THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In her Last Will and Testament dated June 1, 2005 (the "Will"), Caroline Bischoff Lown (the "Decedent") named three devisees, Mrs. Popie Lown Roberts ("Mrs. Roberts"), The Health Sciences Foundation of The Medical University of South Carolina (hereinafter "MUSC Foundation") and The Franke Home, Inc., d/b/a The Franke Home at Seaside ("Lutheran Homes", together with MUSC Foundation, the "Charities") to receive her estate. (R. pp. 240-241) (Will, p. 1-2). In Article SECOND, the Decedent devised all of her personal property to Mrs. Roberts. (R. p. 240) (Will, p. 1). In Article THIRD, the Decedent devised the sum of one million dollars ($1,000,000) to Mrs. Roberts. (R. p. 240) (Will, p. 1). In Article FOURTH, the Decedent named Mrs. Roberts and the Charities as the three beneficiaries of the residue of her estate. (R. p. 241) (Will, p. 2).

In defining the share for Mrs. Roberts under Article FOURTH, the Decedent used the specific language "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." (R. p. 241) (Will, p. 2).

On April 25, 2011, Mrs. Roberts filed a Petition to Construe the Decedent's Will and subsequently filed on July 11, 2011 an Amended Petition. (R. p. 033, p. 061) (Petition; Amended Petition). The Charities filed an Answer and Counterclaim on June 28, 2011 and subsequently filed on July 29, 2011 an Amended Answer and Counterclaim in which the Charities sought a declaratory judgment that Section 62-2-604 of the South Carolina Probate Code disposes of the share, or portion of a share, of any residuary devisee that fails in favor of the remaining residuary devisees. (R. p. 049, p. 083) (Answer; Amended Answer, p. 5).

On January 31, 2012, the Probate Court held a hearing on the Petition and pleadings

submitted in connection therewith. (R. p. 127) (Prob. Ct. Tr. (Jan. 31, 2012)). At the hearing, Mrs. Roberts asserted that the language in Article FOURTH of the Decedent's Will was ambiguous and sought to admit extrinsic evidence to determine whether a latent ambiguity in the Will exists. (R. pp. 147-150) (Prob. Ct. Tr. (Jan. 31, 2012) p. 21-24). The extrinsic evidence before the Probate Court was Mrs. Roberts' testimony and the deposition testimony of the attorney who drafted the Decedent's Will (hereinafter, the "drafting lawyer"). (R. pp. 147-150, pp. 167-183) (Prob. Ct. Tr. (Jan. 31, 2012) p. 21-24, 54-79). The Charities objected to the introduction of the drafting lawyer's testimony on hearsay grounds and the Dead Man's Statue. (R. p. 167) (Prob. Ct. Tr. (Jan. 31, 2012) p. 54). The Probate Court admitted the drafting lawyer's testimony as an exception to the hearsay rule, which was later reversed, so that the Probate Court could determine whether an ambiguity existed. (R. p. 010, p. 032) (Prob. Ct. Order (Jun. 26, 2012), p. 10; Cir. Ct. Order (Apr. 10, 2014) p. 10). In its Order dated June 26, 2012, the Probate Court held as follows: (1) a latent ambiguity exists "with regard to the terms of Mrs. Lown's will as it pertains to the computation of the sums to be distributed among the Devisees requiring the court to consider extrinsic evidence of the testator's intent" and (2) "[r]egardless 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 [Mrs.] Roberts in the amount of $1,000,000 (Item THIRD of the Will), and a single bequest to [Mrs.] Roberts of the personal property (Item SECOND of the Will) with all remaining residual property being divided equally among the three named devises [sic] (Item FOURTH of the Will)." (R. p. 007, p. 012) (Prob. Ct. Order (Jun 26, 2012) p. 7, 12).

Following a motion for reconsideration filed by the Charities and a hearing on October 31, 2012, the Probate Court modified its order to find 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.'" (R. p. 019) (Prob. Ct. Order (Apr. 4, 2013), p. 5).

