the data in the inventory is applied in
 23 the will.

24 THE COURT: Okay. Do you have that
 25 information?

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17

1 MR. KUNES: I do, Your Honor.

2 THE COURT: Can you provide

17 Lown intended. Thank you, Your Honor.

18 THE COURT: Any response to that,

19 sir?

20 MR. DANIEL: Well, Your Honor, yeah.

21 The problem that I have with going through this

22 accounting procedure, and it's a little convoluted,

23 that Mr. Kunes would have us come through, to try and

24 arrive at the ultimate result that he desires, is that

25 in this computation, he is taking the \$1 million from

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24

1 Popie and putting it back into the kitty, if you will,

2 the rest and residuary clause, and then saying, okay,

3 everybody is entitled to a third of that figure, not
4 just the \$1 million, but also the value of the tangible
5 personal property, not the tangible personal property
6 itself, but the \$88,000 value, and throw that all back
7 into the kitty and then divide by thirds, and then say
8 that, okay, everybody is entitled to \$1.75 million, but
9 Popie has already gotten \$1 million, and she's already
10 gotten \$88,000 worth of personal property, and then
11 where that goes is a debit against her column of
12 entitlement, and the rest of us get the extra cash,
13 none of which explains how the quantum leap is made
14 from basically the three of them divying up this \$1
15 million, to paragraph 4A that doesn't specify what's to
16 be done with that \$1 million, just that it's to be

17 subtracted from her share. Clearly, there's an
18 ambiguity there, and clearly the Court needs to hear
19 the testimony to resolve that issue.

20 And, also, this testimony can be tendered
21 not only to help the Court in resolving the ambiguity,
22 but in the Court's determination as to whether or not
23 an ambiguity exists at all. Because in so many of
24 these cases, at first glance, there doesn't appear to
25 be an ambiguity in the will. We've got cases where the

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1 testator referred to giving everything to her
2 "brothers." Well, we all know what a brother is. And

3 yet the court allowed extrinsic evidence to allow a
4 step-child to step in and say, although I wasn't a
5 blood brother, he always referred to me as a brother;
6 it's in the obituary that I was a brother, and all this
7 evidence shows that I was intended to be included in
8 that group or class. And that's the kind of evidence
9 that was needed, and is needed in this case, to
10 determine whether or not these heirs actually were
11 intended to receive a \$1 million which she had
12 previously given to Popie, or just what the testator's
13 intent was. And so, Your Honor, we would ask to be
14 allowed to move forward on our offer of evidence and on
15 those issues.

16 THE COURT: Anything further? The

17 Court is going to take a short recess.

18 MR. KUNES: Your Honor, if I may
19 just kind of briefly, again, I think the Hyman case is
20 clear in its principles that if the language on the
21 will is easily interpreted as it is here when you apply
22 the facts to it, the Court doesn't need to go beyond
23 the language of the will itself in construing the
24 provisions and the intent of the decedent.

25 THE COURT: Thank you. Anything

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1 further before I take a short recess?

2 MR. DANIEL: No, ma'am.

3 MR. KUNES: Your Honor, just so I'm
4 clear on the record, I don't believe Mr. Daniel has yet
5 proffered that deposition, and I would object to that.

6 THE COURT: He has not. You haven't
7 proffered the deposition, you just provided the
8 deposition to the Court, but it hasn't been admitted or
9 anything?

10 MR. DANIEL: No, Your Honor. I was
11 willing to offer it, or proffer it, depending on the
12 Court's -- because he asked that you first rule on
13 whether or not we even unseal the deposition. And, you
14 know, we resolve that, and depending on the Court's
15 resolution of that, I'll either offer or proffer.

16 MR. KUNES: Thank you, Your Honor.

17 THE COURT: Thank you. Let me have
18 a few moments, please.

19 (Whereupon, a short recess
20 was taken.)

21 THE COURT: After having an
22 opportunity to review the statute and some of the case
23 law that's been provided, the Court believes that the
24 language in the will is not easily interpreted and
25 believes that there is an ambiguity in regards to the

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1 plain language of this particular will, and that we
2 should proceed.

3 MR. DANIEL: Thank you, Your Honor.

4 In that case, the first matter, I would now like to
5 offer the deposition, de bene esse, of Attorney Joe
6 Cabaniss, and I've already handed up the sealed
7 original of that deposition. Everyone agreed it would
8 be de bene esse and useable at trial, depending on the
9 judge's ruling, as you just ruled.

10 THE COURT: Attorney Kunes?

11 MR. KUNES: Your Honor, we would
12 object to the admission of that deposition as evidence
13 in this matter for two reasons. The first is the
14 hearsay rule. Mr. Cabaniss would be testifying about
15 conversations he had with someone who's not here today
16 to testify. That, of course, also ties into the Dead

17 Man's statute. Mr. Cabaniss was Mrs. Lown's lawyer, he
18 prepared the document. But part of the documents that
19 are contained in this deposition are Affidavits as to
20 Mr. Cabaniss' interpretation of the will.

21 I think the general rule that an attorney
22 may testify about a will is overridden here by the
23 financial interest that Mr. Cabaniss has in the outcome
24 of this matter. Mr. Cabaniss has opined in his
25 Affidavit that he gave to the estate as to his

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1 interpretation of the will. If his interpretation is
2 not found correct by this Court, I think he faces the

3 potential of a claim from a beneficiary as to the fact
4 that the will did not capture what Ms. Lown intended,
5 so I would object to the introduction of the
6 deposition.

7 MR. DANIEL: Your Honor, the Dead
8 Man's statute, obviously, does require a financial
9 interest in the outcome of the suit. I don't believe
10 that an incohet potential malpractice claim is the type
11 of interest that is contemplated by the Dead Man's
12 statute. He testifies in his deposition that he has
13 absolutely no interest in the outcome of the lawsuit.
14 It can go either way, and he doesn't care. As for
15 his --

16 THE COURT: Can he be called as a

17 witness? Is he able to come in?

18 MR. DANIEL: Well, he is, but we
19 took his -- I mean, depending on the time of day and
20 his health that day. You know, he's 94 years old.

21 THE COURT: Yes. That's why I'm
22 asking that question.

23 MR. DANIEL: That's why we did his
24 deposition de bene esse, so that either the whole thing
25 is admissible, or none of it is admissible, unless the

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1 Court had other questions it wanted to inquire about.

2 But the deposition is his testimony. He says in his

3 deposition what he would say if he were here; the whole
4 point of a de bene esse deposition.

5 THE COURT: Any further?

6 MR. KUNES: Again, Your Honor, I'll
7 reiterate that I do believe Mr. Cabaniss has a
8 financial interest in the outcome of this litigation.

9 THE COURT: And what would that be?

10 MR. KUNES: His risk would be, as
11 Mr. Daniel said, the possibility of a malpractice claim
12 if this Court found that the will is construed in a
13 fashion other than how he says it should -- how he says
14 Ms. Roberts intended to write it.

15 THE COURT: Anything else?

16 MR. DANIEL: As far as the hearsay,

17 Your Honor, clearly, Rule 804, the exception to hearsay
18 includes 804(4), when the declarant is unable to be
19 present or to testify at hearing because of death.
20 Well, we wouldn't be here today if the declarant wasn't
21 dead because the will wouldn't have taken effect yet.
22 So, clearly, the hearsay rule doesn't apply, and there
23 is no financial interest that Mr. Cabaniss is -- and
24 even if he had a financial interest, if his testimony
25 is contrary to his best interest, then he can still

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1 testify, even if he's got a financial interest, but he
2 doesn't.

3 MR. KUNES: Your Honor, I'll just
4 reiterate that I think it's very clear that he does
5 have a financial interest based upon this Court's
6 ruling.

7 THE COURT: I'm going to allow the
8 deposition.

9 MR. KUNES: All right. Your Honor,
10 for the record, I'd like to enter our objection to
11 that.

12 THE COURT: That's fine. Noted.

13 MR. DANIEL: Your Honor, I know that
14 you will read the deposition at your leisure. I will
15 point out now that it has been offered and introduced
16 as Plaintiff's Exhibit -- I'm not sure I introduced it

3 I also asked him if Ms. Lown had any
4 legal training, and he said she did not. Thank you.

5 THE COURT: Okay. Any response to
6 any of the other attorneys, Attorney Daniel or Attorney
7 Kunes?

8 MR. KUNES: No, Your Honor.

9 MR. DANIEL: No, Your Honor.

10 THE COURT: Thank you. Call you
11 next witness.

12 MR. DANIEL: Popie Roberts.

13 THE COURT: You can come forward,
14 ma'am?

15 * * *

16 POPIE ROBERTS, having been first

17 duly sworn, testified as hereinafter set forth.

18 DIRECT EXAMINATION

19 BY MR. DANIEL:

20 Q. You're Popie ROberts?

21 A. Yes, I am.

22 Q. And you're the petitioner in this action?

23 A. Yes, I am.

24 Q. And you're one of the devisees of Caroline

25 Lown?

□

36

1 A. Yes.

2 Q. What relation are you to Ms. Lown?

3 A. She is my aunt by marriage.

4 Q. By marriage. So your uncle was her
5 husband?

6 A. Yes.

7 Q. And what was his name?

8 A. Walden Eugene Lown.

9 Q. And he predeceased Mrs. Lown?

10 A. Yes.

11 Q. How close were you to your aunt?

12 A. Very close.

13 Q. How frequently would you visit your aunt?

14 A. Probably every two months probably,
15 holidays.

16 Q. And you live up in Easley?

17 A. Yes.

18 THE COURT: If you could speak up
19 just a little and pull the mike down.

20 Q. You live up in Easley?

21 A. Yes, I do.

22 Q. And she lived in Mt. Pleasant?

23 A. Right.

24 Q. In addition to visiting personally every

25 couple of months, did you speak on a regular basis?

