

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 IN RE: ESTATE OF)
 Stephen Day Ward, Jr.)
 (Decedent))
)
 Mary K. Ward, a/k/a Mary Kimberly Ward,)
)
 Petitioner,)
)
 v.)
)
 Stephanie Ward Cibinic, David D. Ward, and Brian)
 C. Ward, Co-Personal Representatives,)
)
 Respondents.)

IN THE PROBATE COURT
 CASE NO: 2016-ES-10-01631

**ORDER TO ALTER OR AMEND
 JUDGMENT**

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 SC Court of Appeals

Presiding Judge: Irvin G. Condon
 Hearing Date: April 18, 2018
 Petitioner: Mary K. Ward
 Attorney for Petitioner: Jane McFaddin, Esq.
 Respondents: Stephanie W. Cibinic, David D. Ward, and
 Brian C. Ward
 Attorneys for Respondents: Amanda K. Bailey, Esq. and
 George E. Morrison, Esq.
 Court Reporter: Samantha Flinn

THIS MATTER comes before the Court upon a Motion for Reconsideration filed by the Respondents in this case. Respondents filed the present to Motion for Reconsideration on August 20, 2018 in response to this Court's Order dated August 9, 2018. Respondents argue that the August 9, 2018 Order should be altered or amended pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure due to several errors in the findings of fact and conclusions of law.

Therefore, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, the Order of this Court dated August 9, 2018 is hereby amended to read as follows:

Handwritten initials/signature

THIS MATTER comes before the Court on Mary K. Ward's (hereinafter "Petitioner") Petition for Omitted Spouse Share filed on January 19, 2017. Present at the hearing were Ann Noble-Kiley, daughter and conservator for Petitioner, along with Jane McFaddin, Esquire, attorney for Petitioner, and Amanda K. Bailey, Esquire and George Morrison, Esquire, along with their clients Stephanie Cibinic, David Ward, and Brian Ward (hereinafter "Respondents").

FACTUAL BACKGROUND

Stephen Day Ward (hereinafter "Decedent") and Nancy L. Ward, Decedent's third wife, were married on May 23, 1998. Decedent and Nancy Ward executed an "Agreement for Mutual Wills and Trusts" on April 21, 2005. Nancy L. Ward passed away on June 4, 2011, leaving Decedent as her surviving spouse. Thereafter, on September 7, 2013, Decedent and Petitioner were married on Seabrook Island, Charleston County. Decedent passed away on September 16, 2016, a resident of Charleston County, leaving Petitioner as his surviving spouse.

On September 29, 2016, Respondents filed a Petition for Informal Probate of Will and Appointment, along with the 2005 Last Will and Testament of the Decedent, pursuant to which they were appointed as Co-Personal Representatives of the Estate of Stephen Day Ward on September 30, 2016. On the Application, Respondents listed Mary K. Ward as an intestate heir of the Decedent. On January 28, 2017, Petitioner filed a Petition for Omitted Spouse Share. On April 11, 2017, Respondents filed a Response to Petition for Omitted Spouse Share denying Petitioner's claim for omitted spouse share.

On June 30, 2017, Respondents filed a Motion for Summary Judgment. On October 23, 2017, Petitioner filed a Reply to Motion for Summary Judgment. This Court issued an Order Denying Summary Judgment on October 25, 2017. Respondents filed a Motion for

Reconsideration of Order Denying Summary Judgment on November 27, 2017. This Court issued an Order Denying Respondents' Motion for Reconsideration on February 9, 2018.

This Court issued a Notice of Hearing on March 2, 2018. In lieu of closing statements and with the parties' consent, the Court accepted proposed orders from attorneys for Petitioner and Respondents at the conclusion of the hearing.

