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 REPLY BRIEF OF APPELLANTS

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I. THE PROBATE COURT NEVER MADE FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO THE VALIDITY OF THE WILL PRIOR TO THE WILL BEING FIRST OFFERED FOR PROBATE SEPTEMBER 4, 2015.

In their first argument, Respondents argue that the issue of the validity of the will had previously been raised and ruled on and as a result, it was proper for the court to not even consider addressing these arguments again. Appellants fully address this issue in argument I. A. of their initial brief and refers the court thereto.

To summarize, the only issue raised by Appellants prior to the will being formally offered for probate on September 4, 2015 was the 10-year statute of limitations issue under S.C. Code §62-3-108. Appellants did not and could not have raised any issues related to the validity of the will prior to it formally being offered for probate. As a result, none of the prior court orders and findings could relate to the validity of the will or should preclude Appellants from challenging the validity of the will. As a result, Appellant's arguments are timely and proper and the Probate Court had an obligation to address the merits of these arguments.

II. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT THE WILL HAS BEEN SUFFICIENTLY PROVED.

Respondents argue, "Appellants' contention that there is no evidence of the will's validity is contrary to the record." Other than the will itself, Respondents do not point to any specific evidence in the record that the Probate Court and/or Circuit Court relied upon in finding the will was sufficiently proved.

Appellants fully address this issue in argument I. B. of their initial brief and refers the court thereto. To directly address these contentions, Appellants bring the court's attention to the Probate Court's Order, as affirmed by the Circuit Court and the record. A

close reading of the January 8, 2017 Order from the Probate Court shows that the only evidence the court refers to in support of its finding that the will is valid is the will itself. The court also references the fact that the witnesses to the will were represented to be dead, but this fact cannot be considered evidence of the validity of the will.

Appellants concede that the record has many pages of testimony and documents, however, Respondent would have to conceded that all of this evidence and testimony was generated and submitted to the court in reference to the prior arguments relating to the 10-year statute of limitation set forth in S.C. Code §62-3-108. No new evidence was submitted by either party at the November 9, 2016 hearing. Because the issue of the validity of the will had not been raised prior to Appellants February 9, 2016 petition, one would naturally not expect that any evidence submitted prior to that would relate to the validity of the will.

While it is possible that some of the evidence submitted on the in S.C. Code §62-3-108 issue could relate to the validity of the will, Respondents fail to point to any such evidence in their brief other than the will itself and the copies of the will. A review of the record also shows no evidence that the court could have relied upon in finding the will to be valid. With no evidence in the record to support a finding that the will is valid, this court should reverse the Probate Court's findings, the Circuit Court's affirmation of these findings and Order on this issue, find that the will was not properly proved, and remand the case to the Probate Court for further handling consistent with this ruling.

III. THE WILL SUBMITTED TO THE PROBATE COURT IS THE VERSION THAT WAS TAMPERED WITH AND IS NOT THE ORIGINAL WILL. RESPONDENTS HAVE ARGUED THAT THE WILL OFFERED FOR PROBATE HAS BEEN TAMPERED WITH AND ARE JUDICIALLY ESTOPPED FROM ARGUING OTHERWISE. WITH NO EVIDENCE IN THE RECORD AS TO WHO THE BENEFICIARIES WERE AND WHAT PROPERTY WAS DEVISED IN THE ORIGINAL WILL, THE WILL OFFERED CANNOT BE PROBATED.

Appellants argue that the will offered for probate has clearly been altered, is not the original will, and that since there is no evidence of what the original will stated, the version offered cannot be probated. In argument II of their initial brief, Respondents argue that there is considerable evidence in the record to support the Probate and Circuit Court's findings that the will submitted is the original will. The only evidence cited to is testimony reflecting that Appellants had copies of the will and disseminated it to third parties and family members and that these copies were the same as the will Evelina Brown Moses filed August 4, 2005. To be clear, Appellants are not arguing that the will offered is a copy of the original, but rather that it has been modified or tampered with, specifically the critical sections where the beneficiary designations and the property being devised are made. The fact that copies of the altered version of the original will have been disseminated does not change the fact that the will presented to the court has clearly been altered and is not the original. Respondents have been arguing for over 10 years that this will is not the original as shown by excerpts from Respondent's prior briefs. Respondents argue in their Memorandum in Support of Motion to Vacate dated April 11, 2008,

"In addition, it is important to note that a cursory review of Mrs. Pringle's will suggests that it was tampered with in order to add Emma Smalls' name as a devisee so as to aid in her efforts to obtain the insurance proceeds, to wit:

- The will has clearly been altered via typewriter erasure to add the name of only one of Mrs. Pringle's daughters, Emma Smalls, as a devisee;
- While Emma Smalls is not appointed co-executor in a complex paragraph where such typewriter erasure is not feasible, she is added in a later paragraph that appoints executors via typewriter erasure."

(R. P. 95).

Respondents' description of the will above is a perfect description of the will that was offered for probate September 4, 2015 and Respondents' position that the will has "clearly been altered" is exactly Appellants' position in this case. It is disingenuous for Respondent to now be arguing that the will presented is not the original and that is has not been altered.

The following elements are necessary for the doctrine of judicial estoppel to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another, (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other, (3) the party taking the position must have been successful in maintaining that position and have received some benefit, (4) the inconsistency must be part of an intentional effort to mislead the court, and (5) the two positions must be totally inconsistent. Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004).

Respondent has already taken the position that the will was altered by Emma Smalls in this case, received benefit of winning their argument to have the property transfer reversed and the will be allowed to be offered for probate. Respondents now find themselves in the awkward position of having to represent to the Court that the will they

have argued is clearly altered, is somehow also the original, which is logically inconsistent. By definition, if a will has been altered without the formalities required for alterations, it is not the original will. As a result, Respondent is judicially estopped from arguing that the will has not been altered and that it is the original. To allow Respondent to reverse its position now would be an affront to the integrity of the court.