The Charities filed and served on Mrs. Roberts a Notice of Intent to Appeal on April 17, 2013. On December 17, 2013, the Circuit Court held a hearing to consider the appeal. (R. p. 209) (Cir. Ct. Tr. (Dec. 17, 2013)). The Circuit Court found that the drafting lawyer's testimony was inadmissible hearsay and excluded such evidence. (R. p. 032) (Cir. Ct. Order (Apr. 10, 2014), p. 10). Although the evidence was excluded and is now the law of the case, the Circuit Court, in its construction of the Will, found "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 specific bequests' and the payment of expenses." (R. pp. 031-032) (Cir. Ct. Order (Apr. 10, 2014), pp. 9-10). The Circuit Court "reached the same conclusion as did the Probate Court in the construction of the will, without considering the testimony of [the drafting lawyer]." (R. p. 032) (Cir. Ct. Order (Apr. 10, 2014), p. 10).

ARGUMENT

The underlying action before this court is an action to construe a will. 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). "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." *In re Estate of Boynton*, 355 S.C. 299, 584 S.E.2d 154, 155 (Ct. App. 2003) (citing *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." *Id.* (quoting *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999)). An appellate court should reverse a lower court's rulings when the lower courts' findings are based on an error of law. *Polson v. Craig*, 351 S.C. 433, 437-438, 570 S.E.2d 190, 192 (Ct. App. 2002). An appellate court should also disturb a lower court's findings of fact when there is no evidence that reasonably supports those findings. *Id.*

I. THE CIRCUIT COURT ERRED IN HOLDING THAT SECTION 62-2-604(b) IS INAPPLICABLE TO DISPOSE OF "LESS, HOWEVER, THE SUM OF ONE MILLION DOLLARS" IN FAVOR OF THE CHARITIES.

Section 62-2-604 of the South Carolina Probate Code provides, in relevant part, as follows:

> (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.

S.C. Code Ann. § 62-2-604 (1987) (Emphasis added). The South Carolina Reporter's Comments to Section 62-2-604(b) provide that 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,. . . ." (emphasis added). REPORTER'S COMMENTS, 1986 Act No. 539, §1.

In the Restatement of Property Restatement (Third) of Property: Wills and Other Donative Transfers (1999), § 5.5, Comment o provides:

> "For the purpose of determining what happens to the share of a residuary devisee who fails to survive the testator, a residuary clause that devises the residue to two or more persons is treated as if it created a class gift, even if the devise is not in the form of a class gift. The contrary rule, sometimes called the *no-residue-of-a-residue rule*, is not followed in modern statutory law, including the Uniform Probate Code, nor in this Restatement. Thus, if an antilapse statute does not apply, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or, if more than one, to the other residuary devisees in proportion to the interest of each in the remaining part of the residue. A residuary devise lapses and passes to intestacy only if an antilapse statute does not apply and no residuary devisee survives the testator. . . . The no-residue-of-a-residue rule is rejected for all situations in which a devise to a residuary devisee fails, regardless of the reason for the failure."

(emphasis added).

A. The South Carolina legislature abolished the "no-residue-of-a-residue" rule with the adoption of the Uniform Probate Code in 1987.

With the adoption of the Uniform Probate Code, including Section 62-2-604, effective as of July 1, 1987, the South Carolina Legislature statutorily abolished the "no-residue-of-a-residue" rule. The lower courts erred in relying upon case law that predates the adoption of the Uniform Probate Code in reaching their holdings. For example, the Probate

Court relied upon *Harriett S. Bahan v. Citizens and S. Nat'l Bank of South Carolina*, 267 S.C. 303, 227 S.E.2d 671 (1976) for the proposition that "if the gift which fails is itself a part of the residuary it passes by intestacy" and the Circuit Court cited *Padget v. Black*, 229 S.C. 142, 92 S.E.2d 153 (1956) for the application of the antiquated "English Rule." (R. p. 009, p. 030) (Prob. Ct. Order (Jun. 26, 2012) p. 9; Cir. Ct. Order (Apr. 10, 2014) p. 8).

The reliance on these cases is misplaced. In 1976, the South Carolina Supreme Court in *Bahan* relied upon 80 Am.Jr. (2d) Wills, Section 1695 and *Padgett v. Black*, 229 S.C. 142, 92 S.E.2d 153 (1956) in support of its holding, both of which espouse the English "no-residue-of-a-residue" rule and predate the adoption of the Uniform Probate Code. 267 S.C. 303, 309, 227 S.E.2d 671, 675. This reliance on case law and secondary authority that predates the adoption of Section 62-2-604 is reversible error.

