IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
CIRCUIT COURT

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-000562

MARY P. SMITH, Maezell Mitchell Jefferson, individually and as Personal Representative of the ESTATE OF ANNABELLE THORNTON, SHIRRESE B. BROCKINGTON, as Special Administrator of the ESTATE OF JANINE GOURDINE, EMMA SMALLS, VIOLA PRINGLE, CEPHUS THORNTON, ARTHUR GRADDICK, III, an imprisoned person, VENETRA WATSON, and any known or unknown persons or entities claiming any interest in the ESTATES OF LUCINDA PRINGLE, ODESSA GRADDICK, ARTHUR GRADDICK, Jr., ANNABELLE THORNTON and JANINE GOURDINE.....Appellants,

v.

ANGUS M. LAWTON, Personal Representative of the Estate of Lucinda Pringle, EVELINA BROWN MOSES, THOMAS P. BROWN, JR., and Unknown PR REBECCA PATRICIA BROWN .....Respondents.

FINAL BRIEF OF APPELLANTS

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VII. Did the Circuit Court err as a matter of law in affirming the Probate Court's finding that Appellants concealed the will from Respondents and that this prejudiced Respondents when the attempted concealment could not have caused any prejudice since the proponents of the will were in possession of a copy of the will within three years of the date of death and neglected to offer it for probate?

VIII. Did the Circuit Court err as a matter of law in affirming the Probate Court's finding that the 10-year ultimate time limit to offer a will for probate under S.C. Code §62-3-108 did not apply?

STATEMENT OF THE CASE

The decedent in this case died October 11, 1989 and was vested with an undivided fifty percent (50%) interest in a 10½ acre tract of land located on or near U.S. Highway 17 North in Mount Pleasant, South Carolina (the "Property"). No formal attempt to probate Decedent's estate was made until an application for informal appointment was filed May 5, 1999. The estate was probated and a Deed of Distribution for the Property was filed April 17, 2000. The court issued a Certificate of Discharge on June 26, 2001.

On October 20, 2005, Respondents filed a Petition for Recovery of Improper Distribution based on their claim that a will had been discovered that left the Property to Respondents. This Petition was amended by consent on October 2, 2007 to properly reflect

the parties to the action. On January 8, 2007, Respondents filed a Motion to Vacate the Order of June 25, 2001. A hearing on this motion was held April 8, 2008 where the Appellants took the position that the will could be considered by the Probate Court since the 10 year statute of repose set forth in §62-3-108 prevented the court from any such consideration. The Probate Court found that the 10 year statute of repose did apply to this case and denied Respondent's request for relief in an order dated October 20, 2008.

Respondents appealed this decision to the Court of Appeals arguing that the statute of repose should be tolled if the will was fraudulently concealed as alleged in this case. The Court of Appeals issued an Order filed August 9, 2011 that reversed the Probate Court's ruling that the 10 year statute of repose set forth in §62-3-108 prevented the court from considering the will in cases where there is evidence that a fraudulent concealment of the will has taken place and remanded the case to the Probate Court for further findings consistent with its opinion.

Between the date the Court of Appeals issued its decision in 2011 and 2015, the will was not offered to the Probate Court for consideration. During this period, Appellants filed multiple motions to dismiss on jurisdictional grounds and pursuant to §62-3-108 that were denied. The Probate Court issued an Order dated June 25, 2015 ordering Angus Lawton, the Special Administrator of the estate, to file a petition to probate the will. Mr. Lawton filed a Petition for Appointment and for the Informal Probate of a Will on September 4, 2015. Appellants filed a Petition for Formal Testacy February 9, 2016 challenging the validity of the will and requesting that the court address all issues on remand from the Court of Appeals order filed August 9, 2011.

A hearing on this petition was held November 9, 2016. The Probate Court issued an Order dated January 18, 2017 denying Appellants Petition and finding that the will was valid and able to be probated. Appellant timely filed a Notice of Appeal to the Circuit Court which issued an Order dated March 16, 2018 affirming the Order of the Probate Court. This Appeal followed.