□

37

1 A. Yes, we talked once a week.

2 Q. Did you know before we started this lawsuit

3 who all these other heirs were?

4 A. No, I did not.

5 Q. Do you know whether or not any of these

6 heirs are -- and when I say "heirs," of course, I'm

7 talking about the heirs that after the fact and as part

8 of this litigation we assembled the names and addresses

9 for. Do you know whether or not any of those folks

10 regularly communicated with Ms. Lown?

11 A. No, they did not.

12 Q. Were there ever any family reunions where

13 these people attended?

14 A. No, huh-uh.

15 Q. Have you ever even heard of these people?

16 A. No.

17 Q. When all this controversy arose after the
18 death of Ms. Lown and attempting to administer the
19 estate, were you tasked with finding out a family
20 history and arriving at this list of who her heirs
21 really were, who these distant relatives were?

22 A. Yes, I was.

23 Q. And also to the best of your ability to get
24 addresses for all these people?

25 A. Yes.

□

38

1 Q. And did you do that?

2 A. Well, there wasn't much to find. I mean,

3 it was so far back, and, you know --

4 Q. To the best of your ability --

5 A. Yes, uh-huh.

6 Q. -- did you do that?

7 A. I did it to the best of my abilities. I

8 went through the family papers, everything that I had

9 gotten, and...

10 Q. Now, you've read your petition in this

11 lawsuit, and you've read the recitation of the family

12 history and who these heirs are. Did it appear

13 accurate to you to the best of your knowledge?

14 A. Yes.

15 Q. And did it accurately reflect your

16 research?

17 A. Yes.

18 Q. When Ms. Lown died, was there an obituary
19 in the newspaper?

20 A. Yes, there was.

21 Q. And did the obituary identify any of these
22 other heirs?

23 A. No, it did not.

24 Q. Did it specifically mention the existence
25 or nonexistence?

□

39

1 A. It said that this was the end, there were
2 no more family members. I guess in her eyes.

3 Q. I'm sorry. You have to speak up.

4 A. I said I guess in her eyes there were none
5 more.

6 Q. Thank you, Popie. That's all I've got.

7 THE COURT: Attorney Kunes, any
8 questions for this witness?

9 MR. KUNES: No, Your Honor. Oh, I'm
10 sorry. I may. I apologize. There is one thing I'd
11 like to ask Ms. Roberts.

12 CROSS-EXAMINATION

13 By MR. KUNES.

14 Q. Ms. Roberts, I'm Bob Kunes. I know we met
15 earlier. Would you tell me where your aunt worked
16 during her career?

17 A. At the Medical University and the College
18 of Charleston.

19 Q. Approximately how long had she worked for
20 the Medical University?

21 A. Probably -- I think 20-something years.

22 MR. KUNES: Thank you.

23 THE COURT: Any questions?

24 MR. SOTTILE: No, Your Honor.

25 THE COURT: Okay. Thank you.

□

40

1 MR. KUNES: Your Honor, I apologize.

2 We have not called the Court's attention; Chilton Stone

3 THE COURT: Any additional
4 witnesses?

5 MR. DANIEL: No, ma'am.

6 THE COURT: Attorney Kunes?

7 MR. KUNES: Your Honor, I have no
8 witnesses at this time. Certainly, we're willing to
9 stipulate that the will disposed of all the assets. As
10 the Court knows, Section 62-2604 indicates that if
11 there had been a lapse of any of the residuary
12 beneficiaries while other residuary beneficiaries
13 survived, those remaining residuary beneficiaries take.
14 I don't think there's any question the will disposed of
15 all the assets and there are no intestate takers, from
16 that perspective.

17 MR. SOTTILE: If I may, Your Honor,
 18 my interpretation of what I think Mr. Kunes is talking
 19 about, he talks about failure of the residuary devise,
 20 and there is no failure in this case. But I do agree
 21 that the intestate heirs were not intended to take.

22 THE COURT: Attorney Daniel, any
 23 response to that?

24 MR. DANIEL: Your Honor, I just
 25 would reaffirm what Mr. Sottile said, 604 doesn't

□

42

1 apply, there's been no failure. And I believe there
 2 may be an ambiguity, and probably is an ambiguity that

3 needs to be resolved in favor of the petitioner for all
 4 the reasons and all the evidence before the Court.
 5 Given the evidence before the Court, there can be one
 6 conclusion with regard to the resolution of the
 7 ambiguity. It's clear that -- what the testator
 8 intended.

9 THE COURT: Anything further from
 10 any of the attorneys?

11 MR. KUNES: Your Honor, just as a
 12 matter of clarification, if I may. With regard to my
 13 comments on the provisions of 62-2604, I would remind
 14 the Court that the statute says that if there is a
 15 failure -- Mr. Daniel had alluded earlier to the
 16 possibility of what happened to the \$1 million. If

17 that were deemed to be a failure by the Court, the
 18 other residuary beneficiaries I think under the statute
 19 will take that.

20 Your Honor, I would like to -- since
 21 you've allowed the introduction of the deposition of
 22 Mr. Cabaniss, I would like to introduce Affidavits from
 23 The Franke Home, the Lutheran Homes and the Medical
 24 University with regard to the giving history of Ms.
 25 Lown to demonstrate her interest in those

□

43

1 organizations.

2 THE COURT: Any objections?

3 MR. DANIEL: Yes, ma'am. They're
4 hearsay. I've never even seen them, never heard of
5 them before.

6 THE COURT: Will you allow him to
7 look at those you what to propose, and Attorney
8 Sottile, and also the GAL if you have enough.

9 MR. DANIEL: Well, Your Honor, two
10 grounds: A, they're clearly hearsay. And B, I fail to
11 see the relevance. I mean, I don't mind the Court
12 looking at them, whether or not the Court wants to --

13 THE COURT: Well he wants to have
14 them admitted. Am I correct?

15 MR. KUNES: Yes.

16 MR. DANIEL: And, you know, object

17 on the grounds, clearly, they're hearsay, and secondly
 18 on the grounds of relevance. What they purport to do
 19 is attach a history of the monies that Ms. Lown has
 20 given to these charities over the years. Isn't that
 21 what it does?

22 MR. KUNES: Yes.

23 MR. DANIEL: And I guess my question
 24 is, so what?

25 THE COURT: Relevance?

□

44

1 MR. KUNES: Your Honor, I would
 2 suggest that these items go to show why Ms. Lown wished

3 again to benefit these charities as generously as she
4 did.

5 THE COURT: Attorney Sottile?

6 MR. SOTTILE: Your Honor, I just
7 have to echo Mr. Daniel's objections.

8 THE COURT: Okay, sir? I'm going to
9 allow them, and that would be Respondents 1 and 2.

10 (Whereupon, Exhibits 2 and 3 were
11 marked for identification.)

12 MR. SOTTILE: Thank you.

13 THE COURT: Anything further?

14 MR. KUNES: No, Your Honor.

15 MR. DANIEL: Nothing from the
16 petitioner.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE PROBATE COURT

IN RE: THE ESTATE OF CAROLINE BISCHOFF LOWN

CASE NO. 2011-ES-10-276

HEARING BEFORE: HONORABLE TAMARA C. CURRY
DATE: October 31, 2012
TIME: 1:10 PM
LOCATION: Charleston County Courthouse
100 Broad Street, fourth floor
Charleston, SC
TAKEN BY: Counsel for the Petitioner
REPORTED BY: LORA L. McDANIEL,
Registered Professional Reporter

A. WILLIAM ROBERTS, JR. & ASSOCIATES

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1 APPEARANCES:

2 ATTORNEYS FOR THE PETITIONER
3 THE BENEFICIARIES:

4 EVANS, CARTER, KUNES & BENNETT, P.A.
5 BY: ROBERT M. KUNES
6 115 Church Street
7 Charleston, SC 29401
8 (843) 577-2300
9 kunes@eckb.com

10 ATTORNEYS FOR THE RESPONDENT
11 POPIE ROBERTS:

12 SOTTILE & HOPKINS
13 BY: NICHOLAS C. SOTTILE
14 1037 Chuck Dawley Blvd, Bldg G
15 Mt. Pleasant, SC 29464
16 (843) 884-1464
17 nsottile@shd-law.com

18 MICHAEL R. DANIEL LAW FIRM
19 BY: MICHAEL R. DANIEL
20 2737 Cleveland Street, Suite 101
21 Elloree, SC 29047
22 (803) 897-4600
23 mdaniel@daniellawfirm.net

24 ALSO PRESENT:

25 ROBERT C. STONE, GUARDIAN AD LITEM

1 THE COURT: Gentlemen, this is case number
2 2011-ES-10-276 in reference to the Estate of Caroline
3 Lown. We're here for a motion for reconsideration.
4 And we have a memorandum that's been filed in this
5 court of that reconsideration. Are we ready to
6 begin, Attorney Kunes?

