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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

THE HONORABLE JENNIFER B. MCCOY
Circuit Court Judge

Case No.: 2019-CP-10-01932

Appellate Case No. 2019-002124

IN RE: ESTATE OF STEPHEN DAY WARD, JR.

MARY K. WARD A/K/A MARY KIMBERLY WARDRespondent,

vs.

STEPHANIE WARD CIBINIC, DAVID D. WARD, AND BRIAN C. WARD, Personal
Representatives Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court erred in granting Respondent an omitted spousal share because such finding is controlled by an erroneous application of the law?
- II. Whether the Circuit Court erred in finding Decedent unintentionally omitted Respondent from the Will such finding is wholly unsupported by the evidence?

STATEMENT OF THE CASE

This is an appeal from a finding that Respondent, Mary K. Ward a/k/a Mary Kimberly Ward, is entitled to the omitted spousal share of the estate of Stephen Day Ward, Jr. (“Decedent”) pursuant to S.C. Code Ann. §62-2-301 contrary to Decedent’s clear expressed intention in his will.

Decedent died testate on September 16, 2016. **(R. pp. 64-70)**. On or about September 29, 2016, Appellants, Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward, filed a Petition for Informal Probate of Will and Appointment. **[Id.]** The will presented for probate was the April 21, 2005 Last Will and Testament of Stephen D. Ward (“Will”). Appellants were appointed co-personal representatives of the Estate of Stephen Day Ward, Jr. **(R. pp. 5-12)**. Ann Noble–Kiley, as Conservator for Mary K. Ward, filed a Petition for Omitted Spouse Share on behalf of Respondent regarding the Estate of Stephen Day Ward, Jr. on or about January 18, 2017. **(R. p. 71)**. Appellants timely denied the Petition for Omitted Spouse Share alleging that Decedent intentionally omitted Respondent from his Will and that Decedent provided for Respondent outside the Will pursuant to S.C. Code Ann. §62-2-301(a)(1) and (2). **(R. pp. 72-72)**. After completing full discovery, a hearing on the Petition for Omitted Spouse Share was held on April 18, 2018. **(R. pp. 395-568)**. Respondent was not present at the hearing, but presented Ann Noble–Kiley, her conservator, as a witness in her case-in-chief. **(R. pp. 405-407)**. Following Respondent’s case-in-chief, Appellants moved for involuntary non-suit, which was denied. **(R. pp. 408-415)**. Thereafter, Appellants presented their case-in-chief. Appellants were all present at the hearing and presented Brett Bluestein, Esquire, Trisha Ernstrom, Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward as witnesses. **(R. pp. 408-564)**. Appellants’ Exhibits 1-8 were admitted into evidence. **[Id.]**.

In lieu of closing statements and with the Parties' consent, the Court requested the Parties submit proposed orders. **(R. pp. 564-566).**

On August 9, 2018, the Court issued an order granting the omitted spousal share to Respondent pursuant to S.C. Code Ann. §62-2-301. **(R. pp. 20-27).** Appellants timely moved for reconsideration pursuant to Rule 59(e), SCRPC, and submitted a memorandum in support of the motion for reconsideration. **(R. pp. 162-168; R. pp. 181-367).** On January 18, 2019, the Court issued an order amending the August 9, 2019 Order, substantially altering and changing the findings of fact and conclusions of law, but continuing to hold Respondent entitled to the omitted spousal share to pursuant to S.C. Code Ann. §62-2-301. **(R. pp. 28-39).** As a result of the substantial alterations to the August 9, 2019 Order, Appellants timely filed a motion for reconsideration of the January 18, 2019 Order. **(R. pp. 169-176).** See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 19, 602 S.E.2d 772, 777 (2004). The Court denied the Motion for Reconsideration on April 2, 2019. **(R. pp. 37-41).**

Appellants appealed to the Circuit Court. **(R. pp. 46-47).** The Circuit Court affirmed the decision of the Probate Court by Form 4 Order. **(R. pp. 40-41).** This appeal timely follows.

FACTS

Decedent died testate on September 16, 2016. **(R. pp. 64-70).** Decedent's valid last will and testament is the April 21, 2005 Last Will and Testament of Stephen D. Ward ("Will"). **R. pp. 178-180; R. pp. 28-39).** Decedent's Will clearly and unambiguously sets forth his testamentary intent. The Will was not executed as a standalone document; rather, it was executed in connection

with an Agreement for Mutual Wills and Trusts (**R. pp. 660-670**), which was also executed on April 21, 2005 and incorporated by referenced into the Will.