Based upon a review of the record in this matter, evidence and testimony presented, and proposed orders submitted, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Decedent died testate on September 16, 2016, a resident of Charleston County, South Carolina.
2. The Court has jurisdiction over this matter and venue is proper pursuant to S.C. Code of Laws Ann. §§ 62-1-302 and 62-3-201 (a) (1).
3. The Court finds that proper notice was given to all parties in this matter pursuant to S.C. Code Ann. § 62-1-401.
4. Petitioner called Ann Noble-Kiley as her only witness. Noble-Kiley testified that she is the daughter and court-appointed conservator for the Petitioner. She further testified that she attended the wedding of the Decedent and Petitioner on September 7, 2013 on Seabrook Island, and that at the time of Decedent's passing, he was still married to Petitioner.
5. Following the testimony of Ms. Noble-Kiley, Respondents moved for involuntary non-suit, which the Court denied on the record.
6. Respondents called Brett Bluestein as their first witness. Mr. Bluestein testified that he is currently a wealth strategist, but prior to that, he was a practicing attorney with the South Carolina Bar.

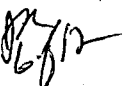
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7. Prior to answering questions relevant to the case at bar, Respondents waived any attorney-client privilege that the Decedent may have had with Mr. Bluestein.
8. While in private practice, Bluestein provided legal services to Stephen Ward and his then-wife, Nancy Ward, in 2005, including the preparation the Agreement for Mutual Wills and Trusts for the Decedent.
9. Bluestein testified that an Agreement for Mutual Wills and Trusts is a document used in very limited circumstances involving couples with children from prior marriages, in order to ensure the distribution of assets is made according to the estate plan even in the event one spouse predeceased the other and the other spouse remarried.
10. Bluestein stated that he would not have suggested or offered up an agreement for mutual wills as part of the Decedent's estate plan unless the Decedent intended for his will and trust agreement to be enforced in the event Nancy Ward predeceased him and he subsequently remarried. Bluestein "would not have offered this agreement to mutual clients unless that was exactly what they wanted to do. Protecting against distribution of their assets after the death of the first spouse."
11. Bluestein clarified that he would not have suggested this document nor offered it up to Nancy Ward or Stephen Ward if it were not crystal clear that their intent in drafting the Agreement for Mutual Wills, their Last Wills and Testaments, and their Trusts Agreement, was to omit any subsequent spouse from inheriting from the surviving spouse's estate.
12. Bluestein testified that he was not aware of any amendments, modifications, or alterations to any of the estate planning documents, nor did Nancy Ward or Stephen Ward reach out to him to do so.

13. The April 21, 2005 Last Will and Testament of Stephen D. Ward ("Will") is the valid Last Will and Testament of Decedent.
14. At the time of execution of the 2005 Will, Decedent was married to his third wife, Nancy Ward.
15. Nancy Ward predeceased the Decedent in 2011.
16. Decedent and Petitioner were married in September 2013 on Seabrook Island, Charleston County, South Carolina.
17. At the time of their marriage, Petitioner owned a home at 1220 Creek Watch Trace on Seabrook Island and Decedent owned a home at 2412 High Hammock Road on Seabrook Island. Resp.'s Ex. 7.
18. Item XIII of the 2005 Will incorporates by reference The Agreement for Mutual Wills and Trusts between Stephen D. Ward ("Husband") and Nancy L. Ward ("Wife"), dated April 21, 2005 ("Agreement for Mutual Wills and Trusts").
19. Sections 2.5 and 7.1 of the Agreement for Mutual Wills and Trusts expressly incorporates by reference the following exhibits:
 1. Trust Agreement of Stephen D. Ward, April 21, 2005;
 2. Last Will and Testament of Stephen D. Ward, April 21, 2005;
 3. Nancy Diemer Trust, April 28, 1998;
 4. First Amendment and Restatement of Trust Agreement of Nancy L. Ward, April 21, 2005; and
 5. Last Will and Testament of Nancy L. Ward, April 21, 2005.
20. In addition, the Trust Agreement for Stephen D. Ward, the Last Will and Testament of Stephen D. Ward, the First Amendment and Restatement of Trust Agreement of Nancy L.

Ward, and the Last Will and Testament of Nancy L. Ward each contain express provisions incorporating by reference the Agreement for Mutual Wills and Trust.

