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**Feb 07 2022**

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Circuit Court

Kristi Lea Harrington, Circuit Court Judge

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Opinion No. 5859
SC Court of Appeals Case No. 2021-001491
Appellate Case No.: 2018-000562

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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.

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# RESPONDENTS' RETURN TO APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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February 7, 2022

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## STATEMENT OF THE CASE

Decedent died on October 11, 1989 owning an undivided fifty percent (50%) interest in a ten and a half (10.5) acre tract of land located on US Highway 17 North in Mount Pleasant, South Carolina (R.p.7). Decedent's heirs were her three (3) grandchildren, Evelina Brown Moses, Thomas P. Brown, Jr., and Rebecca Patricia Brown (hereinafter collectively referred to as "Grandchildren"), and her daughter, Emma Smalls (R.p.815). Decedent had raised Grandchildren following the death of their mother, Evelina Brown, one of Decedent's five (5) daughters (R.p.25). Decedent's surviving daughters (hereinafter collectively referred to as "Children") concealed Decedent's will in order to live out their lives on Decedent's property which Decedent intended Grandchildren to inherit (R.p.26). To do so, Children maintained that Decedent did not have a will and died "*intestate*" (R.pp.51-55).

Following Hurricane Hugo, Emma Smalls processed a claim with the Public Savings Fire & Casualty Insurance Company seeking to obtain monies to repair Decedent's house in which she resided (R.p.9). On January 15, 1990, the insurance company issued a check to Emma Smalls naming as payees Emma Smalls and Grandchildren as "*Executors of the Estate*" (R.p.9). The payees on the insurance check were identical in form and sequence with the provisions of Decedent's will (R.p.9).

Children filed an Application for Informal Appointment in the Charleston County Probate Court on May 5, 1999 (R.pp.51-55). The Probate Court administered Decedent's estate as "*informal*" assuming intestacy in accordance with S.C. Code § 62-3-3014 (R.p.8).

On August 3, 2005, Evelina Brown Moses received Decedent's original will from Emma Smalls and filed it with the Charleston County Probate Court (hereinafter "Probate Court") on

August 4, 2005 (R.p.10). Since its filing, Children, including Emma Smalls, have denied producing the Will to Grandchildren (R.p.10).

On October 19, 2005, Grandchildren filed an Application/Petition for Subsequent Administration and sought the appointment of a Special Administrator for Decedent's estate (R.pp.56-60). In their application, Grandchildren alleged that, "*Decedent's will was concealed and, therefore, the Personal Representative made distributions in accordance with the laws of intestacy rather than pursuant to the terms of the will of Decedent.*" (R.p.58).

On October 20, 2005, Children filed a Petition for Recovery of Improper Distribution (R.pp.61-67). By Order dated January 4, 2006, the Court granted Children's application and appointed Shirrese B. Brockington as Special Administrator (R.pp.3-5).

On January 18, 2007, Grandchildren filed a Motion for Vacation of Order and sought the issuance of an order finding that Children knowingly and intentionally concealed Decedent's will (R.pp.75-83). On April 18, 2008, Grandchildren filed a memorandum detailing evidence of the validity of Decedent's will which included Emma Smalls' insurance claim with the Public Savings and Fire Casualty Company (R.pp.113-158).

On April 8, 2008, the Probate Court held a final hearing (R.pp.6-18). In addition to memorandum and briefs filed by the parties, the deposition transcripts of Thomas P. Brown, Jr., Evelina Brown Moses, Viola Pringle, Maezell Mitchell Jefferson, Emma Smalls, Robert Pringle, Cephus Thornton, and Mary P. Smith were entered into evidence by consent (R.pp.450-451).