STATEMENT OF FACTS

The decedent in this case died October 11, 1989 and was vested with an undivided fifty percent (50%) interest in a 10½ acre tract of land located on or near U.S. Highway 17 North in Mount Pleasant, South Carolina (the "Property"). Lucinda Pringle's surviving heirs were three daughters, Mary Smith, Annebelle Thornton, and Janine Gourdine and three children of a deceased daughter, Evelina Brown Moses, Thomas P. Brown, Jr. and Rebecca Patricia Brown. The estate was originally administered as an intestate estate in 1999 and the Property was deeded to all of the children of Decedent per stirpes by way of deed of distribution on April 6, 2000. The court issued a Certificate of Discharge on June 26, 2001.

In October or November 1989, the parties acknowledged the awareness of at least one copy of the alleged will within several days after the death of Lucinda Pringle but with no information as to the content of the will. On another occasion about three years later, Thomas Brown, Jr. acknowledged in his testimony that he had a copy of the will and made various attempts to file the copy of the will with the Probate Court of Charleston County with no success.

Emma Smalls, in the aftermath of Hurricane Hugo in late 1989, processed a claim with the Public Savings Fire and Casualty Insurance Company with reference to damages

which resulted to the house she resided in on the decedent's property. As a result of the claim, the insurance company issued a check naming as payees the Respondents and Emma Smalls as the "executors of the estate" of the decedent on January 15, 1990. The payees on the insurance check match in order and number the apparent nomination of the executors listed in Item 4 in the alleged will of Lucinda Pringle.

On October 20, 2005, Respondents filed a Petition for Recovery of Improper Distribution based on their claim that a will had been discovered that left the Property to Respondents. This Petition was amended by consent on October 2, 2007 to properly reflect the parties to the action. On January 8, 2007, Respondents filed a Motion to Vacate the Order of June 25, 2001. A hearing on this motion was held April 8, 2008 where the Appellants took the position that the will could be considered by the Probate Court since the 10 year statute of repose set forth in §62-3-108 prevented the court from any such consideration. The Probate Court found that the 10 year statute of repose did apply to this case and denied Respondent's request for relief in an order dated October 20, 2008.

Respondents appealed this decision to the Court of Appeals arguing that the statute of repose should be tolled if the will was fraudulently concealed as alleged in this case. The issues raised in this appeal related to the validity of the Will were not raised in that appeal as shown by the statement of issues on appeal (R. p. 197). The Court of Appeals issued an Order filed August 9, 2011 that reversed the Probate Court's ruling that the 10 year statute of repose set forth in §62-3-108 prevented the court from considering the will in cases where there is evidence that a fraudulent concealment of the will has taken place and remanded the case to the Probate Court for further findings consistent with its opinion.

Between the date the Court of Appeals issued its decision in 2011 and 2015, the will was not offered to the Probate Court for consideration. During this period, Appellants filed multiple motions to dismiss on jurisdictional grounds and pursuant to §62-3-108 that were denied. The Probate Court issued an Order dated June 25, 2015 ordering Angus Lawton, the Special Administrator of the estate, to file a Petition to Probate the will. Mr. Lawton filed a Petition for Appointment and for the Informal Probate of a Will on September 4, 2015. Appellants filed a Petition for Formal Testacy February 9, 2016 challenging the validity of the will and requesting that the court address all issues on remand from the Court of Appeals order filed August 9, 2011.

A hearing on this petition was held November 9, 2016. The Probate Court issued an Order dated January 18, 2017 denying Appellants Petition and finding that the will was valid and able to be probated.

STANDARD OF REVIEW

The standard of review applicable to cases originating in the Probate Court depends upon whether the underlying cause of action is at law or in equity. *University of Southern California v. Moran*, 365 S.C. 270 (S.C. App. 2005). An action to contest a will is an action at law. *In re Estate of Pallister* 363 S.C. 437 (S.C. 2005). When a probate court proceeding is an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them." *Neely v. Thomasson*, 365 S.C. 345 (S.C. 2005).

