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
Opinion No.: 5859

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.

APPELLANT'S PETITION FOR REHEARING

T. Jeff Goodwyn, Jr. [S.C. Bar#: 73789]
Goodwyn Law Firm, LLC
2309 Devine Street
Columbia, SC 29205
JGoodwyn@Goodwynlaw.com
(803) 251-4517
(803) 251-4527 fax
Attorney for Appellants/Petitioners

Pursuant to Rule 221 and 240, SCACR, the Appellants respectfully move the Court for rehearing with respect to this Court's decision in Mary P. Smith, *et. al.* v. Angus M. Lawton, *et. al.*, opinion no. 5859 filed September 1, 2021, which affirmed in part, reversed in part and remanded the Circuit Court's affirmation of the Probate Court's findings and conclusions in this case. Appellants suggest the Court overlooked or misapprehended the following points in affirming the probate court's, as affirmed by the circuit court's decision.

I. Part of this court's ruling was a finding that Grandchildren did not present any evidence of due execution at the November 9, 2016 hearing and remanded the case for an evidentiary hearing on due execution of the will. In remanding the case for an evidentiary hearing on due execution, the court overlooked the fact that Grandchildren have already had a full and fair hearing on due execution and were not denied any due process that would give them a right to a second evidentiary hearing[1].

Grandchildren filed an application for informal probate on September 4, 2015. Children filed a petition for formal testacy challenging, in part, the validity of the will on February 4, 2016. A properly noticed hearing was noticed and held on November 9, 2016. One of the issues raised at this hearing was the validity of and the due execution of decedent's will.

At the hearing, the probate court received testimony and evidence, made no rulings from the bench, and asked both parties to submit proposed orders. (R. pp. 528 – 547). The probate court also inquired into whether the two witnesses to the will were living and counsel for Children indicated that all parties believed that they were both no longer living. (R. p. 534, ll. 20-24). The court did not indicate that this fact in any way relieved Grandchildren from their requirement to

[1] The court refers to Appellants as "Grandchildren" and Respondents as "Children" in its opinion and these names will be used throughout this argument.

present the prima facie case as to due execution or otherwise limited the evidence the court would receive at the hearing related to due execution. (R. pp. 528 – 547).

The opinion in this case reads in relevant part, "Nevertheless, the witnesses death did not relieve Grandchildren, as the proponents of the will, from establishing a prima facie case of due execution. *See* § 62-3-407 ('Proponents of a will have the burden of establishing prima facie proof of due execution in *all* cases.' (emphasis added)). As a result of the probate court's conclusion, Grandchildren were not required to present any evidence to support the prima facie case." This portion of the court's ruling is error as the court misapprehended the requirement to present evidence of due execution at the November 9, 2021 hearing. A review of the hearing transcript shows that the probate court did not conclude at the hearing that no proof to support the prima facie case was required. In fact, counsel for Grandchildren made no arguments at the hearing that his clients should be relieved of the requirement to make the prima facie case due to the fact that the witnesses were dead and the court made no such rulings. With respect to the Children's challenge to the validity of the will, Counsel for Grandchildren only made the timeliness argument which was also not ruled on at the hearing. Only in the probate court's order from this hearing did the issue arise relating to no further inquiry being necessary because the witnesses to the will had died.

In support of this court's ruling, the court astutely cites *In re Estate of King*, a similar case in Massachusetts case involving the interpretation of a Massachusetts statute similar to S.C. Code §62-3-406. See *In Re King*, 156 N.E.3d 220, 98 Mass.App.Ct. 332 (Mass. App. 2020). In *In re Estate of King*, the court found, as this court found, that a prima facie case of due execution must be presented. *Id.* The court went onto remand the case for a new evidentiary hearing because the probate court improperly excluded much of the evidence the proponents of the will offered as to

the authenticity of the testator's signature at the probate court hearing. *Id.* This improperly excluded evidence included opinion testimony of a handwriting expert, testimony of witnesses familiar with the testator's signature, and samples of the testator's signature for the court to review. *Id.* The court in *In re Estate of King* asks the reader to contrast *In re Estate of King* with *Matter of Moran,* 479 Mass. 1016, 1020-1021, 95 N.E.3d 226 (2018) (respondent provided fair hearing when no limitation was placed on testimony and he was allowed full access to copious pages of notes during testimony). *Id.* The question of whether or not to remand in these cases was based on whether or not the party had been given a fair hearing, or said another way, had been denied due process. Based on the reasons recited in these cases and for fundamental due process reasons, the present case should only be remanded for another evidentiary hearing if the Grandchildren were denied due process at the original hearing. *Id.* There was nothing unfair about the probate court hearing in this case. The probate court did not exclude any evidence at the hearing as to due execution as it did in *In re Estate of King*, therefore a remand for additional evidence to be taken is not appropriate.