7 MR. KUNES: We are, Your Honor.

8 THE COURT: Attorney Daniel?

9 MR. DANIEL: Yes, ma'am.

10 THE COURT: Proceed. We also have
11 Attorney Sottile?

12 MR. SOTTILE: Yes, Your Honor.

13 THE COURT: You represent one of the
14 charities; am I correct?

15 MR. SOTTILE: I represent the personal
16 representative.

17 THE COURT: Thank you.

18 MR. STONE: And I represent the guardian
19 ad litem, Chilton Stone.

20 THE COURT: Thank you. And you have
21 someone with you.

22 MR. KUNES: Your Honor, I have with me
23 David Kunes, who practices in our office as well.

24 Your Honor, with the Court's permission, I
25 would like to remain seated. I have a little bit of

1 respiratory problem. I'm not sure that --

2 THE COURT: No problem.

3 MR. KUNES: -- you will be able to hear me
4 as well.

5 THE COURT: Not at all. That mike moves
6 forward, if you need it moved.

7 MR. KUNES: Thank you.

8 Your Honor, as a reminder, this case is
9 before this Court as a result of a petition filed by
10 Ms. Popie Roberts following the death of Caroline
11 Lown asking this Court to construe Ms. Lown's Will.
12 Court held a hearing on January 31st and issued the
13 Order in June 2012.

14 Ms. Lown's Will had a specific gift of \$1
15 million to Ms. Roberts. Ms. Lown disposed of the
16 residue of her estate through a formula. And the PR
17 of the estate, who Mr. Sottile represents, sought
18 construction of the Will.

19 Mr. Daniel represents the beneficiary, Ms.
20 Popie Roberts in her individual capacity.
21 Mr. Sottile represents her in her capacity as a
22 fiduciary.

23 As Mr. Stone indicated, he serves as
24 guardian ad litem appointed by this Court.

25 There are two matters I would like to ask

1 the Court to reconsider; the first involves factual
2 findings and the second involves conclusion of law.

3 What I'd like to do to assist the Court,
4 if I may, is offer not into evidence but as a means
5 of making things clear, some extracts from
6 Mr. Cabaniss' deposition. If I may approach the
7 bench and give The Court that. I think that might
8 assist The Court in following me.

9 THE COURT: That's fine.

10 MR. DANIEL: Your Honor, don't you have
11 the original? I handed up the sealed original.

12 THE COURT: I have the sealed original.
13 It's next door with the exhibits.

14 MR. DANIEL: You won't need it. I want to
15 make sure it's filed with The Court.

16 THE COURT: Yes, sir.

17 MR. KUNES: Your Honor, The Court made 11
18 factual findings. We would ask The Court to consider
19 making some additional findings in a modified Order.
20 The findings we would like to ask The Court to
21 consider adding are highlighted in these materials
22 I've given you.

23 The Court has approved the authorization
24 and use of Mr. Cabaniss' deposition testimony. But
25 this testimony contains some facts that I think are

1 page 7 with regard to the Order. The first paragraph
2 on page 7 of the Order says: There's latent
3 ambiguity with regard to the terms of Ms. Lown's Will
4 as it pertains to the computation of the sums to be
5 distributed among the devisees requiring The Court to
6 consider extrinsic evidence of the testator's intent.

7 We would ask The Court to issue a finding
8 of what that latent ambiguity is. In South Carolina,
9 the Supreme Court, in a 1934 case, addressed the
10 definition of what ambiguity is. And the court said,
11 by adopting Black's Law dictionary: Ambiguity refers
12 to doubtfulness or doubleness of meaning.

13 We would ask that The Court clarify its
14 Order to issue a finding as to the specificity with
15 regard to what ambiguity is.

16 On page 9, in the second full paragraph,
17 The Court recites the language of the Will and notes
18 that it says: There is less, however, the sum of \$1
19 million paid to her, that is to Ms. Roberts, under
20 the preceding bequest.

21 We would ask The Court to make a finding
22 as to the effect of that provision saying, less the
23 sum of \$1 million paid to Ms. Roberts.

24 The Court continues on --

25 THE COURT: Repeat that again.

1 MR. KUNES: We would ask The Court to make
2 a finding as to the effect of that phrase that says:
3 Less the sum of \$1 million paid to Ms. Roberts.

4 Let me give an illustration. Clearly
5 Mrs. Lown wanted Ms. Roberts to have \$1 million. She
6 made a specific gift of that amount.

7 In the residuary clause, she said: Add
8 the residuary to what you made in specific gifts and
9 divide it three ways.

10 An illustration might help. Let me say
11 Ms. Lown had \$4 million. She said give \$1 million to
12 Ms. Roberts, leaving \$3 million as residuary. In the
13 residuary, she said: In dividing that residuary, add
14 back that million dollars and any other specific
15 gifts and divide it three ways.

16 If there were \$4 million in that
17 calculated figure -- \$1 million gift, \$3 million
18 residue -- she said divide that three ways so that
19 Mrs. Roberts got one-and-a-third million, each of the
20 two charities got one-and-a-third million.

21 She then said reduce Ms. Roberts' share by
22 \$1 million. So, effectively, Ms. Roberts got
23 one-third of \$1 million in my example. Each of the
24 charities got one and one-third million. That
25 disposes the entire residue. The entire \$3 million

1 residue is disposed of by the provisions of
2 Ms. Lown's Will.

3 I would suggest The Court has gotten --
4 has not made the calculations correctly in
5 determining what's here. It's not unusual for me to
6 have clients say: I want to leave a specific amount
7 to an individual. If I die with more than a
8 particular amount, I want that individual to share
9 some of the residuary. I want that individual's
10 share of the residuary to be offset by what I gave
11 him or her on the front end.

12 That's what Ms. Lown did here. She said:
13 If I only had \$1 million at death, I'm making a
14 specific gift to Ms. Roberts. If I happen to have a
15 lot more money, I want Ms. Roberts to get some of
16 that residuary, but I want it offset by the million
17 dollars I gave her under item three of her Will.

18 THE COURT: You conclude that from the
19 language in the residuary clause?

20 MR. KUNES: Yes, ma'am.

21 Again, the illustration is, if there's \$4
22 million in the estate, \$1 million gift, there's \$3
23 million in residuary, Ms. Lown in that language said:
24 After the residuary, the specific gift of \$1 million,
25 and divide it in this fashion.

1 The math works perfectly. And the math
2 illustrates clearly that Ms. Lown cleverly wanted to
3 benefit and prefer Ms. Roberts initially, if her
4 estate was fairly small.

5 If her estate was as large as it turned
6 out to be, she wanted her to get a third but not a
7 third plus the initial specific gift. Otherwise, she
8 would've not included that language that says: Less
9 the sum of \$1 million given to her in the preceding
10 bequest.

11 The Court has to give effect to that
12 language, that phrase in the Will because the math
13 works correctly if you do it in that fashion.

14 We would ask The Court additionally to
15 make a finding that item four is a residuary clause
16 in Mrs. Lown's estate.

17 In paragraph ten -- excuse me -- page 10
18 of the Order, I've highlighted language that says:
19 The Court also consider testimony of Ms. Roberts in
20 concluding a latent ambiguity exists, which is an
21 allowable use of extrinsic evidence.

22 I would ask The Court to make a finding as
23 to what in Ms. Roberts' testimony generated anything
24 that shows there to be an ambiguity. Ms. Roberts
25 testified with regard to her relationship to

1 Ms. Lown; that she was a niece-in-law. That she
2 didn't know other relatives. She didn't offer any
3 testimony that indicated that she in any fashion
4 found -- that led to find provisions of the Will were
5 ambiguous.

6 In the second full paragraph --

7 THE COURT: Which page?

8 MR. KUNES: On page 11. The Court's Order
9 reads: The charities further argue that The Court
10 finds in favor of the charities or the intestate
11 heirs.

12 I would like to ask The Court to modify
13 the Order. We did not argue there would be intestate
14 heirs. In fact, our contention is exactly the
15 opposite. If the Probate Code was modified in 1987
16 after the cases The Court cites, modified in 1987 as
17 described in the Reporter's comments as an
18 anti-failure provision, pro-residuary provision.

19 In the first full paragraph on page 13 of
20 the Order, The Court reaches a conclusion: It's
21 obvious from reviewing the entire document, the true
22 and legal effect of the last Will and Testament of
23 the decedent was to devise all personal property and
24 \$1 million to Petitioner, and the remainder after
25 debts, taxes, expenses and fees be split equally

1 among the Petitioners; and the two charities are
2 named.

3 We would ask The Court to make a finding
4 as to the facts that makes it obvious that was the
5 decedent's intent.

6 We would contend on the other hand that
7 the decedent's intent is clearly set forth in her
8 Will and carefully written, again, to favor
9 Ms. Roberts if there are not enough assets to pay
10 more than \$1 million; if there are assets the size
11 that were there, to divide the estate three ways.
12 And she could not have been clearer in the phrase:
13 Less the \$1 million that is taken from that residuary
14 share for Mrs. Roberts.

15 Your Honor, I would also ask that The
16 Court consider, as an admission, statement made by
17 Mr. Daniel in a hearing. Mr. Daniel said: I am
18 convinced, after reading this thing, that literally
19 you could do -- Mr. Sottile agrees, I believe, tell
20 me if I'm wrong -- you could perform this Will
21 exactly as it's written; that is, you give Popie the
22 \$1 million and give Popie the Tanning property.
23 Under item four, you take all that property back, and
24 you put it into the till, and you split it up into
25 thirds. You can do all that.

1 But what you can't do or what is
2 unfathomable to us, after you've done all that, then
3 Popie's one-third, which would be almost 1.7 million,
4 you take away 1 million from her. That same
5 provision of the Will doesn't say what to do with the
6 million dollars.

7 We would ask The Court to consider that an
8 admission by Mr. Daniel that the Will can be
9 administered as it reads, and if you make the
10 calculations correctly, there is not \$1 million left.
11 Again, the specific gift consumes part of the estate.
12 It's added back to the residuary. There is not \$1
13 million left if you do the math.