On October 20, 2008, the Probate Court denied Grandchildren's motion to vacate based on the ten (10) year limit set forth in S.C. Code § 62-3-108. The Probate Court's order included a finding of *"good cause shown"* by Grandchildren, as well as the following specific findings:

1. *Emma Smalls, in the aftermath of Hurricane Hugo in late 1989, processed a claim with the Public Savings & Fire Casualty Insurance Company with reference to damages which resulted to the house she resided in on decedent's property; and*

2. *As a result of the claim, the insurance company issued a check naming as payees Emma Smalls and the Appellants as Executors of the estate of the decedent on January 15, 1990;*

3. *The payees on the insurance check match in order and number the apparent nomination of the executors listed in Item IV on decedent's will; and*

4. *Appellant Emma Smalls used the money received from this check to repair the home on decedent's property in which Appellant Emma Smalls resided.* (R.pp.6-18)

Children's sole argument in opposition to Grandchildren's Petition for Improper Distribution was that the ten (10) year statute of limitation set forth in S.C. Code § 62-3-108 barred the relief sought (R.p.38). The Probate Court found that "*clearly, the Respondents have shown good cause, but it has no choice other than to rule that it is incontestable that decedent left no will and that decedent's estate passed by intestate succession.*" (R.pp.17-18)

Grandchildren appealed this order (R.pp.167-181). In their brief, Children did not dispute the validity of the will or the Probate Court's finding of good cause shown. Rather, Children argued that two (2) daughters of Decedent, Annabelle Thornton and Mary Smith, had copies of the will which they had shown Thomas Brown, and thus, Grandchildren had notice of the Will's existence (R.pp.253-254). Children also maintained that Viola Pringle provided a copy of the will to Thomas Brown about three (3) years after Decedent's death (R.p.254).

By opinion filed August 9, 2011, the Court of Appeals reversed the Probate Court and found the following:

1. *Decedent was predeceased by one of her five daughters, Evelina Brown, the mother of Respondents;*

2. *Appellants had hidden the existence of the will in order to live out their lives on decedent's property;*

3. *One by one, Decedent's other daughters lived their lives and passed away until the last surviving daughter confessed to Evelina's children that she and her sisters had hidden the existence of the Will in order to live out their lives on the property; and*

4. *Decedent intended Respondents to inherit from her will.* (R.pp.24-28)

The Court of Appeals remanded the case to the Probate Court for further proceedings consistent with its opinion (R.pp.24-28). Children did not seek certiorari from this order.

In accordance with the Court of Appeals' remand, the Probate Court held a final hearing as to all matters at issue on November 9, 2012 (R.pp.29-30). On March 24, 2013, the Probate Court issued an order in which it "*accepts for probate the Last Will and Testament of Lucinda Pringle dated July 30, 1988.*" (R.pp.29-30)

On April 5, 2013, Children filed a Notice of Intent to Appeal to the Circuit Court and a Notice of Motion and Motion to Alter/Amend (R.pp.310-314). On April 15, 2013, Children filed a Notice of Motion and Motion to Dismiss (R.pp.315-319). In these filings, Children again argued that the Probate Court's acceptance of the will was barred by S.C. Code § 62-3-108. On June 26, 2013, a hearing was held as to Children's motions and the Probate Court issued an order finding that it was "*required to accept and probate the Last Will and Testament of Lucinda Pringle dated July 30, 1988.*" (R.pp.31-32)

On February 20, 2015, Appellants filed a Notice of Motion, Motion to Dismiss and Brief in Support of Motion in which they maintained that Grandchildren's efforts were barred by S.C. Code § 62-3-108 (R.pp.315-319). By Order dated June 21, 2015, the Probate Court denied Children's motion and found that "*by order dated March 24, 2013, the Court had previously accepted for probate the Last Will and Testament of Lucinda Pringle dated July 30, 1988,*" (R.pp.35-36). On July 14, 2015, Children filed a Notice of Motion to Amend or Alter which was later withdrawn (R.pp.325-326).

On February 9, 2016, Children filed a Petition for Formal Testacy (R.pp.332-339). Although the Probate Court had previously ruled on the issues raised by Children, the Probate Court, in an abundance of caution, again considered these issues and denied Children's petition (R.pp.37-42). The Probate Court also affirmed that the ten (10) year statute of limitations as set forth in S.C. Code § 62-3-108 did not bar the admission of Decedent's will for probate in light of Children's concealment of the will and the prejudice suffered by Grandchildren (R.p.42). Children filed a Notice of Appeal to the Circuit Court which affirmed the Probate Court by order dated March 16, 2018 (R.pp.43-50).