B. The Circuit Court erred in its application of *Ex Parte Byrom* and the "residue of the residue" rule.

The Circuit Court misapplied the "residue of the residue" rule set forth in *Ex Parte Byrom*, 47 So.3d 791, 793 (Ala. 2010) in support of the court's conclusion that a "withholding" of a share of the residue passes under intestacy. Section 43-8-225(b) of Alabama Code of Laws contains almost the identical language as South Carolina's Section 62-2-604, which is a codification of the "residue of the residue" rule. The "residue of the residue rule" is, in fact, the modern view that causes the share of a failed residuary devise to pass to the other residuary devisees. The antiquated English rule is the "**no**-residue-of-a-residue rule", which has been rejected by the Uniform Probate Code and the Restatement of Property. The Circuit Court incorrectly reasoned that if the one million dollars were withheld from Mrs. Robert's share, it would pass by intestate succession in accordance with

the English Rule, which applies in situations "where the residuary clause does not fully dispose of the residue of the estate." *Ex Parte Byrom*, 47 So.3d 791, 793 (Ala. 2010). Instead of applying Section 62-2-604(b) and the "residue of a residue" rule, the Circuit Court uses the premise that the one million dollars would pass under intestacy to construe the Decedent's Will in a fashion that results in Mrs. Roberts receiving one-third of the residue.

C. This Court should liberally construe Section 62-2-604 to promote the underlying purposes and policies of the Probate Code.

Section 62-1-102(a) of the Probate Code provides "[t]his Code shall be liberally construed and applied to promote its underlying purposes and policies." S.C. Code Ann. 62-1-102(a) (1987) (emphasis added). Section 62-1-102(b) of the Probate Code provides: The underlying purposes and policies of this Code are:

> (1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;
> (2) to discover and make effective the intent of a decedent in the distribution of his property;
> (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;
> (4) to facilitate use and enforcement of certain trusts;
> (5) to make uniform the law among the various jurisdictions.

S.C. Code Ann. 62-1-102(a) (1987).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Lincoln General v. Progressive Northern Ins. Co.*, 406 S.C. 534, 538-539, 754 S.E.2d 437, 439 (Ct. App. 2013) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and

that language must be construed in light of the intended purpose of the statute." *Id.* (quoting *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). In its adoption of Section 62-2-604(b), the South Carolina legislature abolished the "no-residue-of-the-residue" rule in favor of the modern view that a residuary clause fully disposes of the residue of an estate. Our courts should liberally construe Section 62-2-604(b) in light of this intended purpose.

The Probate Court and Circuit Court narrowly construed the language of Section 62-2-604(b) to require that the entire devise must fail instead of broadly construing the statute in recognition of a partial failure of a devise, as is the case here. Under the analysis and reasoning of the Circuit Court, if Mrs. Roberts and her issue had predeceased the Decedent, the devise to Mrs. Roberts would have failed in its entirety and, under Section 62-2-604, the Charities would have received an equal share of the residue of the Decedent's estate with no part of it passing under intestacy. There is no other possible construction of Section 62-2-604 and its application to a situation where a residuary devisee does not survive the Decedent.

Nevertheless, both the Probate Court and Circuit Court reasoned that, if the language "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" causes $1,000,000 to be withheld from the share of Mrs. Roberts, it would pass under intestacy and not pursuant to Section 62-2-604. In its analysis of the applicability of Section 62-2-604, the Probate Court initially stated "[t]he 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." (R. p. 009) (Prob. Ct. Order (Jun 26,

2012) p. 9). Reaching a similar conclusion that the million dollars, if withheld from the share passing to Mrs. Roberts, would pass under intestacy pursuant to the "English Rule," the Circuit Court also misapplied Section 62-2-604(b). (R. p. 030) (Cir. Ct. Order (Apr. 10, 2014) p. 8).

The fundamental premise relied upon by the lower courts in reaching their holdings is that the Decedent intended to dispose of all of her property under her Will and that she did not wish for any part of her property to pass pursuant to intestacy. The modern view of the Probate Code does exactly this—through the application of Section 62-2-604(b), a residuary clause fully disposes of the residue of an estate without the need to resort to construing the Will in a fashion that avoids intestacy. Nevertheless, the lower courts based their conclusions on the flawed premise that one million dollars would pass under intestacy unless the language of the Will is construed in a fashion that prevents intestacy. Section 62-2-604 must be liberally construed so as to cause the failure of $1,000,000 to pass to the remaining residuary beneficiaries in equal shares without the need to construe the language of the Will in a fashion that prevents intestacy.