A review of the hearing transcript show that in this case, counsel for both parties agreed that all of the evidence in the record from the prior hearing(s) would remain part of the record for the purposes of this hearing. These depositions and exhibits are what composes the vast majority of the record in this case. Counsel for Children actually offered into evidence one additional original deposition he found in his file taken prior to his involvement in the case, that of Evaline Moses. Counsel for Grandchildren did not object to its admission and the court accepted it. (R. p. 544, l.25 – p. 545, l. 18). No other evidence was offered by either party at the November 9, 2016 hearing.

At the November 9, 2016 hearing, Counsel for Grandchildren argued the evidence in record he had submitted including "affidavits of our client that lay out the facts as to what transpired. There's deposition testimony from all the relevant parties in this case." (R. p. 543, ll. 1-4). Counsel for Children did not object to any of this evidence and the court excluded none of it. At no time did Counsel for Grandchildren offer any evidence that was excluded or even objected to. At no time did Counsel for Grandchildren raise an issue about wanting to submit additional evidence or that he needed more time to prepare evidence for the hearing. In addition, Grandchildren did not argue in this appeal that they were denied due process or a fair trial at the November 9, 2016 hearing as it was in *In re Estate of King*. See *In re Estate of King*, 156 N.E.3d 220, 98 Mass.App.Ct. 332 (Mass. App. 2020). The proponents of the will in *In re Estate of King* had a reasonable argument for claiming a denial of due process at the hearing. In contrast, the proponents of the will in this case have no such argument.

The fact that there is no evidence in the record of due execution is not the result of any ruling by the probate court excluding evidence or any other action by the probate court or due to any objections by Children. Grandchildren simply made a strategic decision to rely on the timeliness argument. Perhaps Grandchildren realized that no handwriting expert could give them a favorable opinion given the fact that the testator signed her name on the will with simply an "X" mark. Perhaps Grandchildren could find no witnesses familiar with the testator's signature or could find no signature samples to compare to the "X" mark on the will. Regardless of the reasons for not choosing to present any evidence of due execution at the hearing, it is clear that Grandchildren made a strategic decision to rely solely on arguments related to the timeliness of the filing of the petition challenging the will.

With the timeliness arguments having not been successful, being granted a second hearing to present evidence of due execution is not proper since Grandchildren have already had a fair hearing to do so. As a result, this court should revise its ruling determining that Grandchildren be granted a new evidentiary hearing to present evidence of due execution and hold that Grandchildren failed to present evidence of due execution and that as a result, the will was not properly proved, and the estate shall proceed as an intestate estate.

II. The court erred in finding that the 2011 court of appeals opinion stating that Decedent intended Evelina Brown Moses, Thomas Brown, and Rebecca Patricia Brown to inherit from her will was binding on the probate court when this language was by definition dicta and not binding on the parties.

A. The language in the 2011 Court of Appeals decision relating to the testator's intent as to who the beneficiaries are is dicta, and not binding.

Judicial dicta is "not essential to the decision." *Black's Law Dictionary* 465 (7th ed.1999). Dicta or, as it is also known, dictum "is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." 21 C.J.S. *Courts* § 227 (2006). See *Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81 (S.C. App. 2007).* Dicta and is neither binding nor illuminating. *See Drummond v. Beasley,* 331 S.C. 559, 503 S.E.2d 455 (1998) (characterizing as dicta certain language in a case concerning a subject not within the question before the court); *Hampton v. Richland County Council,* 296 S.C. 72, 72, 370 S.E.2d 714, 714 (1988) (concluding discussion of a legal principle in an opinion was dicta where it was "clearly unnecessary to a resolution of the issue before the court"); *Welborn v. Dixon,* 70 S.C. 108, 49 S.E. 232 (1904) (dicta is not binding as precedent); *Dennis v. South Carolina Nat'l Bank,* 299 S.C. 34,

39, 382 S.E.2d 237, 240 (Ct.App.1988) (construing language in a case as dicta because it was "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof"). See *State v. Addison*, 338 S.C. 277, 525 S.E.2d 901 (S.C. App. 1999).