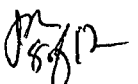
21. Respondents called Trisha Ernstrom as a witness. Ernstrom was friends with the Decedent and Nancy Ward during their lifetimes.
22. Ernstrom testified that after the execution of the 2005 Agreement for Mutual Wills, but prior to Nancy Ward's death in 2011, Ernstrom discussed with the Decedent his and Nancy's estate plan on many occasions. Ernstrom testified that the Decedent stated that he and Nancy had arranged through an attorney and intended to provide for their respective children to inherit the house and all their assets.
23. Ernstrom testified that after Nancy Ward passed away, Ernstrom remained friends with the Decedent and discussed his relationship and subsequent marriage to his fourth wife, Petitioner.
24. Ernstrom testified that prior to their marriage, the Decedent and Petitioner each had a home on Seabrook Island. Ernstrom testified that she had concerns about the Decedent's decision to marry Petitioner and the marriage's impact on the Decedent and Nancy Ward's estate plan, and discussed those concerns with him.
25. Ernstrom testified that when Ernstrom and Decedent discussed his marriage with Petitioner, on at least three occasions, Decedent insisted that the marriage to Petitioner was not going to effect the estate plan he and Nancy Ward had planned, that nothing would change, and that "everything was going to stay as he and Nancy had planned."
26. After the Decedent and Petitioner were married in 2013, Petitioner continued to own her own home at 1220 Creek Watch Trace on Seabrook Island, but moved in with the Decedent at 2412 High Hammock Road on Seabrook Island.



27. Respondent Brian Ward is one of the Decedent's children. Brian Ward testified that the Decedent had property on Seabrook Island since the 1970s that Brian Ward and his siblings would visit during the summers for more than twenty (20) years.
28. Brian Ward testified that in 2005 or 2006, Decedent provided Brian Ward with a bound copy of Decedent's estate planning documents, which included the Agreement for Mutual Wills and its exhibits, which was admitted into evidence without objection as Exhibit 8.
29. Brian Ward testified that he discussed these estate planning documents with the Decedent at the time he delivered them in 2005 or 2006, and then again in 2013, prior to the Decedent's marriage to the Petitioner.
30. Petitioner's attorney objected to testimony on discussions with the Decedent pursuant to the Dead Man's Statute, which the Court sustained. Respondents proffered the testimony of Brian Ward's discussions with the Decedent.
31. Brian Ward testified that at no time did he observe the Decedent unable to make his own decisions, care for himself, communicate freely, or maintain his finances.
32. Brian Ward testified that after Decedent passed away, Brian Ward, as Co-Personal Representative of the estate, reviewed the Decedent's finances and located assets.
33. Brian Ward testified that a joint BB&T account was held between the Decedent and Petitioner, funded entirely by pension and Social Security income of the Decedent, and was used to pay the living expenses of both Decedent and Petitioner during Decedent's lifetime, tax expenses of Petitioner's property on Seabrook Island in the amount of \$1,600.00, and Petitioner's health care expenses of at least \$7,500.00.

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34. Brian Ward testified that the BB&T account was a joint account with rights of survivorship and transferred to Mary Ward outside of the Estate, with a balance of approximately \$4,000.00 upon Decedent's death.
35. Brian Ward testified that the Decedent owned, with rights of survivorship to Petitioner, a time-share in Las Vegas with an unknown value, a Toyota Camry lease with an unknown value, and a Seabrook Island Club membership valued at \$17,000, all of which transferred to Petitioner outside of the estate.
36. Brian Ward testified that in his role as Co-Personal Representative, he was able to identify Social Security and other investment income of the Decedent, but that the Petitioner's income was not used to pay Petitioner and Decedent's living expenses and was not deposited into the BB&T joint account.
37. Brian Ward testified that he has not received any documentation that the Decedent amended, revoked, or modified any of the estate planning documents in Exhibit 8.
38. Respondent David Ward, also one of Decedent's children, testified similarly that in 2006, Decedent provided him a bound copy of his estate planning documents, Exhibit 8, and that to his knowledge, at no time thereafter, was Exhibit 8 amended, ratified, modified, or revoked.
39. David Ward testified that he discussed these estate planning documents with the Decedent in 2011 and then again in 2013, prior to his marriage to Mary Ward.
40. Petitioner's attorney objected to testimony on discussions with the Decedent pursuant to the Dead Man's Statute, which the Court sustained. Respondents proffered the testimony of David Ward's discussions with the Decedent.