II. THE CIRCUIT COURT ERRED IN ITS APPLICATION OF THE PROBATE CODE AND RELATED CASE LAW IN AFFIRMING THE PROBATE COURT'S HOLDING THAT MRS. ROBERTS IS ENTITLED TO ONE-THIRD OF THE DECEDENT'S RESIDUARY ESTATE.

In an effort to avoid the result asserted by Mrs. Roberts that $1,000,000 would pass by intestacy, the lower courts, under the guise of construing the Decedent's Will, re-wrote the language of the decedent's Will to avoid the application of Section 62-2-604 to cause Mrs. Roberts to receive one-third of the residue under testacy.

A. The Probate Court's failure to follow the proper procedure for the construction of the decedent's Will by relying first on inadmissible evidence, instead of the language of the Will itself, is reversible error.

The guiding principles for the construction of the Will are set forth in the South Carolina Probate Code. Section 62-1-102, entitled, "Purposes; rules of construction" provides, in relevant 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 § 62-1-102(b) (1987). Section 62-2-601, entitled, "Rules of construction and intention" provides that "[t]he intention of the testator as expressed in his will controls the legal effects of his disposition." S.C. Code. Ann § 62-2-601 (1987). 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." REPORTER'S COMMENTS, 1986 Act No. 539, §1.

1. The Probate Court's first reference must be the Will's language itself.

This Court 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. (internal citations omitted; emphasis added).

In light of the Probate Code's underlying purposes and policies, and following the reasoning and analysis of this Court in *Hyman*, the 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, Respondent acknowledged that the 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. (R. pp. 142-144) (Prob. Ct. Hr'g (Jan. 31, 2012) p. 16-18.).

Prior to the hearings, neither the Probate Court nor the Circuit Court had actually read the language of the Will. (R. p. 138, p. 227) (Prob. Ct. Hr'g (Jan. 31, 2012) p. 12; Cir. Ct. Hr'g (Dec. 17, 2013), p. 22). Instead, at the initial hearing, the Probate Court allowed counsel for Mrs. Roberts to paraphrase the Decedent's Will and to introduce the testimony of the drafting lawyer in support of its holding that Mrs. Roberts receive one-third of the residue. (R. p. 138) (Prob. Ct. Hr'g (Jan. 31, 2012) p. 12). Despite the objections of the Charities as to the admissibility of such evidence, the Probate Court allowed the testimony of Mrs. Roberts and the lawyer who drafted the Will to be introduced and to influence the Probate Court in making its findings of fact and reaching its holdings. Although the Circuit Court ultimately found that the testimony of the drafting lawyer was inadmissible, which is now the law of the case, the process by which the Probate Court reached its finding of facts and conclusions of law was prejudicial and is reversible error. *See Polson v. Craig*, 351 S.C. 433, 437-438, 570 S.E.2d 190, 192 (Ct. App. 2002) (affirming the circuit court's reversal of the probate court because there was no evidence that reasonably supported the probate court's decision and the probate court decision was based on an error of law).

2. Inadmissible evidence considered by the Probate Court improperly biased the Court's holding and is reversible error.

This Court in the *Estate of Hyman* addressed the issue of the use of extrinsic evidence in a court's determination of a decedent's testamentary intent. 606 S.E.2d 205, 207, 362 S.C. 20, 25-26 (Ct. App. 2004). This Court reasoned that if there is no ambiguity in a decedent's

will, a court cannot resort to extrinsic evidence to assist the Court in determining a decedent's intent; rather a court's first reference in ascertaining the Decedent's intent is always the Will's language itself. *Id.* at 207. When construing this language, the reviewing tribunal must give the words contained in the document their *ordinary and plain meaning. Id.* (Emphasis added). Where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. *Id.*