The Agreement for Mutual Wills and Trusts contained five Exhibits:

- (1) Exhibit 1 was the Trust Agreement of Stephen D. Ward, executed on April 21, 2005 (**R. pp. 624-641**);
- (2) Exhibit 2 was the Will (entitled the Last Will and Testament of Stephen D. Ward) (**R. pp. 598-604**);
- (3) Exhibit 3 was the Nancy Diemer Trust, executed on April 28, 1998 (**R. pp. 605-616**);
- (4) Exhibit 4 was the First Amendment and Restatement of Trust Agreement of Nancy L. Ward, executed on April 21, 2005 (**R. pp. 642-659**); and
- (5) Exhibit 5 Last Will and Testament of Nancy L. Ward, executed on April 21, 2005 (**R. pp. 617-623**).

(R. pp. 660-670). The Agreement for Mutual Wills and its exhibits, along with financial powers of attorney, healthcare powers of attorney, and living wills and declarations of desire for natural death are hereinafter collectively referred to as the “2005 Estate Planning Documents”. (**R. pp. 423, 426, 427, 428, 429, 432; R. pp. 677-784; R. pp. 665**).

Decedent was born on September 11, 1944. (**R. pp. 786-792**). During his lifetime, Decedent was employed by Cargill, Incorporated¹ as a grain trader. He travelled overseas often for his work, and spent the majority of his 33 years with Cargill, Incorporated living in Europe or Asia. (**R. p. 487, lines 4-19**).

Decedent was married four times over the course of his life.

In 1966, Decedent married Linda Ward. They were married for approximately 20 years, and divorced in 1986. Decedent and Linda Ward had three children together, Stephanie Ward

¹ The April 18, 2018 Transcript incorrectly spells “Cargill, Incorporated” as “Cargo, Inc.”

Cibinic, David D. Ward, and Brian C. Ward. During this marriage, Decedent and his family lived overseas, but owned property in the United States, including property on Seabrook Island. Decedent and his children would spend summers at the Seabrook Island property. **(R. pp. 487-490)**. Decedent specifically provided for Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward in the 2005 Estate Planning Documents, including a specific devise of a Schwab account, which contained proceeds from the sale of the villa property on Seabrook Island. **(R. pp. 677-784)**.

In 1987, Decedent married Sally Ward. Decedent and Sally Ward adopted two children together, Stephen A. Ward and Jeremy W. Ward. They were married approximately 10 years, and divorced in 1997. **(R. pp. 487-490)**. Decedent specifically excluded Stephen A. Ward and Jeremy W. Ward from the Will, stating that “they will be provided for by their mother with assets she received from the Settlor pursuant to their divorce.” **(R. pp. 677-784)**.

Next, Decedent married Nancy Ward in 1998. Decedent and Nancy Ward were married approximately 13 years until Nancy Ward’s death in 2011. Decedent and Nancy Ward had no children together; however, Decedent had his children from his two prior marriages, and Nancy Ward had two children, Elizabeth Diemer and Garrett Diemer, from her prior marriage. Decedent and Nancy Ward were married at the time of the 2005 Estate Planning Documents. **(R. pp. 487-490)**. As part of the 2005 Estate Planning Documents, Decedent and Nancy Ward entered into the Agreement for Mutual Wills and Trusts, which was incorporated by reference into the Decedent’s Will. Because Nancy Ward predeceased the Decedent, Nancy Ward was the “Predecessor” and the Decedent was the “Survivor”, as defined in the Agreement for Mutual Wills and Trusts. **(R. pp. 677-784)**. As the Survivor, Decedent received the benefit of their marital estate and Nancy Ward’s assets during his lifetime to the exclusion of her children.

After Nancy Ward's death, Decedent married Respondent, Mary Ward, in 2013. At the time of the marriage, Decedent was 69 years old and Respondent was 88 years old. **(R. p. 407)**. Decedent and Respondent were married approximately 3 years until Decedent's death in 2016. Decedent and Respondent had no children together; however, Decedent had his children from his prior marriages and Respondent had three children from her prior marriage. During the marriage, Decedent and Respondent both maintained assets and real property outside of any marital property. The Decedent's Will pre-dated Decedent's marriage to Respondent and the Respondent is not provided for in the Will. **(R. pp. 677-784)**. Pursuant to the Will, Decedent's assets are to be distributed to Decedent's children and Nancy Ward's children.

There are several key undisputed facts in this case:

- First, it is undisputed that the Will is the last will and testament of the Decedent. **(R. pp. 178-180; R. pp. 28-39 ¶¶13, 49)**
- Second, it is undisputed that the Will pre-dated Respondent's marriage to Decedent and that Respondent is not provided for in the Will. **(R. pp. 178-180; R. pp. 28-39, ¶49)**
- Third, it is further undisputed that the Decedent pre-deceased the Respondent on September 16, 2016. **(R. p. 406; R pp. 28-39, ¶1)**
- Fourth and notably, it is also un-contradicted that, by virtue of the 2005 Estate Planning Documents, the Decedent intended to omit any subsequent spouse from the Will. **(R. p. 31, ¶9, 10, and 11; R. pp. 447-448)**

In addition to these key facts, the lower court also made findings of fact that are not subject to any appeal and are incorporated herein by reference.²

² Paragraphs 1-35 and 37-42 are unappealed findings of fact in the lower court's January 18, 2019 Order **(R. pp. 28-39)** and thus, law- of-the-case. See Dreher v. S.C. Dep't of Health & Env'tl. Control, 412 S.C. 244, 249, 772 S.E.2d 505, 508 (2015). The Appellants' appeals from the finding of fact in Paragraph 36 as unsupported by the evidence, and paragraphs 53-56, and 57, 58, 60 and 61 as unsupported by the evidenced and controlled by errors in law.