ARGUMENT

I. The Circuit Court erred as a matter of law in affirming the Probate Court allowing Decedent's will to be probated when the validity of the will was properly raised and no evidence was offered to prove the proper execution of the will.

A. The Probate Court is required to inquire into the validity of the will since the issue of validity was properly raised when the will was first offered for probate.

In its Order dated January 18, 2017 and as affirmed by the Circuit Court, the Probate Court found that no additional inquiry into the "validity of the will is required in light of the court's prior orders and the Court of Appeals' opinion." (1/18/17 Order, pp 4-5, R. p. 37). The Probate Court does, however, go on to make findings related to the validity of the will that are addressed below.

With respect to the finding that no additional inquiry into the validity of the will is required in light of the court's prior orders and the Court of Appeals' opinion, Appellants would show that the issue of the validity of the Will has never been litigated prior to the will first being offered for probate September 4, 2015. Respondents argue that the issue has been raised and ruled on and as a result, cannot now be argued. However, Respondents have yet to identify any motion, statement of issues on appeal, hearing transcript, or order where issues related to the validity of the Will were raised and/or ruled on prior to September 4, 2015.

Respondent has searched all of the prior orders and appeals and cannot locate any place where issues related to the validity of the Will were raised in the Statement of Issues on Appeal in the prior appeal to the Court of Appeals nor were any such issues raised at any other hearing before the Probate Court. No prior Probate Court Order addresses the validity of the will.

Neither the Probate Court Order dated January 17, 2017, the Circuit Court Order dated March 16, 2018, nor the Respondent's Circuit Court appeal brief references a motion, statement of issues on appeal, hearing transcript, or order where issues related to the validity of the Will were raised and/or ruled on prior to September 4, 2015.

The reason for this is that the validity of the will was not, and could not have been, in dispute prior to the will first being offered for probate September 4, 2015. While the November 12, 2012 hearing was styled as a "final hearing", the March 24, 2013 Order from this hearing orders the Special Administrator to "submit a Form 300 Application to open the Estate..." which clearly indicates that the court neither considered the estate to be finalized nor considered that it had previously received the will for consideration . (3/24/13 Order, p. 1, R. p. 29).

It is also important to put the phrase, "the Court hereby accepts the will for probate" that is used in the March 24, 2013 Order in the correct context in light of the litigation. As of 2013, the Probate Court was prohibited from accepting any will for consideration and had refused to do so due to the statute of repose set forth in §62-3-108. This issue was put to rest at the November 9, 2012 hearing when the court ordered that it was going to accept the will pursuant to the Court of Appeals Order. This could not have meant that the court passed judgment on the validity of the will because no Form 300 Application for the Probate of a Will had ever been filed offering the will for probate. This fact was acknowledged by the court in the March 24, 2013 Order when it ordered the Special Administrator to "submit a Form 300 Application to open the Estate...". (R. p. 29).

The Special Administrator then filed a Form 300 Application September 4, 2015 formally asking the court to probate the will for the first time. Due to the Court of Appeals

Order, the Probate Court was required to accept the will despite the fact that it was more than 10 years after the decedent's death, but there is nothing in any of these orders that prevented any interested party from challenging the validity of the will when it was formally offered for probate.

There is no mechanism in the Probate Code for an opponent to a will to challenge the validity of a will before it is first offered for probate. All of the litigation prior to the will being offered for probate September 4, 2015 dealt with whether the Probate Court could accept for consideration Decedent's will in light of the statute of repose set forth in §62-3-108. As a result, the prior orders and opinions have no bearing on whether the court should inquire into the validity of the will upon proper petition from Appellants when the will is first presented to the court for consideration. While a ruling on this finding may be moot given the fact that the court did make findings related to the validity of the will, to the extent a ruling is required, it was reversible error for the court to fail to inquire into the validity of the will and this court should reverse the Circuit Court's affirmation of the Probate Court's Order and declare that the Decedent died intestate.