The basis on which the Probate Court admitted extrinsic evidence was the assertion that a latent ambiguity existed. (R. pp. 007-010) (Prob. Ct. Order (Jun. 26, 2012) p. 7-10). The only evidence presented to the Probate Court for the purpose of determining whether an ambiguity exists and the construction of the ambiguity was (i) the drafting lawyer's testimony and (ii) the testimony of Mrs. Roberts. (R. p. 010) (Prob. Ct. Order (Jun. 26, 2012) p. 10). The drafting lawyer's testimony related to his recollections about the Decedent's testamentary intent and the Circuit Court properly found that such testimony was inadmissible. (R. p. 032) (Cir. Ct. Order (Apr. 10, 2014) p. 10). Mrs. Roberts testified generally about the Decedent's surviving heirs. (R. pp. 175-182) (Prob. Ct. Hr'g (Jan. 31, 2012), p. 71-78). At best, the only admissible evidence reasonably supports the finding of fact that the Decedent did not intend for any portion of her estate to pass pursuant to intestacy. Mrs. Roberts' testimony does not support the finding that an ambiguity in the Decedent's Will exists, nor does it indicate what the Decedent's testamentary intent was.

The Probate Court had two alternative holdings depending on whether a latent ambiguity was determined to exist. (R. p. 013) (Prob. Ct. Order (Jun. 6, 2012) p. 13). It is inconsistent for the Probate Court (a) to find that a latent ambiguity exists and to use

extrinsic evidence to interpret the Will holding that Mrs. Roberts is entitled to one-third of the residue and (b) to find that, even if a latent ambiguity does not exist, the court reaches, based solely on its reading of the Will, the same holding that Mrs. Roberts is entitled to one-third of the residue. Either an ambiguity exists or it does not exist. *See, e.g., In re Estate of Fabian*, 483 S.E.2d 474, 326 S.C. 349 (Ct. App. 1997) (extrinsic evidence supported conclusion that decedent treated her nephew as a her "brother" for purposes of devising her estate to her "brothers and sisters living at the time of [her] death."). Applying the logic and holding of the Probate Court in this case to the facts of the *Estate of Fabian*, our Probate Court would have found in the alternative: (a) a latent ambiguity exists as to whether the decedent intended to treat her nephew as her brother and, through the use of extrinsic evidence, the court should interpret the will to hold that a nephew should be treated as a brother and (b) and, even if a latent ambiguity does not exist, based solely on the language of the will, the decedent intended to treat her nephew as her brother. It is nonsensical to conclude that a nephew should be treated as a brother unless extrinsic evidence is used to reach this conclusion–which is precisely what the Probate Court improperly does to reach its alternative holding.

Although the Probate Court states that its holding would be the same regardless of whether an ambiguity exists, there is no evidence that supports the finding that the Decedent intended to use the word "after" instead of the word "less" so that Mrs. Roberts receives one-third of the residue. The only evidence before the Probate Court that could have reasonably supported the court's holding is the inadmissible evidence of the drafting lawyer. Regardless of the Probate Court's statements to the contrary, the introduction of the drafting lawyer's

testimony prejudicially influenced the Probate Court's holding.

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 Will in relation to other portions, the Probate Court misapplied the applicable law and reached its conclusion based on an error of law, which this Court should reverse. *Kemp v. Rawlings*, 594 S.E.2d 845, 849, 358 S.C. 28, 34 (2004); *In re Estate of Gill*, 397 S.C. 419, 426, 725 S.E.2d 516, 520 (Ct. App. 2012); *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).

B. The lower courts' redrafting of the Decedent's Will to hold that Mrs. Roberts is entitled to one-third (1/3rd) of the decedent's residuary estate is reversible error.

As an initial threshold matter, if the Decedent had intended for Mrs. Roberts to receive one-third (1/3rd) of the residue, she simply would have stated that Mrs. Roberts receives one-third of the residue. The Decedent, however, did not state that Mrs. Roberts receives one-third of the residue. Rather, the Decedent specifically mentions a reduction of the one-third share by the amount of the gift passing to Mrs. Roberts under Article Third.

Instead of ascertaining the decedent's testamentary intent by the words used in the Will itself, the lower courts use the rules of construction and the flawed premise that a portion of the decedent's property would pass by intestacy to reach their conclusions that Mrs. Roberts receives one-third of the residue. The Decedent's instruction of "less, however, the sum of One Million Dollars" must be given effect.

This Court in the *Estate of Hyman* set forth the standard for construing language of a will: "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." 606 S.E.2d 205, 207, 362 S.C. 20, 25-26 (Ct. App. 2004). (internal citations omitted).