Respondent did not testify and presented no evidence of the intent of the Decedent in the Will, at the time of the Will, or at any time. Respondent's conservator, Anne Noble-Kiley, provided the only testimony on behalf of Respondent. **(R. pp. 405-407).**

In support of their denial of the omitted spouse share, Appellants provided the court copies of the 2005 Estate Planning Documents, which were admitted into evidence, demonstrating that Decedent's omission of the Respondent from the Will was intentional, as well as corroborating testimony. **(R. pp. 425, 428, 429, 430, 431, 416-562).**

The purpose of the Will and the 2005 Estate Planning Documents is apparent from the four corners of the documents. Based on the four corners and plain and ordinary language, the 2005 Estate Planning Documents intended to insure that upon the death of the Survivor, Predecessor's children from his/her former marriage were provided for as agreed upon in the trust agreements, despite any changes in circumstance, including remarriage, after the Predecessor's death. **(R. pp. 660-670).**

Specifically, the 2005 Estate Planning Documents contained mutual pour over wills and trusts, which became irrevocable upon the Predecessor's death. The mutual wills and trust devised Nancy Ward and Decedent's "Property," as defined by the Agreement for Mutual Wills and Trusts, to the Survivor's trust in the event of death. Each of their trusts, in turn, provided for the Survivor's use of their Property during the Survivor's lifetime, and for distribution at Survivor's death in 5 equal shares to Stephanie L. Ward, David D. Ward, Brian C. Ward, Elizabeth Diemer, and Garrett Diemer. **(R. pp. 677-784).**

Thus, when Nancy Ward died in 2011, the Decedent's Will and the Trust Agreement of Stephen D. Ward dated April 21, 2005 became irrevocable pursuant to the terms of the 2005 Estate Planning Documents. Further, upon Nancy Ward's death, pursuant to her pour over will, all of

Nancy Ward's property transferred to the Decedent, as Trustee of the First Amendment and Restatement of Trust Agreement for Nancy L. Ward dated April 21, 2005. Pursuant to the First Amendment and Restatement of Trust Agreement for Nancy L. Ward dated April 21, 2005, Decedent received the benefit of Nancy Ward's property during his lifetime. Thereafter, on Decedent's death, the 2005 Estate Planning Documents provide for ultimate distribution in 5 equal shares to Stephanie L. Ward, David D. Ward, Brian C. Ward, Elizabeth Diemer, and Garrett Diemer. **(R. pp. 677-784).**

Consistent with the plain and ordinary language of the Agreement for Mutual Wills and Trusts, attorney Brett Bluestein testified regarding the Decedent's intent in preparing the Agreement for Mutual Wills and all of the 2005 Estate Planning Documents. Specifically, Bluestein testified that the purpose of an agreement for mutual wills was for a "situation where there's a husband and wife, often times, an older couple, and always a couple with children from a prior marriage, where the ultimate concern was what was going to happen after the death of the first spouse, in respect to individual husband and wife's collective assets". **(R. p. 432, lines 16-22).** Bluestein reiterated that the intent was crystal clear that neither Nancy Ward nor Decedent could amend their estate planning documents, in the event of the death of the first spouse. **(R. p. 441, lines 17-20).** With respect to the Decedent's intent in having the 2005 Estate Planning Documents prepared, Bluestein confirmed that he would not have even suggested a mutual will agreement unless Nancy Ward and Decedent were concerned about preserving their mutual estate plan even if circumstances changed after the first spouse died, including a subsequent marriage by the surviving spouse. **(R. p. 437, lines 6-18).** Bluestein stressed that he would not have prepared the Agreement for Mutual Wills for Nancy Ward nor Decedent if it were not crystal clear that their

intent was to omit any subsequent spouse from inheriting from the surviving spouse's estate. **(R. p. 447, lines 11-25 – R. p. 448, lines 1-2).**

Following Nancy Ward's death, the Decedent could not and did not amend, modify, alter or revoke the 2005 Estate Planning Documents. **(R. p. 442, lines 3-6; R. p. 519, lines 7-17; R. p. 562, lines 23-25- R. p. 563, lines 1-5).** Decedent's friend for many years, Trish Ernstrom, testified that she discussed Decedent's estate plans with Decedent after 2005, both prior to and after Nancy Ward's death. Specifically, Ernstrom recalls discussing Decedent's estate plan in contemplation of his fourth marriage to Respondent, on at least three occasions, in which Decedent expressed that any marriage to Respondent would not affect his estate plan and that everything in his estate plan was intended to and would stay the same as he and Nancy Ward had planned. **(R. pp. 476-480).**