14 Your Honor, I'd also like The Court to
15 address a couple matters with regard to its legal
16 conclusions in the Order. The first relates to the
17 question of latent ambiguity. As I mentioned a
18 moment ago, in the Chapman versus Metropolitan Life
19 case, the South Carolina Supreme Court adopted, as
20 the definition of the term ambiguity: Doubtfulness
21 or double meaning.

22 The phrase in item 4-A, one-third to my
23 niece, Popie Lown Roberts, less the sum of \$1 million
24 is not doubtful or subject to a double meaning; it's
25 a clear reduction of that amount by Mrs. Lown.

1 We have noticed that on a number of
2 occasions Mr. Cabaniss testified that Ms. Lown read
3 the Will, that she was an intelligent woman, she
4 understood everything that was in the Will. The Will
5 was clear, in Mr. Cabaniss' opinion and that, in that
6 situation, the decedent knew everything that was in
7 the Will, according to his testimony.

8 If the decedent's intent was merely to
9 devise the article four residue among three-named
10 beneficiaries, then Ms. Lown would not have inserted
11 that phrase saying: Reduce Popie Robert's share by
12 \$1 million.

13 The Court, in its Order, addressed the
14 question of a possibility of the failure of some of
15 the gift and raises the possibility of intestacy. As
16 I alluded to a moment ago, the case law cited is
17 accurate and correct. It was superseded by the 1987
18 adoption of the Probate Code.

19 In section 62-2-604, the Probate Code
20 says: If the residue is devised to two or more
21 persons and the share of one residuary devisee fails
22 for any reason, his share passes to the other
23 residuary devisee or to the other devisees in
24 proportion to their interest in the residuary.

25 I respectfully suggest that while the

1 Order submitted by Mr. Daniel contained case law,
2 that case law had been overwritten by the Probate
3 Code adoption by the Legislation 1987, and that
4 there's a specific statute that says: In such
5 situation, there is no intestacy but rather the
6 residuary beneficiary's take.

7 We ask The Court, as part of our Answer to
8 the petition, to rule on declaratory judgment that
9 section did, in fact, prevent intestacy, and we ask
10 The Court to rule on its application in this matter.
11 We would reiterate that request in our motion here
12 for reconsideration by The Court.

13 I want to address the issue of hearsay and
14 Mr. Cabaniss' deposition. We objected to the
15 introduction of Mr. Cabaniss' deposition as being
16 hearsay. The Court overruled us and made a finding
17 that the testimony of Mr. Cabaniss offered through
18 his deposition was admissible.

19 As I review the Rules of Hearsay
20 Exceptions, Your Honor, I find that there are
21 exceptions to the hearsay rule and find that there
22 really are four exceptions to that with regard to
23 admissibility; the first is former testimony; the
24 second is statement of belief under impending death;
25 the third is a statement against interest; and the

1 fourth is a statement of personal or family history.

2 The Court finds that Mr. Cabaniss'
3 testimony was hearsay, but it falls within one of the
4 exception. We ask The Court to specify what
5 exception within those four rules that testimony
6 falls within.

7 Part of the reason that's important also
8 relates to the Dead Man Statute. Our contention was
9 that Mr. Cabaniss had an interest in this matter and
10 could not be a witness. The Court found that, based
11 on South Carolina case law, drafting lawyers could
12 testify. We do not dispute that fact. We understand
13 that; however, we contend, if Mr. Cabaniss had an
14 interest as a result of the way he prepared the Will
15 and its effect, then he no longer is available as a
16 witness.

17 As an example, if he were to testify that
18 Mrs. Smith's Will said divide the estate into three
19 shares, A, B, and C, while the Will actually said
20 give half to A, quarter to B, and quarter to C, he
21 clearly is going to have an issue with the
22 beneficiaries in those situations.

23 We would contend in this situation that
24 Mr. Cabaniss is an interested party and, therefore,
25 his testimony is blocked by the Dead Man Statute.

1 And we would ask The Court to reconsider its decision
2 about the allowance of his testimony based upon that
3 Dead Man Statute provision.

4 Finally, we also contend that his
5 testimony is precluded because of the parole evidence
6 rule. It modifies what otherwise is clear and
7 unambiguous terms of Mrs. Lown's Will; therefore, we
8 suggest that the testimony is barred by the Dead Man
9 Statute as well.

10 Most importantly though, I want to turn to
11 the construction of the Will. The statutes in South
12 Carolina clearly say: The purpose of the Probate
13 Code is to make sure that the intention of the
14 testator, as expressed in the Will, controls the
15 legal effects of his disposition.

16 The most recent case law in South Carolina
17 is Hyman, H-Y-M-A-N, case where that case cited four
18 Black letter law principals; the first being that, in
19 construing a Will, a court should give effect to the
20 expressed intention of the testator.

21 Second, in ascertaining intent, the
22 court's first reference is always to the Will's
23 language itself.

24 Third, when construing language, the court
25 must give -- the reviewing tribunal must give the

1 words contained in the document their ordinary and
2 plain meaning.

3 And fourth, where the testator's intent is
4 ascertainable from the Will and not counter to law,
5 the court will give it effect.

6 Our contention here, Your Honor, is asking
7 The Court to review the Will, particularly in view of
8 the fact that The Court has not made a ruling as to
9 the effect of the provisions saying: In residuary,
10 reduce Ms. Roberts' share by \$1 million.

11 We would note that The Court makes the
12 conclusion that the Will is unambiguous. The
13 residual assets are divided in thirds without regard
14 to whether or not there's latent ambiguity. We would
15 contend that the language of the Will is clear in of
16 itself.

17 In summary, your Honor, what we have here
18 is a Will that is not atypical of what we see. A
19 client, Mrs. Lown, who wanted to be sure that
20 Ms. Roberts got \$1 million, she wanted to be sure
21 that Ms. Robert shared in the residuary of what was
22 there. She directed specifically that, in her share
23 of the residuary, the personal representative take
24 into account the million dollar gift she made.

25 To reiterate my illustration, if she had

1 \$4 million, she gave \$1 million to Ms. Roberts. She
2 said: Add that million to the three million residue,
3 divide it three ways so Ms. Roberts gets
4 one-and-a-third million, each charity gets
5 one-and-a-third million, reduce Ms. Roberts
6 one-and-a-third million by \$1 million. That's what
7 we feel The Court has not given proper attention to.

8 Reduce it by \$1 million, and you have an
9 effective disposition of the residuary estate. The
10 residuary estate, again, is \$4 million; \$1 million
11 specific gift. That residuary stated three-million
12 goes one-and-one-third million to each charity, total
13 of two-and-two-third million and one-third to Ms.
14 Roberts. Ms. Roberts gets the same amount as the
15 charities in the formula provision that Ms. Lown has
16 put in this Will.

17 We think the language of the Will is
18 clear, and we would ask The Court to reconsider its
19 decision specifically with regard to the language it
20 says: In computing Ms. Roberts; residuary share,
21 it's to be reduced by the sum of \$1 million. Thank
22 you.

23 THE COURT: Attorney Daniel.

24 MR. DANIEL: Thank you, Your Honor. If I
25 may, I'm going to refer to Mr. Kune's just individual

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Popie Lown Roberts,)
Respondent,)
vs.) Case No.: 2013-CP-10-2243
The Health Sciences)
Foundation of The Medical)
University of South)
Carolina and The Franke)
Home, Inc., d/b/a The)
Franke Home at Seaside,)
Appellant.)

ORIGINAL

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE JUDGE J.C. NICHOLSON, JR.
ON DECEMBER 17, 2013

ROLAYNE M. VOLPE, CCR, RPR
Post Office Box 342
Summerville, South Carolina 29484

A P P E A R A N C E S

For the Respondent:

MICHAEL R. DANIEL
JAMES B. RICHARDSON, JR.

For the Appellant:

DAVID H. KUNES
ROBERT KUNES

Reported By:
Rolayne M. Volpe, CCR, RPR

2013-CP-10-2243
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DESCRIPTION

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(No exhibits were offered or admitted.)

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1 The above-styled cause came on for hearing on
2 the 17th day of December, 2013, at 3:36 p.m., before
3 Judge J.C. Nicholson, Jr., Active/Retired Judge,
4 presiding over the Circuit Court for the County of
5 Charleston, when the following proceedings were had and
6 entered of record, to wit:

7 PROCEEDINGS

8 THE COURT: Will the parties identify
9 themselves and who they represent, please.

10 MR. KUNES: Your Honor, my name is David Kunes,
11 and I'm here with my father, Robert Kunes, and we
12 represent the Medical University of South Carolina
13 Foundation and the Lutheran Homes of South Carolina.

14 THE COURT: Okay.

15 MR. RICHARDSON: Please the Court,
16 James Richardson with Mike Daniel representing the
17 Respondent, Popie Lown Roberts.

18 THE COURT: Okay. Be glad to hear from the
19 appellant.

20 MR. KUNES: May it please the Court, your
21 Honor, my name is David Kunes, and I'm here with my
22 father, Robert Kunes, and we represent the Medical
23 University of South Carolina Foundation and the Lutheran
24 Homes of South Carolina. This case is about the
25 construction of the Last Will and Testament of Caroline

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1 Lown and the Probate Court's reliance on inadmissible
2 evidence without first looking to the actual language of
3 the Will to determine Decedent's testimonial intent.