B. **The Probate Court, as affirmed by the Circuit Court, erred as a matter of law in finding that the will was properly proved and can be probated.**

Despite finding that no inquiry into the validity of the will was required, the Probate Court went on to make such findings and these findings were affirmed by the Circuit Court. The first finding related to the evidence needed to prove the will and the second related to the discrepancies in the attestation clause. (1/18/17 Order, p. 5, R. p. 37). The Probate Court, as affirmed by the Circuit Court, found that since the witnesses to the will were dead at the time of the hearing, "no further inquiry is required." (1/18/17 Order, p. 5, R. p. 41).

S.C. Code §62-3-406 and S.C. Code §62-3-407 of the South Carolina Probate Code require that evidence be presented to prove a will and the burden in all contested cases to prove the due execution of a will is on the proponents of the will. The code sections read as follows:

§62-3-406. Testimony of attesting witnesses.

In a contested case in which the proper execution of a will is at issue:

(1) if the will is self-proved pursuant to §62-2-503, the will satisfies the requirements for execution, subject to rebuttal, without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it;

(2) if the will is notarized pursuant to §62-2-503(c), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will;

(3) **if the will is witnessed pursuant to §62-2-502, but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this State, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.**

(emphasis added).

§62-3-407. Burdens in contested cases.

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. **Proponents of a will have the burden of establishing prima facie proof of due execution in all cases** and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it must be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it must be determined first whether the will is entitled to probate.

(emphasis added).

§62-3-407 clearly tasks the proponents of the will in this case, the Respondents, with the burden of establishing prima facie proof of due execution of the will. §62-3-406 states that in cases where the will is not notarized or self-proved, "the testimony of at least

one of the attesting witnesses is required to establish proper execution if the witness is within this State, competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness." Having the burden of proof, it is Appellants' position that Respondent must produce either the testimony of one witness, either live or by affidavit, or evidence that the witnesses are out of the State, incompetent or unable to testify. If the witnesses are unable to testify, then Respondent must produce some other reliable evidence as to the due execution of the will.

In this case, the Respondent produced no testimony, live or by affidavit, from either of the witnesses to the will. While it was understood by both parties and the court that all of the witnesses to the will had died prior to the hearing, this case has been actively litigated for over 10 years and an affidavit of one of the witnesses could have been obtained during that period prior to the death of the witnesses. It is Appellant's position that the Respondents should not be relieved of the requirement to produce testimony of one of the witnesses to the will if the witnesses were living during the pendency of the case. Respondents produced no evidence as to when the witnesses died or that they were unable to obtain an affidavit as to the proper execution of the will prior to each witness's death. As a result, the Probate Court had no evidence before it to find the will was sufficiently proved and erred in finding that will was sufficiently proved and accepting it for probate. This is an error of law and as a result, this court should reverse the Circuit Court's affirmation of this finding and rule that the Decedent died intestate.

Assuming that Respondents met their burden of proving the unavailability of the witnesses to the will, they still must produce some evidence of the proper execution of the will under §62-3-406. The last sentence of §62-3-406 states, "An attestation clause that is

signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred." In this case, the attestation clause states that the witnesses are witnessing "Lucinda Springer" sign the will. The Probate found that this was a scrivener's error and that no further inquiry is warranted. (1/18/17 Order, p. 6, R. p. 42).

A scrivener's error is defined by Black's Law Dictionary as "a drafter's or typist's technical error that can be rectified without serious doubt about the correct reading." *Black's Law Dictionary, 10th ed.* The difference between "Pringle" and "Springer" is more than the leaving off of a letter ('Daniel' instead of 'Daniels'), a common misspelling ('Jonson' instead of 'Johnson"), or the transposition of letters ('Pringel' instead of 'Pringle'). While the two names have the letters "pring" in common, the names start with a different letter, end with a different letter, and do not share all of the same interior letters. It is much further of a stretch to make a finding that there is no serious doubt as to the correct reading in this case than in the examples above.