Brian Ward testified that Decedent gave him a copy of the 2005 Estate Planning Documents, **(R. pp. 677-784)**, in late 2005, early 2006. **(R. p. 495, lines 11-14).** David Ward and Stephanie Ward Cibinic also testified that Decedent provided them copies of the 2005 Estate Planning Documents, **(R. pp. 677-784).** **(R. p. 540, lines 18-25; R. p. 555, lines 11-22).** In Brian Ward's proffer³, Brian testified consistent with Trish Ernstrom's testimony, that he had a conversation with the Decedent in 2013, in contemplation of Decedent's marriage to Respondent, that Decedent's estate plan contained in **Exhibit 8 (R. pp. 677-784)** would remain unchanged and would not change as a result of the marriage. **(R. pp. 501-502).** Similarly, in David Ward's proffer⁴, David also testified consistent with Trish Ernstrom's testimony, that he had two

³ Respondent objected to this proffered testimony on the Dead Man's Statute, and such objection was sustained. **(R. pp. 496-500)**

⁴ Respondent objected to this proffered testimony on the Dead Man's Statute, and such objection was sustained. **(R. p. 544, lines 5-14).**

conversation with the Decedent in 2011 and 2013 regarding the 2005 Estate Plan Documents, **(R. pp. 677-784)**. **(R. p. 543, lines 13-17)**. In 2011, David proffered that Decedent told David that everything in **Exhibit 8 (R. pp. 677-784)** was still good. **(R. p. 544, lines 16-22)**. Also in the proffered testimony, David stated that again in 2013, in contemplation of Decedent's marriage to Respondent, the Decedent told him his marriage did not affect his prior estate plan in **(R. pp. 677-784)**. **(R. p. 546, lines 7-11)**.

Stephanie Cibinic also testified directly regarding her conversations with Decedent. Respondent objected to this testimony, but the objection was overruled and her testimony was permitted. **(R. p. 563)**. Stephanie stated that Decedent told her in 2013 that his impending marriage to Respondent did not impact the Will. **(R. p. 563, lines 2-5)**.

In addition to the testimony concerning the intent of the Decedent both at the time he executed the 2005 Estate Planning Documents, and thereafter, Appellants also presented testimony concerning the assets held by Respondent and Decedent outside of any marital estate and transfers Decedent made to Respondent outside of the Will. In their marriage, Respondent and Decedent did not commingle their previously acquired assets. Respondent maintained her own home and assets outside of the marital estate, including but not limited to real property at 1220 Creek Watch Trace on Seabrook Island; a life insurance policy, and a Schwab account. Notwithstanding, Decedent also transferred multiple assets to Respondent outside of his estate, payable on death, including: (1) the BB&T account, (2) Toyota Camry lease, (3) club membership, and (5) a timeshare. During their marriage, Decedent used his income to provide for Respondent during his lifetime, and also paid for delinquent taxes in the amount of approximately \$1,400 on Respondent's property at 1220 Creek Watch Trace on Seabrook Island and Respondent's medical bills in the amount of approximately \$7,500 from his assets. Despite having income from social

security and a life insurance policy, Respondent did not utilize her own assets to provide for Decedent or to purchase their joint assets during their marriage. (R. pp. 514-519). All of the expenses paid and assets acquired during their marriage were paid for by the Decedent's income and benefitted Respondent outside of Decedent's estate.

SCOPE OF REVIEW

An action under the omitted spouse statute is an action at law. Timmerman v. Timmerman, 331 S.C. 455, 502 S.E.2d 920 (Ct.App.1998).

On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. Blackmon v. Weaver, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005).

DISCUSSION

I. The Probate Court erred in granting Respondent an omitted spousal share because such finding is controlled by an erroneous application of the law.

The Probate Court erred in granting Respondent an omitted spousal share because the finding is controlled by errors of law. The Probate Court erroneously applied the law regarding the elective share to a claim for the omitted spousal share.⁵

⁵ Respondent repeatedly and erroneously argues that the omitted spousal share could not be denied because the 2005 Will was drafted prior to Decedent's marriage to Respondent and not made in contemplation of Decedent's marriage to Respondent. This is a legally incorrect statement of the law and public policy as the omitted spousal share statute requires that the surviving spouse claiming the share to be married to the testator *after the execution of the will*. S.C. Code Ann. §62-2-301. While the Probate Court originally adopted Respondent's erroneous argument in the August 9, 2018 Order (R. pp. 20-27), it corrected this error in the January 18, 2019 Order (R. pp. 28-39). The Probate Court nonetheless continued to err in applying the elective share standard to this claim for an omitted spousal share in the January 18, 2019 Order (R. pp. 28-39) and rendering a ruling controlled by errors of law and wholly unsupported by the evidence. The Appellant incorporates by reference the arguments set forth at trial, in support of their motion for involuntary non-suit, in their proposed order submitted to the court on May 7, 2018 (R. p. 799), in the Motion for Reconsideration dated August 20, 2018 (R. pp. 162-168), in the Memorandum in Support of Motion for Reconsideration dated October 8, 2018 (R. pp. 181-367), Motion for Reconsideration dated January 23, 2019 (R. pp. 169-176), and on appeal to the Circuit Court.