Webster's Dictionary defines the term "less" to mean "with the deduction of; minus; as, total income *less* earned income." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1038 (2d ed. 1968). Substituting the definition of "less" in this crucial phrase, it reads "one-third (1/3) to my niece-in-law, [Mrs. Roberts] . . . [with the deduction of][minus], however, the sum of One Million and 00/100 ($1,000,000.00) Dollars, paid to her, or her issue, under the preceding bequest." It is clear from the plain meaning of the word "less" that the one-third share is reduced by One Million Dollars.

In *Limehouse v. Limehouse*, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971), the question before the South Carolina Supreme Court was whether an individual died "childless (without heirs)" in a situation where the individual received a testamentary devise of "a fee simple estate in the land, defeasible on his death 'childless (without heirs)'". Five years after his receipt of the real property interest under his mother's Will, the individual adopted a child. *Id.* In holding that the individual did not die childless (without heirs) because of the adopted child, the Court reasoned that the parenthetical expression--(without heirs)--cannot "be discarded as meaningless without strong reason for so doing." *Id.* at 258, 182 S.E.2d at 60 (quoting *Lemmon v. Wilson*, 204 S.C. 50, 69, 28 S.E.2d 792, 800 (1944) for the

proposition that "only a very strong reason can justify the treatment of any of the testator's words in his last will and testament as surplusage").

The phrase "less, however, the sum of One Million Dollars . . ." is a crucial part of the Decedent's Will and our courts, under the guise of construing a Will, may not simply discard these words as meaningless without a strong reason for doing so. Instead of giving the word "less" its ordinary and plain meaning, the Probate Court doctored a crucial part of the Will by substituting the phrase "'*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.'" (R. p. 019) (Prob. Ct. Order (Apr. 4, 2013) p. 5). The Circuit Court suggested that the phrase "less, however," "may be seen as a misplaced repetition of the clause which begins Article IV." (R. pp. 031) (Cir. Ct. Order (Apr. 10, 2014) p. 9). In so holding, both lower courts discarded the phrase as meaningless and redrafted the Decedent's Will to achieve a different result than the Decedent intended. Based on the principles set forth in *Fabian*, *Limehouse*, and *Lemmon*, this is reversible error.

Our case law requires that the phrase "less, however, the sum of One Million Dollars . . ." be considered in relation to the other portions of the Will. The first paragraph of Article Fourth 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. . . ."

Relying on *Connelly v. Earl Frazier Special Sch. Distr.,* 167 Ark. 49, 266 S.W. 929 (1924) and *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) to construe this language, the Circuit Court found that the Decedent, or the drafting

lawyer, committed an apparent typographical error that the Circuit Court was required to correct by the insertion of the word "after" in two places in this sentence. (R. p. 028) (Cir. Ct. Order (Apr. 10, 2014) p. 6). The question before the Arkansas Supreme Court in *Connelly* was whether a legislative act that created a school district and granted "a majority of said board of directors authori[ty] to execute a promissory note or notes, or bonds, in the name of, and for such sum . . . ." was "invalid because [the act] does not state in whose names the notes, bonds, and mortgages may be executed." *Connelly v. Earl Frazier Special Sch. Distr.*, 167 Ark. 49, 266 S.W. at 929 (1924). Finding the act to be valid and inferring the legislative intent behind the act, the court stated "it is apparent that the name of the school district was omitted through typographical error." *Id.* The *Connelly* case does not involve a will construction action and stands only for the proposition that an Arkansas court may supply an omitted word in a legislative act where the intent and purpose of the legislature is clear. The Charities have been unable to find a single South Carolina case that stands for the proposition that a court can insert words into a Decedent's Last Will and Testament and this Arkansas case should not be the basis under which our courts redraft or doctor a last will and testament.