It is not inconceivable, especially in this family, that this will is in fact a fraud drafted and executed by one or more of the named beneficiaries in the will in an effort to take more than they would in intestacy. With the testator's signature being only "X" marks, her signature cannot be disproved by comparisons to prior known signatures. There are plausible reasons to think that the name "Pringle" could have been changed to "Springer" in furtherance of a fraud. For example, the perpetrator of the fraud could have done this to ease the witnesses' concerns that they would be lying about what they actually witnessed.

The burden is on the proponents of the will, the Respondents, to prove that it was a scrivener's error and they did not produce any evidence that the use of "Springer" is an honest mistake. The court may consider extrinsic evidence in determining if an error is a

scrivener's error. *Fenzel v. Floyd*, 289 S.C. 495, 347 S.E.2d. 105 (Ct. of App. 1986). "The Court cannot make wills nor can they conjecture as to the intent of the testator." *Cornelson v. Vance*, 220 S.C. 47, 66 S.E.2d. 421 (1951). In this case, no extrinsic evidence was presented to try to show that this was a scrivener's error.

Regardless of how likely the court believes that the inclusion of "Springer" was a scrivener's error as opposed to being part of a fraud, with no evidence presented outside of the will itself that this was in fact a scrivener's error, the court is only left to speculate that this was a scrivener's error, which it is prohibited from doing under *Cornelson. Id.* As a result, the Probate Court, as affirmed by the Circuit Court, has committed a reversible error of law in making this finding and this court should reverse the court's finding on this issue and find that the attestation clause is invalid and no evidence as to the valid execution of the will was presented and that the Decedent died intestate.

Assuming that the court finds that the attestation clause stated that the witnesses were witnessing Lucinda Pringle sign the will, this with nothing more cannot be enough to prove a will's validity. To make such a finding would create a method for any unscrupulous heir to create a fraudulent will that no one can dispute: present a will that is not notarized or self-proved with an attestation clause containing forged signatures of two witnesses that are already dead. For example, one of the Appellants could present a will executed shortly after this will, with a different disposition of the property, signed with an "X" mark and with an attestation clause signed with forged signatures of the same two dead witnesses used for the will in this case. Without a requirement of testimony or other proof of the execution of the will outside of the will itself, no one would have any way to prevent the court from accepting the will as the last will of the Decedent.

The requirements for the execution of and the proving of a will are in place to prevent fraud and to ensure that the testator actually signed the will offered to the court. If any will should ever be suspected for fraud, this is the one. There are many aspects of and irregularities with this will that are not found in most wills that suggest that it may be fraudulent. This list includes:

1. There is no evidence that the will was prepared by an attorney or executed in the presence of an attorney;
2. The will is a form will copied out of a book with blanks to fill in the names of beneficiaries and the property devised;
3. The will was executed with "X" marks that cannot be compared to other known signatures of the testator;
4. The will was not executed before a notary nor are the witness signatures notarized;
5. The name of the person the witnesses claim to be witnessing the signature of in the attestation clause is significantly different than the testator ("Springer" v. "Pringle");
6. There are clear alterations made to multiple sections of the will that change the beneficiaries, personal representative and the property being devised;
7. Both of the witnesses to the will are dead and unavailable to testify; and
8. No other witness testimony or other evidence as to the execution of the will has been presented.

Even if the court believes that the will is valid, the Respondents still have the burden under §62-3-407 to present evidence to support such a belief. With no evidence other than

the will itself presented, the court can only use conjecture to assume that the will is valid. "The Court cannot make wills nor can they conjecture as to the intent of the testator." *Cornelson v. Vance*, 220 S.C. 47, 66 S.E.2d. 421 (1951). Because Respondent has presented no evidence on this issue, the court has no basis to make a finding that the will is valid. For these reasons, the Probate Court's finding, as affirmed by the Circuit Court, that the will is valid should be reversed and the Decedent should be declared to have died intestate.

II. The Probate Court as affirmed by the Circuit Court erred as a matter of law in finding the offered will to be an accurate version of the last will of the Decedent when the beneficiary designation portion of the will is clearly altered on its face and there was no Petition to probate something other than the original will and no evidence presented as to how the original will disposed of the decedent's property.