In this case, any opinion issued by the court of appeals in its 2011 order related to the testator's intent relating to what beneficiaries were to take under the will can only fairly be characterized as dicta. This is true because issues involving the testator's intent not only were not before the court, but they could not possibly have been before the court, and therefore, these were issues not necessarily involved in the case nor necessary to a decision thereof.

Prior to the will first being offered for probate on September 4, 2015, the only issue before the probate court and the circuit court and court of appeals was the Children's argument that the probate court could not even consider accepting the will because it was more than 10 years after the Decedent's death. See S.C. Code § 62-3-108. Because of the fraudulent concealment of the will, the court found that good cause existed to re-open the estate and that the 10 year bar in § 62-3-108 didn't apply. The issue of who the testator wanted to take under her will was not at issue. Questions about who the actual beneficiaries were under the whited out portion of the will were not ever litigated or discussed in the opinion.

Generally speaking, the question of the testator's intent doesn't arise until a will has been accepted as genuine by the probate court. The testator's intent would be irrelevant if a will is not even accepted by the court. Until September 4, 2015, the will had never previously been offered for probate. As a result, the Children never had the ability to challenge its validity or to raise issues concerning the testator's intent. This was one factor in this court's decision to find that the Children had timely filed a petition for formal probate challenging the validity of the will.

At the November 9, 2026 hearing, both counsel for Children and counsel for Grandchildren argued that this was the first time the validity of the will had been raised. In support of his timeliness argument, Counsel for *Grandchildren* states, "This is the first time that there's been any suggestion or challenge as to the validity or acceptability of this particular Last Will and Testament." (R. p. 538, ll. 11-14). He goes on to state, "And I will – I will note for the record at no point in the 11-and-a-half year history of this case has anyone challenged what transpired. The issues have always been legal issues, as to whether or not the respondents, or now the petitioners, are barred by time, by the sequence of events. *But at no time has there been any argument that the Will isn't the Last Will and Testament of Lucinda Pringle*...". (emphasis added) (R. p. 541, ll. 8-15). In an effort to make his timeliness argument, opposing counsel is essentially making the Children's case for why the testator's intent was not before the court of appeals in 2011 and that the statements in that opinion on that subject must be dicta.

In addition, to find that the 2011 opinion determined who the rightful heirs are would mean that the Children never had the opportunity to present evidence and argue that issue thereby depriving them of their due process rights on that issue. See *In re Estate of King*, 156 N.E.3d 220, 98 Mass.App.Ct. 332 (Mass. App. 2020). The Children have never had their day in court on this issue.

This finding is also inconsistent with this court's ruling on the timeliness issue. The only way the court in 2011 could have ruled on these issues and it not be dicta is if they had been previously raised and ruled on. While the Children agree with the court that their February 4, 2016 petition was timely, if it was filed timely, then it is logically inconsistent to rule that the same issues raised in that petition had previously been raised, ruled on, appealed and ruled on by the court of appeals in 2011.

In conclusion, the issue of the testator's intent was not and could not have been before the court of appeals in 2011 as the will had not even been offered, much less proved and accepted by the court. Counsel for *both parties* have argued the issue of the validity of the will and the testator's intent had not been raised prior to the filing of the February 4, 2016 petition. As a result, these issues were not necessary to the court of appeals decision in the 2011 opinion and therefore, dicta. With this language being dicta, this court should modify its opinion of this issue and make rulings raised by the Grandchildren relating to the alterations in the will.

B. Even if the 2011 opinion related to who should take is binding, the 2011 opinion is silent on what property is to be devised meaning that the law of the case doctrine does not prevent this court from ruling on this issue.

Even if the 2011 court of appeals opinion is properly found to be law of the case, as the court notes in its decision, the 2011 opinion is limited. It only holds that Decedent intended Evelina Brown Moses, Thomas Brown, and Rebecca Patricia Brown to inherit from her will. There is no reference in the 2011 opinion as to what property the Decedent intended these three heirs to inherit. This is of critical importance since the portion of the will indicating the property to be devised was whited out and typed over. Since Emma Smalls needed the real property to be devised to her to access the property insurance, it is unknown if the original will devised the real property or if Emma Smalls added the real property to suit her insurance needs. Since the portion of the will devising Decedent's property was altered, it would be pure speculation as to what property, real or personal, the Decedent intended to devise, which is prohibited by *Cornelson v. Vance*, 220 S.C. 47, 66 S.E.2d. 421 (1951).