The Omitted Spouse Statute, Section §62-2-301 of the South Carolina Code, 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.*

(emphasis supplied).

In Green ex rel. Estate of Cottrell v. Cottrell ex rel. Estate of Cottrell, 346 S.C. 53, 60–62, 550 S.E.2d 324, 328–29 (Ct. App. 2001), 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).

South Carolina specifically permits documents to be incorporated into a will by reference. S.C. Code Ann. §62-2-509 (2014).

South Carolina also specifically permits an expressed testamentary compact for joint wills, such as the one contained in the Agreement for Mutual Wills, which becomes irrevocable when one party predeceases. See e.g., Pruitt v. Moss, 271 S.C. 305, 311–12, 247 S.E.2d 324, 327–28 (1978); S.C. Code Ann. §62-2-701 (2014).

In this case, Item XII of the Will expressly provides that: “The Agreement for Mutual Wills and Trusts dated as of even date herewith between Stephen D. Ward and Nancy L. Ward is incorporated by reference into this Last Will and Testament”; thus, incorporating the Agreement for Mutual Wills and Trusts, and all exhibits, into the Will pursuant to S.C. Code Ann. 62-2-509.

The intent of the Decedent is expressly set forth in the recitals of the Agreement for Mutual Wills and Trusts:

II. RECITALS.

2.1 Husband [Stephen D. Ward] and Wife [Nancy L. Ward] are now married.

2.2 Husband and Wife each have children from a former marriage.

2.3 Husband and Wife mutually desire for the Survivor to have full use of the Property during his or her life with the Property after the death of the Survivor to be distributed as provided for in the Trust Agreement of Stephen D. Ward (dated as of even date herewith) and the First Amendment and Restatement of Trust Agreement of Nancy L. Ward (dated as of even date herewith).

2.4 Husband and Wife have executed their Wills and Trusts, copies of which have been annexed hereto as Exhibits 1 through 5.

2.5 The Wills and Trusts of the Parties have been made as they are on the condition that the disposition of the Property be made according to their Wills and Trusts, unless this Agreement is altered, amended or revoked as provided for hereinafter.

2.6 This Agreement is made to insure that the mutual plan of the Parties shall not be altered by acts subsequent to date hereof, except as agreed upon between the Parties.

(R. p. 661, Section II). The Agreement for Mutual Wills and Trusts Provides that while both Husband and Wife are living, the Agreement for Mutual Wills and Trusts may not be altered, amended or revoked except pursuant to a writing signed by both parties. **(R. p. 661, Section III. 3.1; IV).** There is not a writing signed by both the Decedent and Nancy Ward altering, amending, or revoking the Agreement for Mutual Wills and Trusts. Moreover, upon Nancy Ward's death, the Agreement for Mutual Wills and Trusts, as well as the Decedent's Will and the Trust Agreement of Stephen D. Ward dated April 21, 2005 became irrevocable. **(R. p. 661, Section III. 3.2)**

Based on the four corners and plain and ordinary language of the Agreement for Mutual Wills and Trusts, as incorporated by explicit reference into the Decedent's Will, the 2005 Estate Planning Documents were intended to insure that upon the death of the Survivor, Predecessor's children from his/her former marriage were provided for as agreed upon, despite any changes in circumstance, including remarriage, after the Predecessor's death. **(R. pp. 660-670)**. See also Uniform Probate Code § 2-301(a)(2) (stating the surviving spouse is not entitled to an intestate share when "the will expresses the intention that it is to be effective notwithstanding any subsequent marriage").

Applying the general rules of construction, where the testator's intent is ascertainable from the will and not counter to law, the Court will give it effect. In re Estate of Fabian, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997). The Court can neither "redraft the [w]ill, nor ... doctor a crucial part." Id. (citations omitted). In construing the language of a will, courts must give words their ordinary, plain meaning unless it is clear the testator intended a different sense, or unless such meaning would lead to an inconsistency with the testator's declared intention. Id. To do this, it must look at the words of the will and the circumstances known to Decedent *at the time of execution*. Id.