In addressing Appellants' argument that the Probate Court cannot probate the will submitted since it is not the original will, the Probate Court, as affirmed by the Circuit Court, found that Emma Smalls made the alterations and that since Appellants were not questioning Emma Small's status as an heir, "any such alteration by Ms. Smalls does not preclude Decedent's will from being probated and that further inquiry is unwarranted." (1/18/17 Order, p. 5; R. p. 41).

S.C. Code §62-3-402 of the South Carolina Probate Code addresses the requirements to petition the court to probate a will or if no original will is submitted, the requirements of the petitioner in such a case, and reads as follows:

§62-3-402. Formal testacy or appointment proceedings; petition; contents.

(a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will:

(1) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(2) contains the statements required for informal applications as stated in the six subitems under Section 62-3-301(a)(1), and the statements required by subitems (ii) and (iii) of Section 62-3-301(a)(2);

(3) states whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

(b) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by (1) and (4) of Section 62-3-301(a) and indicate whether administration under Part 5 [Sections 62-3-501 et seq.] is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subitem (ii) of Section 62-3-301(a)(4) above may be omitted.

(Emphasis added).

In this case, Angus Lawton, the Special Administrator of the estate filed a Petition for Appointment and for the Informal Probate of a Will on September 4, 2015 pursuant to the Probate Court's order directing him to do so dated June 25, 2015. This petition asserts that the will being offered for probate is the original will. (R. p. 329). The Probate Court, however, finds that there are alterations made to this will and goes on to make a finding that Emma Smalls made these alterations. (1/18/17 Order, p. 5; R. p. 41). This finding is unappealed and is now the law of the case.

If there are changes to the original will made by the testator, the changes have to be executed with the same formalities as the original will. *Stevens v. Royalls*, 77 S.E.2d 198, 223 S.C. 510 (S.C., 1953). In this case, however, Respondent took the position that the clear changes made to the will were not made by the testator herself. Rather, Respondent

argued, and the Court agreed, that the changes were made by Emma Smalls to help her obtain home owners insurance benefits. As a result, the beneficiaries named and the property devised in the will before the court were the wishes of Emma Smalls, and not the wishes of the testator. The Appellant also agrees that this is the case meaning that there is no dispute on this issue.

When a will is offered for probate that is not the original will, S.C. Code §62-3-402 requires that the "petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable." Not only did the petition fail to state who the beneficiaries were or what property was being devised under the original will, no evidence was presented at the hearing on the petition as to how the altered clause read prior to being altered by Emma Smalls. This is a clear failure to comply with the requirements of S.C. Code §62-3-402 by Respondents, is an error of law, and this court should reverse the Circuit Court's affirmation of the Probate Court's findings that the will offered for probate can be probated.

In addition to this statutory violation, the more significant issued raised by the alterations in the section of the will that devises property to the beneficiaries is that the court has no basis to determine the intent of the testator as to who she wanted to take under the will and what she wanted them to take. "The paramount rule of will construction is to determine and give effect to the testator's intent. S.C. Code Ann. § 62-1-102(b)(2) ('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.')"; *Holcombe-Burdette v. Bank of America*, 640 S.E. 2d 480 (S.C. App. 2006) citing, *Epworth Children's Home v. Beasley,* 365 S.C. 157, 165, 616 S.E.2d 710, 714 (2005); *Bob Jones Univ. v. Strandell,* 344 S.C.

224, 230, 543 S.E.2d 251, 254 (Ct.App.2001); *Matter of Clark,* 308 S.C. 328, 330, 417 S.E.2d 856, 857 (1992).

"In determining the intent of the deceased, a court must always look first to the language of the will itself.' *Holcombe-Burdette v. Bank of America*, 640 S.E. 2d 480 (S.C. App. 2006) citing, *Pate v. Ford,* 297 S.C. 294, 299, 376 S.E.2d 775, 778 (1989); *Bob Jones Univ.,* 344 S.C. at 230, 543 S.E.2d at 254 ("In construing a will, a court's first reference is always to the will's language itself."). "The primary rule of ascertaining intent is that "[r]esort is first to be had to the instrument's language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." *Chiles v. Chiles,* 270 S.C. 379, 383-84, 242 S.E.2d 426, 429 (1978) (quoting *Superior Auto. Ins. Co. v. Maners,* 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). "The court must be guided by the words which the testator has used, reading them in the light of established principles of law." *White v. White,* 241 S.C. 181, 185, 127 S.E.2d 627, 629 (1962).