4 Just a few words about the standard review
5 here, your Honor. The standard -- I'm sorry, the review
6 depends on whether the underlying action is at law or in
7 equity. An action to construe a Will is an action at
8 law. An appellate court must correct errors of law and
9 should correct or overturn a lower court's findings of
10 fact if there is no evidence that reasonably supports
11 those findings.

12 Your Honor, we submit that the Probate Court
13 erred as a matter of law for two reasons --

14 THE COURT: Is it reasonableness or substantial
15 evidence? Which is the standard in probate?
16 Substantial evidence supports factual evidence or
17 reasonable --

18 MR. KUNES: No evidence that reasonably
19 supports the findings.

20 THE COURT: Okay. All right. Go ahead.

21 MR. KUNES: Your Honor, we submit that the
22 Probate Court erred as a matter of law for two reasons:
23 First, the Probate Court misapplied certain evidentiary
24 rules; and, second, the Court failed to determine the
25 Decedent's testamentary intent --

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1 THE COURT: So your argument is errors of law,
2 not a reasonable -- no reasonable support of the
3 findings of that; correct?

4 MR. KUNES: Yes, your Honor.

5 THE COURT: Errors of law?

6 MR. KUNES: Yes, your Honor.

7 THE COURT: It's an evidence issue; is that
8 correct?

9 MR. KUNES: The first issue is an evidence
10 issue --

11 THE COURT: Okay.

12 MR. KUNES: -- and the second issue is a
13 misapplication of the Probate Code in determining the
14 Decedent's testamentary intent.

15 THE COURT: Okay.

16 MR. KUNES: Briefly, let me explain the facts
17 here. Mrs. Lown, the Decedent, named three designees in
18 her Last Will: Mrs. Roberts, the MUSC Foundation, and
19 Lutheran Homes of South Carolina. In Article II, she
20 left the tangible personal property to Mrs. Roberts.
21 In Article III, she left the sum of \$1 million to
22 Mrs. Roberts. And in Article IV, she names Mrs. Roberts
23 and the two charities to receive the balance of her
24 estate.

25 However, in defining the share for

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1 Mrs. Roberts, Mrs. Lown used the following specific
2 language: Less, however, the sum of \$1 million paid to
3 Mrs. Roberts under the preceding request. Let me say
4 that to you again, your Honor. It says: In defining
5 the share for Mrs. Roberts, she is to receive less,
6 however, the sum of \$1 million paid to her under the
7 preceding request.

8 This language is a critical part of Mrs. Lown's
9 Will and this word should be given effect. The Probate
10 Court admitted the testimony of the drafting lawyer of
11 the Last Will and Testament to assist the Court in
12 determining the Decedent's testamentary intent, and, in
13 particular, the meaning of the phrase "less, however,
14 the sum of \$1 million." Based on this evidence, the
15 Probate Court found the word "after" should be
16 substituted in place of the word "less" when defining
17 the share Mrs. Roberts received under Article IV.

18 Your Honor, the first error of law is the --
19 THE COURT: Does the fourth have "after"
20 anywhere? I'm looking at it here. It says: One-third
21 to my niece, and if she should die. . . .

22 Where are you talking about "after"?

23 MR. KUNES: Your Honor, the word "after" --

24 THE COURT: They just -- is that worded in
25 here --

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1 MR. KUNES: Correct.

2 THE COURT: -- in the fourth?

3 MR. KUNES: Sorry, your Honor.

4 THE COURT: Is this -- the fourth paragraph of

5 the Will, apparently, is the word "after" in here?

6 MR. KUNES: No, sir.

7 THE COURT: Okay.

8 MR. KUNES: It is not, your Honor.

9 THE COURT: Okay. What did the Probate Judge

10 say was ambiguous?

11 MR. KUNES: Your Honor, I'm sorry?

12 THE COURT: What did the Probate Court say was

13 ambiguous?

14 MR. KUNES: Your Honor, I don't believe the

15 Probate Court ever made a finding of fact as to what was

16 ambiguous about the Will.

17 And we would submit that the first error of law

18 here that the Probate Court made was in the admission of

19 the drafting lawyer's testimony, for three reasons: the

20 hearsay rule, the Dead Man's Statute, and the parol

21 evidence rule. The lower court found the testimony of

22 the drafting lawyer was hearsay. But then it falls

23 within one of the exceptions to the hearsay rule,

24 specifically Rule 804(a)(4). Rule 804 addresses

25 situations in which a witness is unavailable to testify,

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1 and 804(b) says there are four situations in which
2 hearsay is admissible. The four situations being former
3 testimony, a statement against interest, a statement
4 made under belief of impending death, and a statement of
5 personal or family history. Here the drafting lawyer's
6 testimony does not relate to anything related to those
7 four categories. It does not relate to the Decedent's
8 personal or family history. It does not relate to a
9 statement the Decedent made under belief of impending
10 death. It does not relate to a statement made against
11 her interest. And it does not relate to a statement of
12 former testimony the Decedent made.

13 Your Honor, the second grounds for excluding
14 the drafting lawyer's testimony is the Dead Man's
15 Statute. The Dead Man's Statute prohibits the witness
16 from testifying in a legal proceeding about a
17 communication between the witness and a now deceased
18 person if the witness has a legal or equitable interest
19 that could be affected by the outcome of the legal
20 proceeding.

21 THE COURT: What would the drafting -- interest
22 of the drafting attorney have in the outcome?

23 MR. KUNES: Your Honor, generally, there would
24 be no interest in the outcome except, in this situation,
25 the drafting lawyer signed an affidavit in which he

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1 -- the Court's failure to ascertain the Decedent's
2 testamentary intent as expressed in the Will first prior
3 to considering extrinsic evidence. It's a better opt
4 principle of the Probate Court that you construe the
5 language in the Will to determine and give effect to the
6 Decedent's testamentary intent as expressed in her Will.

7 A number of cases have held that a court's
8 first reference is always the actual language of the
9 Will itself. The words must be given their ordinary and
10 plain meaning --

11 THE COURT: Well, procedurally, how do you
12 think a Probate Court should do that? I mean, you think
13 he's got to say, well, I've read this, and the intent on
14 the Will to such and such. I'm going to take this parol
15 evidence to clear up this ambiguity. How do you,
16 procedurally, think he should have done that?

17 MR. KUNES: Well, your Honor, we would submit
18 that the Court should apply the language of the Will
19 first, and then if it can't be performed as written in
20 the Will, which is clearly the Probate Code's paramount
21 importance here, that if you can't apply the words on
22 their face, then you can introduce evidence to prove an
23 ambiguity. And if you can prove an ambiguity, then you
24 can use that evidence to help interpret that ambiguity.

25 THE COURT: Well, how do you think the

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1 ambiguity ties in to hearsay?

2 MR. KUNES: Your Honor, the drafting lawyer's
3 testimony was that Mrs. Roberts receive one-third of the
4 residue, and it does not --

5 THE COURT: That's not my question. My
6 question to you is: Do you think the ambiguity in the
7 Will, if there is some ambiguity in the Will, affects
8 the hearsay that you're arguing, that it was hearsay?

9 MR. KUNES: Your Honor, I guess the first --

10 THE COURT: I think you said 804; didn't you?

11 MR. KUNES: Yes, sir, your Honor. Sorry.

12 So for the testimony to be admissible, before
13 the Court can even consider the extrinsic evidence, it
14 must be admissible. And it is our position, we submit,
15 your Honor, that the drafting lawyer's testimony was
16 found by the lower court to be hearsay. And if it falls
17 within an exception to the hearsay rule, namely,
18 804(a)(4), which, as your Honor knows, defines the
19 situation in which a witness is deceased and unavailable
20 to testify.

21 THE COURT: Right.

22 MR. KUNES: But the four situations in which
23 hearsay is admissible involve former testimony. The
24 drafting lawyer was not making statements about what the
25 Decedent had told him about former testimony. It did

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1 not relate to a statement the Decedent made under belief
2 of impending death. It did not relate to a statement
3 against the Decedent's interest. And it did not relate
4 to a statement against -- or, sorry, a statement of her
5 personal or family history. And so before you can even
6 use the evidence to consider whether there's an
7 ambiguity, it must be admissible first.

8 THE COURT: Okay. Go ahead.

9 MR. KUNES: Your Honor, as we -- we're just
10 talking, but the paramount construction of the Probate
11 Code requires that you determine and give effect to the
12 Decedent's testamentary intent as expressed in her Will.

13 THE COURT: Well, I understand that. But if
14 it's ambiguous, you can't do that.

15 MR. KUNES: Your Honor, the words must be given
16 their ordinary and plain meaning.

17 THE COURT: Well, that's true. I understand
18 that. I don't disagree with that. But if it's
19 ambiguity involved in the language, how are you going to
20 do that?

21 MR. KUNES: Your Honor, we submit that the Will
22 can be performed as it is written --

23 THE COURT: I mean, your position is,
24 basically, the Will is not -- or the language in the
25 Will is not ambiguous; is that correct?

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1 MR. KUNES: I -- well, yes, your Honor, and our
2 position is that the --

3 THE COURT: Well, which language are we talking
4 about --

5 MR. KUNES: Your Honor, I think the --

6 THE COURT: -- in the Will?

7 MR. KUNES: -- the issue is on Article Fourth,
8 the -- the language is "less, however, the sum of \$1
9 million."

10 THE COURT: All right. What part of
11 paragraph four are you referring to is ambiguous or not
12 ambiguous?

13 MR. KUNES: Your Honor, in Fourth(a), it says:
14 One-third to my niece-in-law, Popie Lown Roberts, where
15 if she should then be dead to her issue then living at
16 the time of my deaths -- my death, less, however, the
17 sum of \$1 million paid to her -- to her or her issue
18 under the preceding request.