As a result, it is apparent from the Will that the omission of Respondent, and any subsequent spouse, was intentional. Under Section §62-2-301 of the South Carolina Code, the court, thus, must deny the omitted spousal share. As a result, the Court erred in granting Respondent's petition because the intention of the Decedent was apparent from the Will.

Notwithstanding the clear expressed intent in the Will, testimony outside the four corners of the Will also evidences the Decedent's intent to omit Respondent, and any subsequent spouse, from the Will. 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. See also The South Carolina Probate Code's Omitted Spouse Statute and in Re Estate of Timmerman, 50 S.C. L. Rev. 979, 987 (1999) (discussing cases that suggest that looking beyond the language of a will is acceptable when applying the statute and determining if the intentional-omission exclusion applies as extrinsic facts aid in interpretation of the testator's intent).

Respondent is not entitled to the Omitted Spouse Share simply due to her marriage to Decedent at time of death, as provided for in the Elective Share. Rather, Respondent must prove the elements of S.C. Code §62-2-301 and must prove her omission from the Will was unintentional.

A surviving spouse who wishes to qualify as an "omitted spouse" must demonstrate the following four elements:

- (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.

Green ex rel. Estate of Cottrell v. Cottrell ex rel. Estate of Cottrell, 346 S.C. 53, 60–62, 550 S.E.2d 324, 328–29 (Ct. App. 2001).

Respondent failed to present any evidence that her omission from the Will was unintentional. In fact, Respondent presented no evidence regarding elements 3 or 4 of the omitted spousal share at all. As a result, the Court erred in granting Respondent's petition, and further erred in denying Appellants' motion for involuntary non-suit.

Moreover, the Court erred in applying facts and law regarding the elective share to Respondent's claim for the omitted spousal share. The Court concluded that the Decedent failed

to comply with Section IV 4.2 of the Agreement for Mutual Wills by: (a) failing to ratify the Will, and (b) failing to require Respondent to waive a right to the Estate. **(R. pp. 28-39, ¶¶53-58; 60-61)**. These findings are wholly unsupported by the facts and law, and irrelevant to the Omitted Spouse Share.

First, the Probate Court erred in concluding that the Decedent failed to comply with the Agreement for Mutual Wills by failing to ratify the Will after 2013. A finding that Decedent failed to ratify the Will is directly contrary to the un-appealed finding of fact in the order that the Will is the last will and testament of Decedent. **(R. pp 28-39, ¶¶13, 49)**. Moreover, this finding is directly contrary to the evidence presented by Brett Bluestein, Esquire, Trisha Ernstrom, Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward as witnesses that the Will had not been amended, modified, or altered, and contrary to Decedent's verbal affirmations of the Will before, during, and after his marriage to Respondent. The Will was ratified and is the undisputed last will and testament of the Decedent. Decedent intended it to be irrevocable pursuant to its own terms any time after 2011 and at the time of Decedent's marriage to Respondent. A will may be ratified expressly or impliedly, by the passage of time, or by other words or actions indicating affirmation. See Bazell Bros. Contractors v. Hill, 245 S.C. 69, 74-75, 138 S.E. 2d 835, 837 (1964) (stating that ratification may be either express or implied, and further stating that "[t]o ratify is to sanction or affirm, to give validity to something done for one by another, not to contract anew or upon different terms."); see also, e.g. Calhoun v. Calhoun, 277 S.C. 527, 533, 290 S.E.2d 415, 419 (1982) (in the context of undue influence, finding a will ratified where the testator has had the unhampered opportunity to revoke his will). As a result, the finding of fact that Decedent did not ratify his Will is wholly unsupported by the evidence.

Second, the Probate Court erred in concluding that Decedent failed to comply with the Agreement for Mutual Wills by failing to require Respondent to waive a right to the Estate prior to their marriage. However, the Agreement for Mutual Wills does not require Decedent to demand Respondent waive a right to the *Estate*. Rather, the Agreement for Mutual Wills discusses a waiver of the *elective share*. As a result, this finding of fact is wholly unsupported by the evidence. Further, Respondent has not made a claim for the elective share and the elective share is not before the Court. Neither party to the marriage provided testimony or was capable of testifying related to any waiver of the elective share. Further, that Respondent declined to pursue the elective share is evidence directly contrary to this finding of fact. Any evidence of a waiver or non-waiver of the elective share by Respondent is irrelevant to the elements of the Omitted Spouse Share under S.C. Code §62-2-301, where it is Respondent's burden to show that her omission from a Will was unintentional. In this case, it is uncontradicted that the Decedent's intent was to omit changes in circumstances, including remarriage, from effecting the devises in his Will.