The sole purpose of a will construction action is to determine a decedent's testamentary intent and to give it effect. *In re Estate of Fabian*, 326 S.C. 349, 352, 483 S.E.2d 474, 475 (Ct. App. 1997). If it is possible to give the words of a Will their ordinary, plain meaning, our court must do so; they cannot doctor any part of it. *Id.* at 353; 483 S.E.2d at 476. Although not artfully drafted language, the words of this sentence can be construed, without the insertion of additional words, as a formula devise in a fashion that gives effect

to the decedent's testamentary intent. The phrase "rest and residue of my estate" simply means the decedent's property that remains after carrying out the prior provisions of the decedent's Will, namely, the bequest of the personal property under Article Second and the bequest of $1,000,000 under Article Third. The phrase "the payment of specific bequests" refers to the items passing under Article Second and Third. The phrase "with all debts, expenses and taxes" refers to estate administration expenses. The Decedent directs that these items "be divided" and "bequeath[ed] and devise[d]" into one third shares. Despite repeated arguments by the Charities that these words can be given their ordinary and plain meaning that fits into the whole plan of the Will[1], the lower courts myopically focused on achieving a particular result that is based on the flawed premise that a portion of the residue would pass under intestacy.

As to the Decedent's testamentary intent, it is logical to conclude based on a reading of the entire Will that the Decedent intended for Mrs. Roberts to receive the first $1,000,000 in her estate and, if there were only $1,000,000, Mrs. Roberts would be the only devisee to receive any property under the Will. However, if the Decedent, in fact, had more than $1,000,000, she wanted the Charities to benefit equally from the next $2,000,000 of her estate. And, if the Decedent had more than $3,000,000, then Mrs. Roberts and the Charities would receive an equal one-third share of the entire estate, with Mrs. Roberts's share

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[1]For a simple and generic example of the application of the ordinary and plain meaning of the words of Article Fourth of the Decedent's Will, please see the Circuit Court Hearing Transcript at pages 20 through 23. For a more precise mathematical representation of the application of the language using the Decedent's actual estate values, please see the Charities' Amended Answer and Counterclaim at pages 3 through 5.

consisting of the pecuniary gifts and a portion of the residuary estate.

To reiterate, if the Decedent had intended to leave Mrs. Roberts $1,000,000 plus one-third of the residue, which is the result reached by the lower courts, the Decedent would not have included the phrase, "less, however, the sum of $1,000,000." Our courts cannot simply discard this language in the Decedent's Will as meaningless or as surplusage. Since the drafting lawyer's testimony has been properly excluded from the case, which was not appealed and is now the law of the case, there is no evidence properly before this Court that reasonably supports the lower courts' findings and the lower courts' failure to apply the plain and ordinary language of the Will is an error of law.

CONCLUSION

The Probate Court's admission of the testimony of the drafting lawyer improperly biased the process by which it reached its holdings in favor of Mrs. Roberts. Although the Probate Court states that its conclusion would be the same regardless of admissibility of the drafting lawyer's testimony, once the Circuit Court excluded the drafting lawyer's testimony, there is no evidence that reasonably supports the Probate Court's holding. Following the faulty analysis and reasoning of the Probate Court based on case law superseded by the Probate Code that intestacy would occur if one million dollars was withheld from Mrs. Roberts' share of the residue, the Circuit Court actively engaged in a revision of the Decedent's Will to ensure that the Decedent's estate passes under the Will–the precise result that is achieved through the operation of Section 62-2-604 of the Probate Code without the need for rendering any of the Decedent's words meaningless. Our lower courts cannot be allowed to ignore applicable provisions of the Probate Code and to apply faulty legal

principles in construing a Last Will and Testament; otherwise, our courts, not a decedent through his or her Last Will, control the disposition of one's estate.

The Circuit Court's order which affirmed the Probate Court's orders dated June 26, 2012, and April 4, 2013, and the said Probate Court orders, should be reversed. This case should be remanded to the Probate Court to apply S.C. Code Ann. §62-2-604(b) so that the Charities receive an equal share of the one million dollars that is withheld from Mrs. Robert's one-third share. In the alternative, if this Court finds that Section 62-2-604(b) is inapplicable, this case should be remanded to the Probate Court to construe the decedent's Will with the instruction that the share calculated under Article Fourth for Mrs. Roberts be reduced by one million dollars.

Respectfully submitted,

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December 2, 2014

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.

PROOF OF SERVICE

I, David H. Kunes, certify that I have served the FINAL BRIEF OF APPELLANT and FINAL REPLY BRIEF OF APPELLANT on Respondent Popie Lown Roberts by depositing a copy of the same in the United States Mail, postage prepaid on December 5, 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.

December 5, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief and Appellant's Final Reply Brief comply with Rule 211(b), SCACR.

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December 2, 2014