41. Respondent Stephanie Cibinic, Decedent's daughter, also testified similarly that in late 2005 or 2006, Decedent provided her a with bound copy of his estate planning documents, Exhibit 8, and that to her knowledge, at no time thereafter, was Exhibit 8 amended, ratified, modified, or revoked.
42. Cibinic testified, without objection, that Decedent called her in August 2013, prior to his marriage to the Petitioner, and told her he was going to get married and said, "This does not impact the Will."

CONCLUSIONS OF LAW

43. An action under the omitted spouse statute is an action at law. Green ex rel. Estate of Cottrell v. Cottrell ex rel. Estate of Cottrell, 346 S.C. 53, 60, 550 S.E.2d 324, 328 (Ct. App. 2001).

44. The Omitted Spouse Statute, S.C. Code Ann. § Section 62-2-301, provides in relevant part:

(a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate he would have received if the decedent left no will unless:

(1) it appears from the will that the omission was intentional;

or

(2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

45. In Green ex rel. Estate of Cottrell, the Court noted that the legislative purpose behind the Probate Code was "(2) to discover and make effective the intent of a decedent in the distribution of his property." Id. (emphasis supplied).

46. A surviving spouse who wishes to qualify as an omitted spouse must demonstrate:

- (1) the decedent spouse executed the Will in question prior to the marriage;
- (2) the Will does not provide for her as the surviving spouse;
- (3) the omission was unintentional; and
- (4) the decedent did not provide for the spouse with transfers outside of the Will.

Id. at 60–62, 550 S.E.2d 324, 328–29.

47. The reporter’s comments to the Omitted Spouse Statute specifically contemplates evidence of the Decedent’s intentions from the face of the Will, from the Decedent’s statements, or other evidence.

48. The Omitted Spouse Statute, as currently amended, replaces an earlier statutory version, which declared a will, executed by one spouse prior to a marriage, was presumptively revoked by a subsequent marriage. Former S.C. Code § 21-7-220, S.C. Code 1962 § 19-222. The current statutory provision, amended in 1986, provides two specific and limited exceptions to the presumption of revocation. S.C. Code Ann. § 62-2-301 (a) (1) allows an exception where “it appears from the will that the omission was intentional.” S.C. Code Ann. § 62-2-301(a)(2) allows an alternate exception if the decedent “provided for the spouse by transfer outside the Will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.”

49. In the present case, it is undisputed that the Petitioner meets the first two elements to qualify as an omitted spouse, as the Decedent executed the 2005 Will prior to his marriage to Petitioner and the 2005 Will does not provide for the Petitioner.

50. Respondents argue that the omission was intentional, as evidenced by the language of the Will and the documents incorporated by reference therein.