Third, the Probate Court erred in concluding that Decedent's theoretical failure to comply with Section IV 4.2 of the Agreement for Mutual Wills is evidence of an unintentional omission of Respondent in the Will. This finding again confuses the legal standard required for an Omitted Spouse Share with evidence potentially relevant to a claim for an elective share, which is not before this Court. Under the Omitted Spouse statute, where it is apparent from the Will that the omission is intentional, Respondent is not entitled to recover. No further inquiry was required. Notwithstanding, there was no extrinsic evidence presented at the hearing to suggest or support any finding that Respondent was unintentionally omitted from Decedent's Will. Respondent's potential rights under the elective share statute are not asserted, not before the Court, and not relevant to a determination of the Decedent's intent as expressed in the language of Will.

As a result, the Probate Court erred in granting Respondent an omitted spousal share because such finding is controlled by an erroneous application of the law. This court should reverse and deny Respondent's claim for an omitted spousal share.

II. The Probate Court erred in finding Decedent unintentionally omitted Respondent from the Will such finding is wholly unsupported by the evidence.

The Probate Court erred in that Decedent unintentionally omitted Respondent from the Will because the evidence of Decedent's intent to omit changes in circumstances, including remarriage, from effecting the devises in his Will was undisputed.

A. Evidence of intent at the time of the Will

Rules of construction are designed to help courts determine the testator's intent as expressed in the will. Albergotti v. Summers, 205 S.C. 179, 31 S.E.2d 129 (1944). Where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. Schroder v. Antipas, 215 S.C. 552, 56 S.E.2d 354 (1949). We can neither "redraft the [w]ill, nor may we doctor a crucial part." Limehouse v. Limehouse, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971). In construing the language of a will, we must give words their ordinary, plain meaning unless it is clear the testator intended a different sense, or unless such meaning would lead to an inconsistency with the testator's declared intention. Buist v. Walton, 104 S.C. 95, 88 S.E. 357 (1916). To do this, the Court must look at the words of the will and the circumstances known to Declarant at the time of execution. In re Estate of Fabian, 326 S.C. 349, 355, 483 S.E.2d 474, 477 (Ct. App. 1997).

In this case, the Decedent's intent is readily ascertainable from the plain and ordinary language of the Will. The Probate Court was not required to look any further. Based on the four corners and plain and ordinary language of the Agreement for Mutual Wills and Trust explicitly incorporated into the Will, the Will was intended to insure that upon the death of the Decedent,

Nancy Ward's children from her former marriage were provided for as agreed upon in the Agreement for Mutual Wills and Trusts, despite any changes in circumstance, including remarriage, after the Predecessor's death. **(R. pp. 660-670)**. See also Uniform Probate Code § 2-301(a)(2) (stating the surviving spouse is not entitled to an intestate share when "the will expresses the intention that it is to be effective notwithstanding any subsequent marriage"). The Will expressed the intention for it to be effective notwithstanding Decedent's subsequent marriage to Respondent. Further, at the time of the execution of the Will, Bluestein reiterated that Decedent's intent to omit a subsequent spouse from inheriting from Decedent's estate was crystal clear. **(R. p. 447, lines 11-25 – R. p. 448, lines 1-2)**.

As a result, the Probate Court erred in granting Respondent an omitted spousal share because it is undisputed that the intent of the Decedent at the time of the execution of the will was to omit subsequent spouses and for the Will to be effective notwithstanding any subsequent marriage of the Decedent.

B. Evidence of intent at the time of Marriage

Decedent's intent to omit a subsequent spouse from his Will is apparent from the face of the Will, and evident and undisputed from the circumstances surrounding the execution of the Will. Further, Decedent's intent to omit a subsequent spouse from the Will is also evident and undisputed from the Decedent's verbal affirmations of the Will in contemplation to his marriage to Respondent.

In contemplating marriage to Respondent, the Decedent expressed that the marriage was not going to affect the estate plan he and Nancy Ward had in 2005, that nothing would change, and that "everything was going to stay as he and Nancy had planned". Further, in contemplation of marriage to Respondent and after his marriage to Respondent, the Decedent did not attempt to

revise his estate plan, or seek to set aside the Agreement for Mutual Wills, despite being competent and capable of doing so. This is additional evidence following the execution of the Will and in contemplation of his marriage to Respondent, that the Decedent's omission of Respondent from the Will was intentional. See Green ex rel. Estate of Cottrell v. Cottrell ex rel. Estate of Cottrell, 346 S.C. 53, 64–65, 550 S.E.2d 324, 330–31 (Ct. App. 2001); see also In Re: Timmerman, 331 S.C. 455, 459, 502 S.E.2d 920, 922 (Ct. App. 1988) (stating that where Decedent “chose to leave his old will intact” was support that he unintentionally omitted her, and did not intend for his spouse to receive benefits under the omitted spouse statute).

Decedent ratified the Will by his verbal affirmations of the Will in contemplation of his subsequent remarriage and by declining to amend, modify or alter his estate plan documents in **Exhibit 8 (R. pp. 677-784)**. The only evidence presented to the Probate Court after the Will expressed the Decedent's intention that the Will was to be effective notwithstanding any subsequent marriage to Respondent. The Probate Court erred in concluding otherwise, contrary to the law and evidence.