Since there is no residuary clause in Decedent's will, this is determinative of who will take the Property. Even if the heirs that take under the will have been determined, the property they

receive has not. If it can't be determined that the Property was part of the original will in the whited out section, then the Property does not pass to the beneficiaries of the will, but passes under the law of intestate succession pursuant to S.C. Code § 62-2-101.

Since there have been no prior court rulings on the issue of what property was devised, this court should reach a decision on this issue and Appellant's respectfully ask the court to modify its opinion as the issue of the portion of the will stating the alteration issue was previously decided by the 2011 court of appeals decision.

Conclusion

With respect to the order to remand the case for an evidentiary hearing on due execution, the court erred in finding that the case should be remanded when Grandchildren received a fair hearing to present evidence on due execution and chose not to, relying instead on a timeliness argument. The court should modify its ruling on this issue, find that a remand is not appropriate, determine that will has not been proved, cannot be accepted, and that the estate should proceed as an intestate estate.

With respect to the alteration issue, the court erred in considering the language from the 2011 court of appeals decision related to the testator intent as to who the beneficiaries of her will were as binding when both parties have argued that these issues were not raised prior to the November 9, 2016 hearing. Since these issues were not before the court in 2011, this language was not necessary to the ruling in the case and therefore, dicta. Even if the ruling is found to be binding, the issue of the property being devised is not referenced in the 2011 order, and as a result, there is not binding law to prevent this court from ruling on that issue. The court should modify its order to make ruling on the alteration issue.

GOODWYN LAW FIRM, LLC

T. Jeff Goodwyn, Jr.
2309 Devine Street
Columbia, SC 29205
(803) 251-4517
Attorney for Appellant

Dated: September 13, 2021

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
Opinion No.: 5859

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,

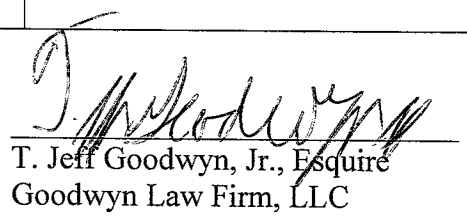
v.

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.

PROOF OF SERVICE

I certify that I have served the **Appellant's Petition for Rehearing** on the following parties' counsel, at the addresses listed below by depositing a copy of same in the United States Mail, postage prepaid, on September 13, 2021.

Angus M. Lawton Personal Representative of the Estate of Lucinda Pringle 496 Bramson Court, Suite 100 Mt. Pleasant, SC 29464	Jonathan S. Atlman, Esquire Derfner & Altman 575 King Street, Suite B Charleston, SC 29403
Stephen M. Slotchiver, Esquire Slotchiver & Slotchiver, LLP 44 State Street Charleston, SC 29401	Ayesha T. Washington, Esquire The Washington Law Firm, LLC P.O. Box 30026 Charleston, SC 29417



T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2309 Devine Street
Columbia, South Carolina 29205

September 13, 2021

GOODWYN LAW FIRM, LLC

T. Jeff Goodwyn, Jr.*
C. David Beale, Jr.*

Reply to:
2309 Devine Street
Columbia, South Carolina 29205

Tel. (803) 251-4517 (Columbia)
Fax (803) 251-4527

Email:jgoodwyn@goodwynlaw.com
dbeale@goodwynlaw.com
Web: www.goodwynlaw.com

*Also Licensed in Georgia

September 13, 2021

VIA COA FILING EMAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

RE: ***Mary P. Smith, et. al. vs. Angus M. Lawton, et. al.***
Appellate Case No. 2018-000562
Our File No.: 3000-0253

Dear Ms. Kitchings:

Enclosed for filing, please find the Appellant's Petition for Rehearing and Proof of Service in regards to the above referenced matter. Please have your office file the original and return the filed stamped copies to my legal assistant's email cchase@goodwynlaw.com.

As evidenced in the Proof of Service, I have served all interested parties, with a copy of Appellant's Petition for Rehearing.

Thank you for your attention to this matter and should you have any questions, please do not hesitate to contact me.

Sincerely,

T. Jeff Goodwyn, Jr.

TJG:cnc
Enclosures
cc: Jonathan S. Atlman, Esquire
Stephen M. Slotchiver, Esquire
Angus M. Lawton, Esquire
Ayesha Washington, Esquire