51. South Carolina law permits an expressed testamentary compact for joint wills, which becomes irrevocable when one party predeceases. S.C. Code Ann. § 62-2-701.
52. Additionally, South Carolina law provides for documents to be incorporated into a will by reference. S.C. Code Ann. § 62-2-509.
53. Section IV 4.2 states that if the surviving spouse remarries, he or she will “Thereafter ratify his or her Will and Trust in the form and with the provisions contained in his or her Will and Trust...and as a condition of such re-marriage, require any person he or she remarries to legally and unconditionally waive his or her right to an Elective Share in the Property provided them under South Carolina Law.”
54. Decedent did not ratify his Will or Trust and did not condition his marriage to Petitioner on the requirement that she waive any right to his Estate.
55. While South Carolina Courts have held that a Decedent’s choice to leave a previous Will intact is evidence of an intentional omission, the opposite is true in this case. Green ex rel. Estate of Cottrell v. Cottrell ex rel. Estate of Cottrell, 550 S.E.2d 324 (Ct. App. 2001).
56. The Court finds that the Decedent’s failure to comply with Section IV 4.2 of the Agreement for Mutual Wills and Trusts is evidence that the Decedent did not intentionally omit the Petitioner from his Estate.
57. With respect to the fourth element, Petitioner must demonstrate that “that the Decedent did not provide for Petitioner outside of the Will.”
58. To satisfy the fourth element, the testator must provide for the spouse outside the will and intend this provision to be in lieu of any testamentary disposition. S.C. Code Ann. § 62-2-301.

59. In re Estate of Timmerman, 502 S.E.2d 920 (Ct. App. 1998), the Court found that the Decedent provided for the spouse outside the will, in lieu of any testamentary disposition, based on “the sheer magnitude” of the transfers to the surviving spouse. In Timmerman, the transfers from the Decedent to the Petitioner amounted to \$1.2 million, including joint bank accounts and substantial gifts to the surviving spouse and her children. Id.

60. Respondents argue that the Decedent provided for Petitioner outside of the Will, during his lifetime, by paying for Petitioner’s living expenses, expenses related to Petitioner’s own individual home on Seabrook, Petitioner’s health care related expenses, and providing for rights of survivorship to the BB&T account, time share, Toyota Camry lease, and Seabrook Island Club membership.

61. The Court finds that, although the Decedent shared expenses with the Petitioner during their marriage, there is no evidence that the Decedent intended these transfers to be in lieu of any testamentary disposition.

Based on the foregoing, it is hereby,


ORDERED ADJUDGED AND DECREED that Petitioner’s claim for omitted spouse share is **GRANTED**; it is further

ORDERED, ADJUDGED, AND DECREED that the Petitioner is entitled to her intestate share of the Decedent’s estate; it is further


ORDERED, ADJUDGED, AND DECREED that the parties shall have ten (10) days from the date of this Supplemental Order to file any post-hearing motions.

IT IS SO ORDERED.

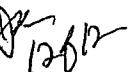
This 18th day of January, 2019
Charleston, South Carolina



IRVIN G. CONDON
Judge of Probate
Charleston County

Attest: A True Copy


Clerk Probate Court



BURR • FORMAN MCNAIR

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February 3, 2020

Jenny Abbott Kitching, Clerk
South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

**Re: In Re: Estate of Stephen Day Ward, Jr.
Stephen Ward Cibinic, David D. Ward, and Brian C. Ward, Personal
Representatives v. Mary K. Ward a/k/a Mary Kimberly Ward
Our matter: 2066339.0000001**

Dear Ms. Kitchings:

I am in receipt of the Court's correspondence dated January 24, 2020. Pursuant to the request contained in that correspondence, please find enclosed a copy of the Probate Court's January 18, 2019 Order to Alter or Amend Judgment.

Very truly yours,

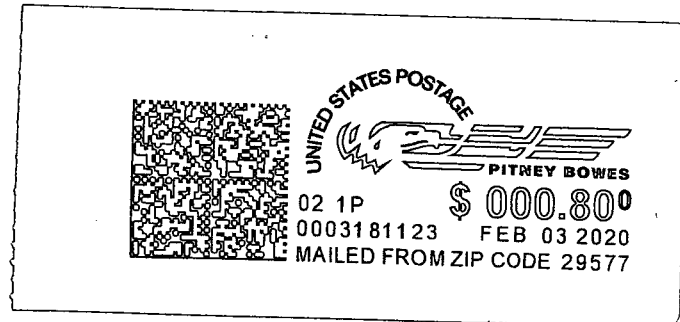

Amanda Bailey

AAB/emb
Enclosure

cc: Jane A. McFaddin, Esq, w/enc.
Client, w/enc. (via Email)

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SC Court of Appeals

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