Respondent argues that multiple people received a copy of the will since Mrs. Pringle's death, but the only version of the will that is in the record is the one that was offered for probate September 4, 2015. Since both parties agree that this will has clearly been altered from its original form and there is no evidence in the record as to what the original will stated, the Probate Court erred in finding this will to be the last will of Lucinda Pringle and this court should reverse this finding and remand to the Probate Court for further administration consistent with this ruling.

IV. RESPONDENTS WAIVED THE ARGUMENT RELATING TO THE TIMELINESS OF APPELLANTS PETITION CHALLENGING THE VALIDITY OF THE APPEAL BY FAILING TO RAISE THE ISSUE OR ASK THE PROBATE COURT FOR A RULING ON IT. IN ANY EVENT, APPELLANTS TIMELY FILED ITS PETITION TO CHALLENGE THE VALIDITY OF THE WILL.

Respondent's argument that Appellants have not timely filed its petition to challenge the validity of the will was not preserved and is without merit. Respondents acknowledge in their brief to the Circuit Court that "While not addressed by the Probate Court..." Appellants' petition was not timely. The Probate Court did not address this issue because it was never raised by Respondents. Since this argument was never raised and ruled on and is unappealed, it is waived and this court should not inquire into this argument further.

Should the court decide to address this issue on the merits, it is clear that Appellants' petition was filed within the 8 month time limit. Respondents state in their brief that the petition must be "commenced within eight months from informal probate or one year from the decedent's death, whichever is later." S.C. Code §62-3-108(c).

Respondents point to the Application/Petition for Subsequent Administration filed October 19, 2005 and the subsequent appointment of Chirrese Brickington as Special Administrator as the filing from which Appellant's should have filed a petition to challenge the validity of the will. Appellants point out that no will was attached to the October 19, 2005 filing and a will is not supposed to be filed with this filing. The filing simply requests that a subsequent administration be opened. In addition, Mrs. Brickington never offered any will for probate.

This is not the proper time to challenge the validity of the will. The proper time is when a will is first offered for probate and in this case, this was September 4, 2015. With Appellants' Petition being filed February 9, 2016, this is well within the 8 month time limit. Respondents misread the language in *Wooten v. Wooten*. The language in the relevant case law states that the time limit to challenge a will is when the will is admitted to probate or when the clerk accepts the will for probate. Wooten v. Wooten, 235 S.C. 228, 110 S.E.2d 922 (1959); In the Matter of George Theisen, 314 S.C. 140, 442 S.E.2d 179 (1994).

In this case, the will was not admitted and the clerk could not have accepted the will for probate until it was first offered. While the Probate Court had previously ordered that the clerk accept the will, it was not formally offered until September 4, 2015. This is the date that the clerk accepted the will and this is the date the time limit to challenge the

will must run. As a result, this court should consider Appellants' arguments on the merits of the validity of the will.

V. THE ALLEGED FRAUD BY EMMA SMALLS IS NOT RELEVANT TO THE ANALYSIS OF THE VALIDITY OF THE WILL. THE FACT THAT THE WILL OFFERED FOR PROBATE IS NOT THE ORIGINAL WILL WITH NO EVIDNCE OF THE CONTENTS OF THE ORIGINAL WILL MEANS THAT THE WILL OFFERED CANNOT BE PROBATED.

With respect to the assertion by Respondent that "Appellants hid Decedent's will" and that the "circumstances of which Appellants now complain is entirely of their own making", Appellants point out that the only person that has been alleged to have concealed the will was Emma Smalls, and she is now deceased. Thomas Brown did admit to having a copy of the will within three years of the Mrs. Pringle's death negating any damage Mrs. Smalls' concealment may have created.

None of the living Appellants have done anything wrong or have done anything to create this situation. There is no reason for a court to look upon the Appellants in the case with an eye to punish for bad behavior since none of the surviving Appellants have unclean hands. Even if the court was interested in punishing bad actors, other than Emma Smalls, it is impossible to tell who the original beneficiaries were and what property was to be received. Respondents assume that the Decedent's real property would have been left to them in the original will, but there is no evidence of that. All we know is that Emma Smalls needed the real property left to her so she could make her insurance claim. The court would have to speculate as to the testator's intent if it is trying to find a way to uphold the will that has been offered.

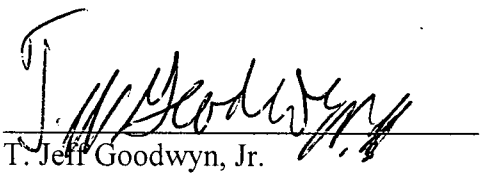
It is unfortunate for both Appellants and Respondents that no one has a copy of the original will and that no one even can testify as to who the beneficiaries in the original will

were and what property was devised in the original will. Given the will that has been presented, however, the court would have to engage in pure speculation to determine what the testator's intent was, and this is prohibited by Cornelson v. Vance, 220 S.C. 47 (66 S.E.2d 421 (1951).

As a result, the court must find that will cannot be probated as is and that there is no evidence of the testator's intent, reverse the Probate Court on this issue and remand the case for further findings consistent with this ruling.

Respectfully Submitted,

GOODWYN LAW FIRM, LLC



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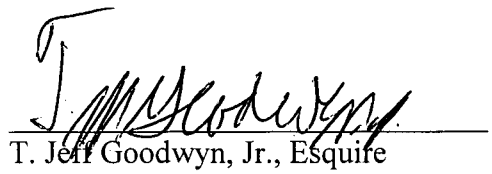
Certificate of Counsel

The undersigned hereby certifies that the Final Reply 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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