Children filed a Notice of Appeal to the Court of Appeals which affirmed the Lower Courts as to the following issues:

1. No extrinsic evidence was necessary to show that the misspelling of Decedent's last name was a scrivener's error as the error could be determined from the face of the Will which included Decedent's correct name on two (2) of its three (3) pages and that the date of the Will, as well its style and form, were consistent across all of the Will's three (3) pages;

2. The contents requirement of S.C. Code § 62-3-402(a) was satisfied by Grandchildren's filing of Decedent's Will; and

3. Because Children did not seek certiorari from the Court of Appeals' 2011 opinion, the Court of Appeals' finding that Decedent intended Grandchildren to inherit was the law of the case.

The Court of Appeals reversed the Lower Courts on the single issue of due execution and remanded the case to the Probate Court for a hearing to consider evidence of witness attestation.

Children filed a Petition for Rehearing which was denied on November 19, 2021. Children's Petition for Writ of Certiorari was filed on December 17, 2021.

## ARGUMENTS

I. IT WAS NOT AN ERROR OF LAW FOR THE COURT OF APPEALS TO REMAND THE CASE FOR AN EVIDENTIARY HEARING AS TO THE ISSUE OF DUE EXECUTION WITH RESPECT TO THE WITNESSES' ATTESTATION.

While Grandchildren maintain that the record includes evidence of due execution which satisfies the requirements of S.C. Code § 62-3-406, Grandchildren do not dispute that the Court of Appeals' remand for an evidentiary hearing on this issue was well within its discretion and consistent with the policy of ensuring that the intent of a decedent is honored. Throughout the lengthy history of this case, Children have consistently undertaken to dishonor Decedent's wishes. Children's actions have been motivated by their desire "*to live out their lives on Decedent's property.*" (R.pp.24-28). While Children's maneuvers have been successful to date, it is time that Decedent's intentions, which became the law of this case in 2011, be effectuated.

While Children's contend that the Court of Appeals relied upon Massachusetts' law, the Court of Appeals' opinion reflects otherwise. The Court of Appeals cited and followed S.C. Code § 62-3-406 in finding that:

> "*the death of the witnesses to the Will does not prohibit the Court from probating the Will because the proponent of the Will may present "**other evidence**" of due execution, whether it be an affidavit from a witness or evidence establishing the witness' handwriting.*" See S.C. Code § 62-3-406 (emphasis added).

The Court of Appeals also cited *Hopkins v. De Graffenreid*, 2 S.C.L. (2 Bay) 187, 192 (1798) and *Harleston v. Corbett*, 46 S.C.L. (12 Rich.) 604, 608 (1860) in further support of its decision. The Court of Appeals did not err in remanding the case to ensure that the requirements of S.C. Code § 62-3-406 were met.

II. BECAUSE CHILDREN DID NOT SEEK CERTIORARI FROM THE COURT OF APPEALS' 2011 FINDING THAT DECEDENT INTENDED THE GRANDCHILDREN TO INHERIT THROUGH HER WILL, THAT FINDING IS THE LAW OF THE CASE.

A. THE COURT OF APPEALS' 2011 FINDING THAT DECEDENT INTENDED GRANDCHILDREN TO INHERIT FROM HER LAST WILL & TESTAMENT WAS NOT DICTA.

The Court of Appeals' unappealed 2011 finding that Decedent intended Grandchildren to inherit from her Last Will & Testament is the law of this case. In its 2011 opinion, the Court of Appeals set forth the factual basis for this finding:

> "*Decedent was predeceased by one of her five daughters, Evelina Brown, the mother of Appellants. One by one, Decedent's other daughters lived their lives and passed away. Her last surviving daughter confessed to Evelina's children that she and her sisters had hidden the existence of the Will in order to live out their lives on the property. Decedent intended Appellants to inherit from her Last Will & Testament. Thus, the evidence supports the finding of the Probate Court that there is good cause to reopen the estate.*" (R.pp.24-28)

In its 2011 opinion, the Court of Appeals noted that Children had not appealed the Probate Court's finding of "*good cause*". Likewise, Children did not seek certiorari as to the Court of Appeals' 2011 finding of Decedent's intent. In its 2021 decision, the Court of Appeals found:

> "*as to childrens' intent and alterations argument, children never sought a Writ of Certiorari as to our 2011 Opinion which stated Decedent intended Evelina Brown-Moses, Thomas Brown, and Rebecca Patricia Brown to inherit from her Will*," *Moses v. Haile-Howard ex rel. Estate of Smith*, Op. No. 2011-UP-386. Thus, this finding became the law of the case. See *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010)("*an unappealed ruling is the law of the case and requires affirmance.*")

Children now maintain that the Court of Appeals' findings in 2011 as to Decedent's intent were dicta. The record shows otherwise.