19 THE COURT: So that's the language in question;
20 is that correct?

21 MR. KUNES: Correct.

22 THE COURT: Okay.

23 MR. KUNES: And we say that language is not
24 ambiguous in its meaning when applying the ordinary and
25 plain meaning of those words to the statement.

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1 THE COURT: Okay.

2 MR. KUNES: That a court must consider -- the
3 Supreme Court is required to consider a -- a court
4 interpreting a Will to consider every word contained in
5 that Will, that a court cannot redraft nor doctor a
6 crucial part of the Will.

7 And, your Honor, we submit that the Probate
8 Court, in essence, redrafted and doctored the Will by
9 substituting the word "after" in place of the word
10 "less" in that Article Fourth, clause a. If the
11 Decedent had intended for Mrs. Roberts to receive the
12 sum of \$1 million and one-third of the residue, the
13 Decedent could have simply said just that: I leave
14 one-third of the residue to Mrs. Roberts, without the
15 need to include any additional language in that clause.
16 This did not happen, though. The Decedent used the
17 specific language "less, however, the sum of \$1 million"
18 in defining the share Mrs. Roberts receives under
19 Article Fourth(a). And these words must be given
20 effect.

21 By failing to ascertain what the Decedent meant
22 by the terms used in the Will and by failing to consider
23 each item of the Decedent's Will in relation to the
24 other items, the Probate Court misapplied the law and
25 reached its conclusions based on an error of law.

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1 In conclusion, the lower court improperly
2 admitted the testimony that should have been excluded on
3 grounds of hearsay, the Dead Man's Statute, and the
4 parol evidence rule. The Probate Court then failed to
5 ascertain the Decedent's testamentary intent by first
6 looking at the four corners of the Will and instead used
7 the testimony of the drafting lawyer to, in essence,
8 doctor a critical part of the Will to the detriment of
9 charities. And we're asking this Court to exclude the
10 evidence of the drafting lawyer and to remand the case
11 back to the Probate Court with instructions to ascertain
12 the Decedent's testamentary intent as expressed in the
13 language of her Will.

14 THE COURT: Thank you very much.

15 MR. RICHARDSON: May it please the Court?

16 THE COURT: Yes, sir.

17 MR. RICHARDSON: Pardon my cold, your
18 Honor. Jim Richardson and Mike Daniel representing
19 Mrs. Roberts, Respondent.

20 The first ambiguity in this Will was not
21 mentioned by my friend. It's -- paragraph 4 of the Will
22 is on the bottom of page 2 of our Brief. It's in the
23 very first words of the Court binding the Will: I
24 direct that the rest and residue of my estate, comma,
25 the payment of a specific bequest, comma, with all

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1 debts, expenses, and taxes be divided.

2 Here's the way the charities say that that
3 should be interpreted. They say: I direct the rest and
4 residue of my estate plus the payment of the specific
5 bequests plus all the debts, expenses, and taxes to be
6 divided as follows: one-third, one-third, one-third.

7 They turn this Will on its head. They say that
8 each of these three parties gets one-third, thereby
9 totally nullifying the earlier bequest of all the
10 tangible property and the million dollars. So the judge
11 must have thought that -- although I agree that it
12 wasn't totally articulated in the Order -- this doesn't
13 make any sense at all the way it reads. Nobody --
14 nobody defines a residuary estate to include both the
15 rest and residue and the earlier specific bequest and
16 the debts. The debt's not part of the residue under any
17 interpretation of any Will.

18 So Mr. Cabaniss was called upon to resolve that
19 ambiguity, among others, and he said that her intent was
20 that the residue -- the rest and residue of whatever's
21 left, as would always be the case, your Honor, after the
22 specific bequest. And that was her intent.

23 I think it's important for the Court to
24 recognize what -- how they want this case to come out.
25 They want the residue to be the gross estate, all of it.

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1 So that MUSC and Lutheran Homes and Mrs. Roberts share
2 it equally. Not a residue, but the gross estate. Now,
3 how can that possibly be? Forget the million dollars --

4 THE COURT: Is that y'all's position, that the
5 third, third, and the third is a -- and so you get a
6 third of the gross estate?

7 MR. KUNES: I would like to clarify that our --

8 THE COURT: Or do you agree that you take a
9 million off of the gross estate and the third, third,
10 and the third?

11 MR. KUNES: We agree that Mrs. Roberts receives
12 a million dollars under Article III. But we would
13 submit in our interpretation of the construction of the
14 Will that Article Fourth requires a calculation based on
15 the gross estate. We're not disposing of anything more
16 than the residue under Article Fourth, but it requires a
17 calculation that would reduce Mrs. Roberts' share by a
18 million dollars that she already received. So we're not
19 asking the Court to find that --

20 THE COURT: Well, what calculation are you
21 saying they should have done?

22 MR. KUNES: Exactly what my co-counsel over
23 here was saying, your Honor, is that, in essence, the
24 Court is -- or the Decedent is asking the Court -- my
25 apology. The Decedent is asking that the entire gross

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1 estate number be used. And to use a simple
2 illustration, there was between five and six million
3 dollars in this estate, actual numbers.

4 THE COURT: All right. Let's just say it's
5 6 million.

6 MR. KUNES: So assuming a \$6 million estate,
7 Mrs. Roberts gets a million dollars under Article III,
8 and then under Article IV, you base a calculation on a
9 two -- I'm sorry, on a \$6 million total gross estate so
10 each share --

11 THE COURT: So you're saying each third would
12 get two and she -- her third would be reduced by a
13 million, is what you're saying?

14 MR. KUNES: Correct. So she would get a
15 million under Article III and then a million -- again,
16 the residue being \$5 million at that point, the million
17 dollars goes to Mrs. Roberts and the charities each get
18 \$2 million.

19 THE COURT: In their position, she would get
20 three million, or a third of five.

21 MR. RICHARDSON: Yes, sir.

22 THE COURT: And they would get a third of the
23 five.

24 MR. RICHARDSON: My friend has left out the
25 tangible property, your Honor.

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1 THE COURT: The what?

2 MR. RICHARDSON: The tangible personal
3 property. They want to put that back in, as well, and
4 charge her with the value of the tangible personal
5 property.

6 THE COURT: Is that correct?

7 MR. KUNES: Your Honor, in the calculation that
8 we're assuming a \$6 million --

9 THE COURT: Well, let me ask y'all a question.
10 Do y'all have a copy of the Will --

11 MR. KUNES: Yeah.

12 THE COURT: -- that I could take a look at, the
13 whole Will? Because the only thing I've got in this
14 memo is that one paragraph.

15 (Document is handed to the Judge from
16 Mr. Kunes.)

17 THE COURT: Okay. Thank you very much.

18 So let me make sure I understand what you're
19 saying. Taking the Will as a whole, your position is
20 all the personal property, all the real property of
21 whatever's there, and I'll use the same example as
22 before, 6 million -- amounts to \$6 million for my -- the
23 purpose of my question.

24 So the way you think it should go is Mrs. --
25 who is it? Owens? I'm sorry. Roberts. Mrs. Roberts

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1 gets a million.

2 So that leaves 5. And then under paragraph 4,
3 she should have got 2. So she won't get an additional
4 million. And you'll get 2. And I guess Franke Home
5 will get 2; is that correct?

6 MR. KUNES: The other two charities each can
7 get \$2 million, yes, your Honor.

8 THE COURT: So you would -- MUSC would get 2,
9 Franke would get 2, and she would -- actually wound up
10 with 2 under your interpretation?

11 MR. KUNES: Correct, your Honor.

12 THE COURT: Correct?

13 Okay. All right. Thank you very much.

14 Go ahead.

15 MR. RICHARDSON: Your Honor, what happens to
16 the value of the tangible personal property if they --

17 THE COURT: Well, for my purpose of my example,
18 I told him to put that in, put all the personal
19 property, real property in. I just used a hypothetical
20 figure, six million. I don't have a clue what it is
21 worth.

22 MR. RICHARDSON: Well, your Honor, regardless
23 of the form of the words that they use, here's the
24 Proposed Order they gave to the Probate Court, and I
25 quote -- put in their Probate Court Proposed Order:

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1 Article Fourth requires the Decedent's gross estate with
2 all debts, expenses, and taxes to be calculated and
3 divided equally among the three receivers.

4 So, in effect, how can you read a Will that
5 disposes of something in a residuary clause and say that
6 that residuary clause transforms the whole thing into
7 the gross estate? Why have the gift --

8 THE COURT: Well, why -- well, how does that
9 justify violation of the hearsay rule as well as the
10 Dead Man's Statute and possibly parol evidence --

11 MR. RICHARDSON: Your Honor, as to Mr. --

12 THE COURT: -- by allowing the drafting
13 attorney to testify? I mean, irrespective of their
14 interpretation of the whole Will?

15 MR. RICHARDSON: Well, first of all, as to the
16 ambiguity, your Honor --

17 THE COURT: Well, the only -- wouldn't the --
18 the ambiguity only goes towards the parol evidence rule
19 and wouldn't have anything to do with the Dead Man's
20 Statute and the hearsay?

21 MR. RICHARDSON: I think the first question is,
22 is any evidence admissible and can be admissible, it's
23 got to be an ambiguity.

24 THE COURT: Well, then what hearsay rule
25 exception do you think it will apply? Which I don't

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1 think -- I don't think ambiguity enters into the
2 hearsay argument.