The court's ruling on this issue states that since the Appellants do not question "Emma Small's status as an heir, any alteration she made does not preclude Decedent's will from being probated...". This analysis has no rational relationship to the requirements of the law relating to determining the intent of the testator. *Id.* Appellants position has consistently been that the will is not valid as not being proved, that it is not the original will, that no determination can be made as to what property the testator intended to be devised or who the testator intended to receive the property, and the all of the children/heirs of the testator, including Emma Smalls, should take under the laws of intestacy. This finding by the Probate Court as affirmed by the Circuit Court suggests that the intent of the

testator is irrelevant since the court intends to probate a will that it has found is not the original and that the portion of the will identifying the property being devised and the beneficiaries receiving the property was drafted by someone other than the testator.

The altered section of the will shows that the items to be devised were covered up by white-out or otherwise covered up along with what appears to be room for at least one beneficiary. The only evidence the court has before it to help it determine what was originally in this clause is the fact that Emma Smalls either added herself as a beneficiary, added the homes as an item being devised, or both. There is no evidence, however, as to what information was covered up and typed over. "The Court cannot make wills nor can they conjecture as to the intent of the testator." *Cornelson v. Vance*, 220 S.C. 47, 66 S.E.2d. 421 (1951). Without any evidence of what the original will devised, the court is not allowed to speculate and has no way to determine what property the testator intended to devise.

Based on the court's finding that Emma Smalls made these alterations, it is reasonable to assume that Emma Smalls added her name where it was not before. However, there is no way to tell and there is no evidence in the record as to who the other beneficiary(ies) was(were), if any, and what property the testator intended to devise prior to the alterations. One could simply assume that the original will included Evelina Brown as a beneficiary and that the original will devised "my personal property and my homes", but this would be pure conjecture which the court is not allowed to do. *Id.* Emma Smalls was free to name anyone she wanted as beneficiary and to add any items to the property being devised that she wanted. Emma Smalls has been found to have altered the will and

then conceal it to suit her own needs, so it cannot fairly be said that she was not willing to or capable of altering the property being devised in the will as well.

Not knowing what property was devised as part of the original will is especially significant in this case since there is no residuary clause in the will. For example, if the original will only devised personal property, the decedent's real property would not pass under the will and would pass under the law of intestacy pursuant to S.C. Code §62-2-101 and §62-2-103. Respondent simply assumes that the original will leaves the Property to the named beneficiaries in the altered will, but presented no evidence that the Property was ever listed as devised property in the original will. If it were not, all of the parties would take an equal share under §62-2-103.

It is also noteworthy that the reason Respondents claim Emma Smalls made these alterations was so that she could show a home owners insurance company that she was an heir to the home she was living in order to obtain home owner's insurance benefits after hurricane Hugo. If the original will did not leave the homes to the named beneficiaries, Emma Smalls would then be motivated to not only add herself as a beneficiary, but to add a specific mention that the homes were being devised.

Regardless of what is listed as the devised property in the will before the court, the record is completely devoid of what property the testator intended to be devised in the original will. While the names of Thomas Brown and Patricia Brown do not appear to have been altered, Evelina Brown and Emma Small's names appear to be newly added by Emma Smalls. Again, there is no evidence as to whose names, if any, used to be in the place where Evelina Brown and Emma Smalls names are now.