In their petition, Children cite a series of cases defining dicta including *State v. Addison*, 338 S.C. 277, 525 S.E.2d 901 (S.C. App. 1999) in which dicta is defined as "*an expression or*

*statement by the Court on a matter not necessarily involved in the case, nor necessary to a decision thereof"* and *Welborn v. Dixon*, 70 S.C. 108, 49 S.E.2d 232, (1904), in which dicta is defined as "*an discussion of a legal principle in an opinion which was 'clearly unnecessary to a resolution of the issue before the Court.'*" The Probate Court and Court of Appeals' consideration of Decedent's intent were unquestionably material to the findings of both Courts.

In their petition, Children argue that the validity of the Will and Decedent's intent had not been considered or raised prior to the November 9, 2016 hearing and reference a statement by Grandchildren's counsel in support of this argument. In fact, the record reflects that the November 9, 2016 hearing was the first occasion at which Children argued that the Will was "*invalid*". Prior thereto, Children had not disputed Decedent's intentions or the validity of her Will. Rather, Children argued that their disclosure and production of the Will to Thomas Brown following Decedent's death precluded Grandchildren from probating it. Throughout this case's lengthy history, Children have repeatedly argued that the ten (10) year statute of limitations contained in S.C. Code § 62-3-108 rendered Decedent's intent irrelevant. With this argument having been unsuccessful, Children devised a new strategy and argued for the first time that Decedent's Will was invalid. However, by electing not to appeal the Probate Court's finding of good cause shown or seek certiorari from the Court of Appeals' 2011 decision, the findings with which Children take issue are the law of the case.

B. THE COURT OF APPEALS CONSIDERED S.C. CODE § 62-3-402(A) AND FOUND THAT GRANDCHILDREN'S FILING OF DECEDENT'S WILL SATISFIED ITS CONTENTS REQUIREMENTS.

In their final argument, Children maintain that Decedent's estate must pass under the laws of intestate succession pursuant to S.C. Code § 62-2-101 even if the Court of Appeals' finding that Decedent intended Evelina Brown, Moses, Thomas Brown, and Rebecca Patricia Brown to inherit

from her Will is the law of the case. While Children maintain that the Court of Appeals was silent on their alteration/contents argument, the Court of Appeals' decision includes its consideration and rejection of this argument.

On August 3, 2005, Evelina Brown Moses received Decedent's original Will and filed it with the Probate Court the next day. (R.p.10) Since its filing, Grandchildren have sought the administration of Decedent's estate in accordance with the terms of the Will. The Court of Appeals properly found that the Grandchildren's "*presentation of the Will satisfied the requirements of 62-3-402(a) as the contents can be determined from this document.*[1]"

The Court of Appeals was also correct in applying "*law of the case*" rationale in rejecting Children's timeliness argument which the Court stated, "*was an attempt to relitigate the issue of whether S.C. Code § 62-3-108 barred Grandchildren from reopening the estate under the Will.*" In support of this finding, the Court cited *Ackerman v. McMillan*, 324 S.C. 440, 443, 447 S.E.2d 267, 268 (Ct. App. 1996). "*Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form*". Children's argument represents a final attempt to prevent Decedent's intent from being honored. In affirming the Lower Courts, the Court of Appeals properly rejected it.

## CONCLUSION

Since Decedent's death in 1989, Children have done whatever is necessary to prevent Decedent's Will from being probated. To date, through a series of legal maneuvers, Children's efforts have kept Decedent's wishes from being honored. Grandchildren respectfully submit that the Court of Appeals did not err as a matter of law and that this case is not in conflict with any

[1] § 62-3-402(a) ("If the original will is neither in the possession of the court nor accompanies the petition[,]...the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable."

prior decision of the Supreme Court. Grandchildren further note that there was no dissent to the Court of Appeals' decision, and that this case does not involve constitutional issues or federal questions. Therefore, Children's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Date: February 7, 2022

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