3 MR. RICHARDSON: It's not hearsay at all, your
4 Honor. It's not --

5 THE COURT: Why not?

6 MR. RICHARDSON: It's not offered for the truth
7 of the matter asserted. It's the instructions given by
8 the Testatrix to the drafting attorney.

9 THE COURT: So your position is it was not
10 offered for the truth of the matter asserted?

11 MR. RICHARDSON: It's instructions given to the
12 lawyer.

13 THE COURT: You don't think it meets any
14 exceptions; it's just not hearsay?

15 MR. RICHARDSON: The client can tell the lawyer
16 the moon is made of green cheese. And that's not
17 hearsay; that's instructions or a comment made by the
18 client.

19 Now, your Honor, as for the Dead Man's Statute,
20 our Supreme Court through Justice Kittredge four years
21 ago in a case cited at the bottom of page 6 of our Brief
22 Red (phonetic) against Morris; this was a case where a
23 disappointed heir sued the draftsman for being late with
24 the Will. The client died before she got the Will
25 signed. The Court refused to recognize the cause of

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1 action in negligence against the lawyer in that respect.

2 The Court then said there's no case where we've
3 been called upon to decide whether a negligently drafted
4 Will exposes the lawyer to malpractice at the hands of
5 the disappointed heir, and we're not going to make that
6 decision today. There's no South Carolina case --

7 THE COURT: Let's assume -- for purpose of my
8 question, let's assume that they would have enough of a
9 -- excuse me, a legal malpractice claim against the
10 drafter. Do you think that comes under the interest
11 issue of Dead Man's Statute?

12 MR. RICHARDSON: No, sir, I don't. I don't see
13 how. It's speculative. It's got to be a vested
14 interest. That is a pure speculation to think that my
15 client would ever sue Mr. Cabaniss for anything. Of
16 course, we don't think there's any doubt about how the
17 Will reads anyway. He testified that the word "plus,"
18 that they want to put in there, doesn't go in there.
19 It's "less."

20 THE COURT: I understand. But their objection
21 is allowing this inadmissible evidence, i.e., the
22 attorney to testify about what she told him his intent
23 was.

24 MR. RICHARDSON: I understand.

25 But, your Honor, it's not hearsay in the Dead

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1 Man's Statute --

2 THE COURT: Did he testify -- I don't know what
3 he testified to.

4 MR. RICHARDSON: He testified --

5 THE COURT: What did he actually testify to?

6 MR. KUNES: Your Honor, he testified as to what
7 the Decedent intended in her Last Will, you know, based
8 on his recollection.

9 THE COURT: Did he interpret the language that
10 he drafted?

11 MR. KUNES: Your Honor, I believe he reviewed
12 the Will before he made his testimony, yes, sir.

13 THE COURT: Okay.

14 MR. RICHARDSON: But that understanding comes
15 from what his client instructed him to do, your Honor.
16 It's got to be instructions. It's not hearsay. It's
17 not offered for the truth of the matter asserted. If
18 she were to say in Court herself, here's the way I want
19 my property to go upon my death, that wouldn't be
20 hearsay. That would be a statement of -- a declaration
21 of instructions to a lawyer to prepare the Will.

22 But, your Honor, in any event, the "less"
23 clause, now, that's really the main clause they rely on
24 is the "less" clause. The first principle of construing
25 a Will is that you don't just look at one word or one

Reported By:
Rolayne M. Volpe, CCR, RPR

2013-CP-10-2243
December 17, 2013

1 clause. You look at the whole thing and try to arrive
2 at the intention of the testator. I think that "less"
3 clause can only be interpreted to mean to refer to the
4 residue.

5 What is the residue? The residue is less and
6 excepting the million dollars that I've already given to
7 Mrs. Roberts. Why in the world would you give in
8 Article III a million dollars and then take it right
9 back in Article IV. That doesn't make any sense at all,
10 not to mention Article II, which was the tangible
11 personal property. They say she's got to give that
12 back, as well, in this complex calculation.

13 The Probate Court looked at this Will as a
14 whole and not just incorrectness. The Probate Court
15 found that it was ambiguous. Mr. Cabaniss' testimony
16 was admissible and was helpful. But the Probate Court
17 also found that even without considering his testimony,
18 forget his testimony, the Will would be interpreted by
19 the Probate Court just the same. So even if it was
20 error to admit his testimony, it was not prejudicial.

21 THE COURT: So the Probate Court in it's Order
22 set his testimony aside, but the interpretation was
23 still as follows?

24 MR. RICHARDSON: Exactly right.

25 THE COURT: Okay.

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1 MR. RICHARDSON: Thank you, your Honor.

2 THE COURT: So that testimony didn't change his
3 opinion one way or another?

4 MR. RICHARDSON: Can't be prejudicial at all.
5 The Judge said even if I didn't have that testimony,
6 this would still be my finding.

7 THE COURT: Okay.

8 Yes, sir?

9 MR. KUNES: Your Honor, first let me respond to
10 just a couple of points here. Counsel, has just
11 identified the first ambiguity being in the preamble
12 clause of Article IV. The lower court never found there
13 was any other ambiguity in the Will. They never found
14 there was an ambiguity in the Will in the first place.
15 The drafting lawyer's testimony, again, we think is
16 inadmissible, says, the Decedent had read the Will. She
17 understood what the terms of the Will meant. The Will
18 speaks for itself.

19 The argument that you're taking a million
20 dollars away in Article IV that was previously given in
21 Article III is nonsensical in light of the intent to
22 consider a calculation in Article Fourth. And the
23 calculation is based on a total value of the estate.

24 And so, your Honor, we would submit that a
25 million dollars passes under Article III, and then a

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1 calculation is made under Article IV to determine the
2 share each party receives --

3 THE COURT: How do -- how do you say you've got
4 a -- wait -- the very start of paragraph 4 says: I
5 direct that the rest and residue of my estate. Talks
6 about residue of my estate. Now, I assume that's what's
7 left after the prior provisions; is that correct, or
8 incorrect?

9 MR. KUNES: Yes, your Honor.

10 THE COURT: Well, then how can you possibly
11 want to include the first million that went to
12 Mrs. Roberts in your calculation of a third, a third,
13 and a third?

14 MR. KUNES: If you keep reading, your Honor, it
15 says: Comma, the payment of the specific bequests,
16 which would include Article II and Article III with all
17 debts, expenses, and taxes. He divided it into
18 one-third shares. In essence, it's a net estate
19 calculation to determine those one-third shares. And
20 Mrs. Roberts has already received under Article II and
21 Article III the million dollars and the tangible
22 personal property.

23 And we're asking -- and the Court -- sorry.
24 Then the Article Fourth(a), her share is reduced by
25 those -- by the sum of a million dollars at that point

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1 in time.

2 But, your Honor, again, we would submit that
3 the drafting lawyer's testimony was inadmissible and
4 should be excluded. There's no evidence to support the
5 probate court's finding that the word "after" should be
6 introduced -- or should be substituted for the word
7 "less." And that's effectively what the Court does in
8 its alternative holding in its lower court order is to
9 say that, regardless of whether this evidence comes in,
10 we find that the Decedent intended one-third of the
11 residue to go to Mrs. Roberts. But they don't address
12 the issue of the specific language "less, however, the
13 sum of a million dollars." And the Supreme Court has
14 said you have to consider every word in the Will in
15 relation to the other words and, if practical, give
16 effect to those words. And, your Honor, we think the
17 Court did not give effect to the words "less, however,
18 the sum of \$1 million."

19 THE COURT: Okay. Thank you very much.

20 Thank y'all. Give me a chance to look at
21 the Will and read the Memorandum. I appreciate your
22 presentation.

23 MR. KUNES: Thank you, your Honor.

24 (The hearing of this cause concluded
25 at 4:07 p.m., on December 17, 2013.)

Reported By: |
Rolayne M. Volpe, CCR, RPR

2013-CP-10-2243
December 17, 2013

REPORTER'S CERTIFICATE

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF BERKELEY)

I, ROLAYNE M. VOLPE, Certified Court Reporter, CCR,
and Registered Professional Reporter, RPR, do hereby
certify that the transcript of the foregoing proceedings
accurately reflects the events that occurred before me
to the best of my ability at the time and place set out
on the caption hereto, the witnesses having been duly
cautioned and sworn, or affirmed, to tell the truth, the
whole truth, and nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for,
related to, nor employed by any of the parties to the
action in which these proceedings were taken or to any
attorney or counsel employed by the parties hereto, nor
financially interested, directly or indirectly, in the
outcome of this action.

CERTIFIED AND SIGNED on this 11th day of August,
2014.

ORIGINAL


ROLAYNE M. VOLPE, CCR, RPR
Certified Court Reporter and
Registered Professional Reporter
Commission Expires: 8/20/2021

Reported By:
Rolayne M. Volpe, CCR, RPR

FILED

Exhibit A

Page 1 of the Last Will and Testament of Caroline Bischoff Lown

Annotations

12 FEB 22 AM 11:09

PROBATE COURT
CHARLESTON COUNTYCase: 2011-ES-10-276
File 2: 2-13-11

Last Will and Testament

OF
CAROLINE BISCHOFF LOWN

I, CAROLINE BISCHOFF LOWN, a resident of Charleston, South Carolina, do hereby make, publish and declare this to be my Last Will and Testament hereby revoking all former wills or codicils by me made.

FIRST: I direct that my Personal Representative hereinafter named pay all of my just debts and funeral expenses as soon as practicable after my death.

SECOND: I hereby give and bequeath all of my tangible personal property, including furniture, jewelry, personal effects, and any vehicles registered in my name, to my niece-in-law, POPIE LOWN ROBERTS, of Easley, South Carolina.