C. Evidence of Intent after Marriage

Decedent's intent to omit a subsequent spouse from his Will is apparent from the face of the Will, and evident and undisputed from the circumstances surrounding the execution of the Will. Moreover, Decedent's intent to omit a subsequent spouse from the Will is also evident and undisputed from the Decedent's verbal affirmations of the Will in contemplation to his marriage to Respondent. Further, Decedent's intent to omit Respondent from the Will is also apparent from financial circumstances of the Respondent and Decedent during their 3 year marriage and the Decedent's non-testamentary transfers after marriage.

Decedent and Respondent were married three years prior to Decedent's death. Both had prior marriages, and for the Decedent, this marriage was his fourth. Respondent was 20 years older than Decedent, and maintained her own home and assets outside of the marriage, including but not limited to real property at 1220 Creek Watch Trace on Seabrook Island, a life insurance policy, and a Schwab account. They did not comingle their assets. Despite Respondent's assets held outside of the marriage, Decedent also transferred multiple assets to Respondent outside of the estate, that were payable on death, including: (1) the BB&T account, (2) Toyota Camry lease, (3) club membership, and (5) a timeshare. During their marriage, Decedent used his income to provide for Respondent during his lifetime, and also paid for delinquent taxes in the amount of approximately \$1,400 on Respondent's property at 1220 Creek Watch Trace on Seabrook Island and Respondent's medical bills in the amount of approximately \$7,500 from his assets. Despite having income from social security and a life insurance policy, Respondent did not utilize her own assets to provide for Decedent or to purchase their joint assets during their marriage. **(R. pp. 514-519)**. All of the expenses paid and assets acquired during their marriage were paid for by the Decedent's income and benefitted Respondent outside of Decedent's estate.

The evidence related to Decedent's and Respondent's financial course of dealing and Decedent's non-testamentary transfers to Respondent during his lifetime is evidence of his continued intent to omit Respondent from his Will after marriage and is consistent with the intent expressed in the plain and ordinary language of the Will. Decedent and Respondent consciously declined to create marital assets in order to preserve the devises in the Will. This was the only evidence presented to the Probate Court after Respondent and Decedent's marriage and continued to express the Decedent's intention that the Will was to be effective notwithstanding his subsequent marriage to Respondent.

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."); see, e.g., Holcombe-Burdette v. Bank of Am., 371 S.C. 648, 655–57, 640 S.E.2d 480, 483–84 (Ct. App. 2006). In determining the intent of the deceased, a court must always look first to the language of the will itself. In assigning meaning to the words used in the will and ascertaining the intent of the testator, the court must view the will as a whole. "An interpretation that fits into the whole scheme or plan of the will is most likely to be the correct interpretation of the intent of the testator." Id. Construction depends upon the Decedent's intent at the time of execution as shown by the face of the document and not on any secret wishes, desires or thoughts after the event. Id.; see also In re Estate of Prioleau, 361 S.C. 627, 633, 606 S.E.2d 769, 773 (2004).

The Probate Court erred in disregarding all evidence of Decedent's intent, at the time of the Will, in contemplation of his marriage to Respondent, and following his marriage to Respondent, in granting the omitted spousal share, contrary to the law and evidence.

CONCLUSION

For the reasons set forth herein, the Probate Court erred in granting Respondent the omitted spousal share. Respondent should be denied her claim for the omitted spousal share and this court should reverse.

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Dated: November 25, 2020

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Nov 25 2020

SC Court of Appeals

CERTIFICATION

We hereby certify that Appellants' Final Brief complies with Rule 211(b).

Respectfully submitted,

BURR & FORMAN LLP

Dated: November 25, 2020

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Nov 25 2020

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
THE HONORABLE JENNIFER B. MCCOY
Circuit Court Judge

Case No.: 2019-CP-10-01932
Appellate Case No.: 2019-002124

IN RE: Estate of Stephen Day Ward, JR.

Mary K. Ward a/k/a Mary Kimberly WardRespondent

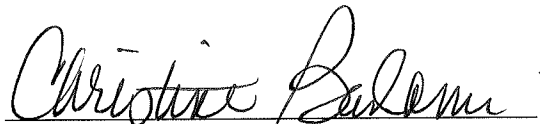
vs.

Stephanie Ward Cibinic, David D. Ward, and Brian C. Ward, Personal
Representatives Appellants,

PROOF OF SERVICE

I, Christine Badami, an employee of Burr & Forman LLP, attorneys for Appellants in the above-entitled action, certify that I have served **Appellants' Final Brief** and **Proof of Service** on Counsel of Record by electronic mail by using the AIS Email address of counsel of record to this matter pursuant Order of the Supreme Court of South Carolina, Appellate Case No. 2020-000447, Section (g)(3), on the 25th day of November, 2020 as follows:

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