Assuming no alterations were made to Thomas Brown and Patricia Brown's names, all the court knows about the testator's intent is that Thomas Brown and Patricia Brown were to receive some unknown property under the will and that all other property not disposed of would pass under the laws of intestacy. Without any evidence as to what the intent of the testator was with respect to what property was to be devised, the court is only left to speculate as to what property original will devised which is prohibited under *Cornelson. Id.* As a result, the will before the court cannot be probated. To find that terms of the will are to be abided by is an error of law and as a result, all of the testator's property including the Property, must pass through the laws of intestacy. This court should reverse the Circuit Court's affirmation of the Probate Court's rulings on this issue and find that the will cannot be probated, that the Decedent died intestate and/or that the Property passes through the laws of intestacy by way of S.C. Code §62-2-103.

III. The Circuit Court, in affirming the Probate Court, erred as a matter of law finding that Emma Smalls perpetrated a fraud on Respondents by concealing the will when it is admitted and the court found that the Respondents had possession of a copy of the will within three years of death and failed to timely offer it for probate.

In its 2011 remand order, the Court of Appeals ordered that the Probate Court "for further proceedings consistent with this opinion." (8/8/2011 Order, R. p. 24). While the Court of Appeals that good cause was shown to reopen the estate, this does not preclude the Probate Court from making further determinations that the concealment that was found did not harm the Respondents. As a result, Appellants contend that the Probate Court could make additional findings on this issue at the November 9, 2016 hearing.

While Appellants do not dispute the finding that Emma Smalls concealed the will, this concealment did not harm the Respondents since they had a copy of the will no later than 3 years after the decedent's death and tried to probate it. (Depo. of Thomas Brown,

Jr., p. 14, R. p. 585). While Emma Smalls tried to harm Respondents, she was unsuccessful. While Appellants can see where the court would want to punish a bad actor, the most that can be said about Emma Smalls' behavior is that she attempted to conceal the will, but failed. Since the Respondent's had a copy of the will well within the 10 year statute of repose, the statute of repose should not be tolled in this case and the court should reverse the Circuit Court's affirmation of the Probate Court on this issue and find that the will is barred by S.C. Code Ann. §62-3-108.

CONCLUSION

Since the Respondents had a copy of the will within three years of the death of the decedent, as a matter of law, no concealment of the will could have extended beyond this time. As a result, the will should be barred from being accepted for consideration for probate under S.C. Code Ann. §62-3-108.

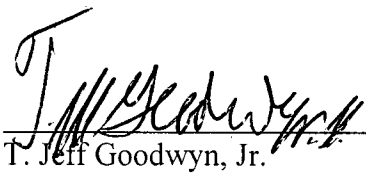
If the will is allowed for consideration, Appellants challenged the validity of the alleged will in this case the first time it was offered to the court for probate which was September 4, 2015. Appellants could not have challenged the validity of the will at any time prior to this as the will had not been formally offered to the Court. The fact that there was 10 years of litigation surrounding unrelated issues prior to the will being first offered is irrelevant to this analysis.

Outside of the will itself, there has been no evidence at all presented as to the valid execution of the will. The will is not notarized or self-proved and no witness testimony or other evidence was presented as to the will's execution. As a result, the will cannot be considered valid and probated and this ruling should be overturned and an order entered that the decedent died intestate.

The will presented to the court for probate is not the original will and the Probate Court has found that Emma Smalls altered the original will to be able to obtain home owner's insurance benefits. No evidence has been presented to the court as to what property the original will devised or to which beneficiaries the original will left the property to. As a result, the law prohibits the court from speculating as to what property the testator intended to leave or which beneficiaries she intended to take. As a result, the Probate Court cannot probate the will that has been offered to the court. This is an error of law and this court should reverse the Circuit Court's affirmation of the Probate Court on this issue and enter an order declaring that the decedent died intestate.

Respectfully Submitted,

GOODWYN LAW FIRM, LLC



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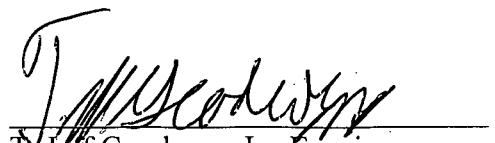
Certificate of Counsel

The undersigned hereby certifies that the Final Brief of Appellants contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,



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