THIRD: I give and bequeath to my niece-in-law, POPIE LOWN ROBERTS, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, but should she predecease me or we should die simultaneously or as the result of a common tragedy, I give and bequeath the said sum to her issue then living at the time of my death.

Attest to True Copy

 Deputy Probate Court
Charleston County, South Carolina

1

INVENTORY - FORM 350	\$5,313,656.55	
Less Non Probate	~~\$(35,830.59)~~	Insurance and retirement accounts
PROBATE ESTATE	\$5,277,734.96	

FIRST:	\$100,000.00*	*Debts and funeral expenses <u>estimated</u> to be \$100,000.00
--------	---------------	---

SECOND:	\$88,683.34	Tangible personal property devised to Popie Lown Roberts Per Schedule F - Form 350 Amount \$88,683.34
---------	-------------	--

THIRD:	\$1,000,000.00	Bequest of \$1,000,000.00
--------	----------------	---------------------------

Subtotal:	\$1,188,683.34	Total amount of specific bequests and expenses paid in Articles First through Third
-----------	----------------	--

	\$5,277,734.96	
	~~(\$1,188,683.34)~~	
Rest and Residue of Estate:	\$4,089,051.62	

Page 1 of 2

 In the Matter of the Estate of Caroline Bischoff Lown
Charleston County Probate Case Number: 2011-ES-10-276

Exhibit A

239

2

Page 2 of the Last Will and Testament of Caroline Bischoff Lown	Annotations
FOURTH: I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses and taxes, be divided and I bequeath and devise as follows: (a) One-third (1/3) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest. (b) One-Third (1/3) to the FRANKE HOME AT SEASIDE, Mt. Pleasant, S.C., to be used to establish an endowment to be known as the "BISCHOFF-LOWN RESIDENT ASSISTANCE FUND," to be held in trust, nevertheless, with the income to be used to assist those with a demonstrated financial need in paying the costs of residence in the said Franke Home in Mt. Pleasant, or its successor. It is further my desire that preference be given to South Carolina residents in choosing the recipients of such assistance. (c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, in trust, nevertheless, to establish an endowment with the income to be used to be known as the "BISCHOFF-LOWN SCHOLARSHIP" and to be awarded to those students pursuing a degree of Doctor of Medicine (MD) and who have shown ability and dedication to the study and practice of medicine and who have a demonstrated financial need. It is my request that preference be given to residents of South Carolina with the above qualifications.	FOURTH: "Rest and Residue of Estate" \$4,089,051.62 "Payment of the Specific Bequests" With all debts, expenses and taxes" <u>\$1,188,683.34</u> Total Amount \$5,277,734.96 FOURTH (a): 1/3 share to Popie Lown Roberts \$1,759,244.99 Less 1/3 expenses <u>\$(33,333.33)</u> Net Amount \$1,725,911.66 Less <u>(\$1,000,000.00)</u> Net Total Amount \$ 725,911.66** FOURTH (b): 1/3 share to Franke Home \$1,759,244.99 Less 1/3 expenses <u>\$(33,333.33)</u> Net Total Amount \$1,725,911.66 FOURTH (c): 1/3 share to Health Sciences Foundation of MUSC \$1,759,244.99 Less 1/3 expenses <u>\$(33,333.33)</u> Net Total Amount \$1,725,911.66 ** Tangible personal property \$ 88,683.34 Residual cash <u>\$637,228.32</u> \$725,911.66

Court: 2011ES10-00276
File 2: 2-13-11

Last Will and Testament

OF

CAROLINE BISCHOFF LOWN

2011 APR 23 PM 1:15

I, CAROLINE BISCHOFF LOWN, a resident of Charleston, South Carolina, do hereby make, publish and declare this to be my Last Will and Testament hereby revoking all former wills or codicils by me made.

LB
① FIRST: I direct that my Personal Representative hereinafter named pay all of my just debts and funeral expenses as soon as practicable after my death.

① SECOND: I hereby give and bequeath all of my tangible personal property, including furniture, jewelry, personal effects, and any vehicles registered in my name, to my niece-in-law, POPIE LOWN ROBERTS, of Easley, South Carolina.

THIRD: I give and bequeath to my niece-in-law, POPIE LOWN ROBERTS, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, but should she predecease me or we should die simultaneously or as the result of a common tragedy, I give and bequeath the said sum to her issue then living at the time of my death.

Attest: A True Copy

Deputy Clerk Probate Court
Charleston County, South Carolina

FOURTH: I direct that the rest and residue of my estate, the payment of the specific bequests, with all debts, expenses and taxes, be divided and I bequeath and devise as follows:

(a) One-third (1/3) to my niece-in-law, POPIE LOWN ROBERTS, or if she should then be dead to her issue then living at the time of my death less, however, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest.

(b) One-Third (1/3) to the FRANKE HOME AT SEASIDE, Mt. Pleasant, S.C., to be used to establish an endowment to be known as the "BISCHOFF-LOWN RESIDENT ASSISTANCE FUND," to be held in trust, nevertheless, with the income to be used to assist those with a demonstrated financial need in paying the costs of residence in the said Franke Home in Mt. Pleasant, or its successor. It is further my desire that preference be given to South Carolina residents in choosing the recipients of such assistance.

(c) One-Third (1/3) to the Health Sciences Foundation of the Medical University of South Carolina, in trust, nevertheless, to establish an endowment with the income to be used to be known as the "BISCHOFF-LOWN SCHOLARSHIP" and to be awarded to those students pursuing a degree of Doctor of Medicine (MD) and who have shown ability and dedication to the study and practice of medicine and who have a demonstrated financial need. It is my request that preference be given to residents of South Carolina with the above qualifications.

FIFTH: I hereby nominate, constitute, and appoint as Personal Representative of my estate, my niece-in-law, POPIE LOWN ROBERTS, but should she predecease me or fail to qualify, I appoint as substitute Personal Representative, my brother-in-law, ALBERT BUREN LOWN, and I direct that neither my Personal Representative nor substitute Personal Representative be required to furnish any bond or other security for the faithful performance of his or her duties. I further give to my Personal Representative and substitute Personal Representative full power and authority to sell any and all of my property, real or personal, at such time or times, in such manner and upon such terms and for such purposes as such Personal Representative or substitute Personal Representative may deem proper for the best and orderly administration of my estate.

P
JB
③

IN WITNESS WHEREOF, I have hereunto set my Hand and Seal, this the 1st. day of June, 2005.

Caroline Bischoff Lown
CAROLINE BISCHOFF LOWN

The foregoing Will consisting of five (5) typewritten pages, this included, the two (2) preceding pages thereof bearing on the margin the signature of the Testatrix was this 1st day of June, 2005, signed, sealed, published and declared by the said Testatrix as and for her Last Will and Testament, in our presence, and we, at

her request and in her presence, and in the presence of each other,
have hereunto subscribed our names as witnesses on the above date.

J. W. C. Morris of *Charleston, S. C. 29401*
Carola Morley of *Charleston, SC*

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

SELF-PROVING AFFIDAVIT

① I, CAROLINA BISCHOFF LOWN, the Testatrix, sign my name to this
instrument, this the *1st* day of June, 2005, and being first duly
sworn, do hereby declare to the undersigned authority that I sign
and execute this instrument as my Last Will and Testament and that
I sign it willingly, that I execute it as my free and voluntary act
for the purposes therein expressed, and that I am eighteen years of
age or older, of sound mind, and under no constraint or undue
influence.

Caroline Bischoff Lown
CAROLINE BISCHOFF LOWN

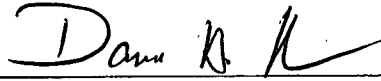
We, *J. W. C. Morris* and

CAROLA MORLEY, the witness, sign our names
to this instrument, being first duly sworn, and do hereby declare
to the undersigned authority that the Testatrix signs and executes
this instrument as her Last Will and Testament and that she signs
it willingly, and that each of us, in the presence and hearing of
the Testatrix, hereby signs this Will as witness to the Testatrix's
signing, and that to the best of our knowledge, the Testatrix is

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 17, 2014

RECEIVED
DEC 08 2014
SC Court of Appeals



Robert M. Kunes, Esq. (SC Bar #3579)
Andrew W. Chandler, Esq. (SC Bar #69388)
David H. Kunes, Esq. (SC Bar #76310)
EVANS CARTER KUNES & BENNETT, P.A.
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Judge J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-02243
Appellate Case No. 2014-001085

RECEIVED

NOV 24 2014

SC Court of Appeals

Popie Lown Roberts,

Respondent,

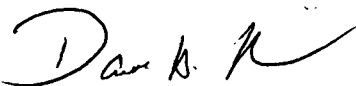
v.

The Health Sciences Foundation of The Medical
University of South Carolina and The Franke Home,
Inc., d/b/a The Franke Home at Seaside, Appellant.

PROOF OF SERVICE

I, David H. Kunes, certify that I have served the RECORD ON APPEAL on Respondent Popie Lown Roberts by depositing a copy of the same in the United States Mail, postage prepaid on November 20, 2014, addressed to her attorneys of record, Michael R. Daniel, Esq., 336 Cardinal Rd., Elloree, SC 29047 and James B. Richardson, Jr., Esq., 1229 Lincoln Street, Columbia, S.C. 29201.

November 20, 2014



David H. Kunes, Esq. (SC Bar #76310)
EVANS CARTER KUNES & BENNETT, P.A.
P.O. Box 369
Charleston, SC 29402
(843) 577-2300
(843) 577-2055 (fax)
Attorney for Appellant