SUPREME COURT OF FLORIDA
CASE NO. 79,632

IN RE: ESTATE OF
ALEXANDER TOLIN

** DISTRICT COURT OF APPEAL,
** 4TH DISTRICT NO. 91-1261

BROWARD ART GUILD, INC.'S
ANSWER BRIEF ON THE MERITS
(Respondent)

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SUMMARY OF THE ARGUMENT

This a fastrack appeal. Petitioner has restated the agreed issues to be placed before the Court. Petitioner has added another issue such that there are now four issues, petitioner's three plus the certified question, before this Court in derogation of the fastrack rules which requires that the "issues not exceed two".

The testator tore up a photocopy of the codicil to his will for the purpose of destroying **that copy** of the codicil. Petitioner maintains that tearing up a copy of the codicil with the intention to revoke the codicil is a proper method to revoke a codicil. Respondent asserts that the legislature has provided for the correct method to revoke a codicil to a will. The statute provides that any revocation by destruction must be accomplished on the original copy of the codicil.

The circuit court held that the original codicil was revoked by the testator tearing up a photocopy of the codicil. The district court of appeal reversed the circuit court. Before this court is a question certified of great importance encompassing the facts of this case.

Respondent argues that an original will or codicil may only be revoked consistent with the provisions of the Florida statute providing for a revocation of a will or codicil by destruction. Simply destroying an unsigned copy, even one containing a photo image of the original signature, is insufficient to accomplish that end.

ARGUMENT

RESPONSE TO PETITIONER'S BRIEF

Petitioner has unilaterally changed the agreed statement of this case in presenting the issues to be considered by this appellate Court. On July 17, 1991, petitioner's attorney for the appeal below and for this appeal, and the Art Guild's attorney executed an agreed statement of the case which represented a "fastrack" agreement and presented a "concise statement of the issues on appeal". See petitioner's appendix, pages 1 through 5, where petitioner has included the whole fastrack agreement with her brief and respondent's appendix, pages 1 and 2, which presents the fastrack election.

At this juncture, Petitioner has chosen to restate the issues for consideration by this Court; and has also chosen to add a new issue: that of an "impressed trust" upon the estate. Fastrack requires that the number of issues on appeal "not exceed two." This appeal already has two agreed issues. Petitioner's restating and adding to the issues agreed to be put before this Court is in violation of the fastrack agreement. Therefore, Petitioner's brief should be stricken or not considered. Nevertheless, the Art Guild will respond to Petitioner's restated issues, new issue, and the certified question before returning to the agreed issues of the fastrack schedule.

PETITIONER'S RESTATED ISSUE ONE, AND THE NEW ISSUE
(Not the same as agreed to in Fourth DCA Fastrack Appeal)

> **I. WHERE THE UNDISPUTED FACTS DEMONSTRATE THAT THE TESTATOR DESTROYED A PHOTOGRAPHIC COPY OF HIS CODICIL UNDER THE MISTAKEN BELIEF THAT BY SUCH ACT HE WAS DESTROYING THE ORIGINAL AND THE TESTATOR INTENDED TO REVOKE THE ORIGINAL, DOES SUCH ACT CONSTITUTE AN EFFECTIVE REVOCATION, AND IF NOT, SHOULD A TRUST BE IMPRESSED ON THE ESTATE IN FAVOR OF THE HEIR HE INTENDED TO BENEFIT?**
>
> **THE ANSWER IS IN THE NEGATIVE ON BOTH ISSUES.**
>
> **CERTIFIED QUESTION: MAY A CODICIL TO A WILL BE REVOKED BY DESTROYING A PHOTOGRAPHIC COPY IF THE TESTATOR BELIEVED THAT BY SUCH ACT HE WAS DESTROYING THE ORIGINAL AND THE TESTATOR INTENDED TO REVOKE THE CODICIL?**
>
> **THE ANSWER IS IN THE NEGATIVE.**

The crux of this dispute is Petitioner's argument that there is no doubt that Mr. Tolin, the testator, tore up a photocopy of the codicil to his will; however, nobody knows for sure what he intended by the act. Petitioner argues that it is a deliberate misstatement of the facts of the case to present observations of alternative situations in the scenario of events that present alternative motives for the testator's act of tearing up a photocopy of the codicil. One ulterior motive might very well be to get testator's girlfriend off his back by conducting an act which was a nullity.

The trial judge allowed parol evidence testimony of the so-called friends of the testator which influenced him to acquiesce and agree that the testator actually revoked the codicil because he tore up a photocopy of his codicil. Each time parol evidence was admitted in the hearing before the circuit court, Broward Art Guild

objected to this biased and self-serving testimony. We can go to the fastrack agreed statement of this case in the district court to resolve the misstatement problem the petitioner pleads. On page 2 of petitioner's brief, she boldly states that "it is not disputed that this document was torn up and destroyed with the intent, and for the purpose of revocation." The purpose is disputed. Respondent does not quarrel with the fact that the testator intended to tear up, destroy, and revoke "this document" which was a photocopy of his codicil. Whether or not the testator's purpose was to revoke the original copy of his codicil by tearing up the photocopy of his codicil is a subject of never ending argument and conjecture because the testator is now dead and gone.

On page 8 of petitioner's brief, she notes that respondent presents no citations to the record for respondent's argument that there is not any way of determining what the testator's intent was in destroying the photocopy of the codicil. Of course, there are no citations to the record in this case because it was agreed that there would be no record except an agreed statement of the case. This is another fastrack rule. Respondent argues that there could be many motives for tearing up a photocopy of testator's codicil other than to revoke the original codicil. The argument presented to the district court was as follows:

> We submit the possibility of fraud in the attempt of appellee to establish revocation. The probability of fraud is strong that testator was intending to merely convey the illusion of revocation of the codicil to the beneficiary of his will. The trial judge

> imputed what the testator "thought" from the statements of the witnesses. This is in error." Page 4 of appellant's brief before the district court.

Petitioner construes this argument as a "deliberate" misstatement of the facts of the case. But, the proposition is argument and presents an extremely legitimate alternative motive than what the petitioner would have us believe here. The district court recognized the argument in its opinion and states that "however the appellant raises questions, in argument, of other possible motives."

The legislature and The Florida Bar have struggled to end the never ending arguments regarding a deceased testator's intent of his acts pertaining to his will, codicil, and last wishes. As a result, laws have been enacted as to how a will or codicil can be properly revoked. The courts have demanded strict compliance with the revocation law. Both the legislature and the Bar have revised and restated the law to make it clearer and more restrictive as to how to properly revoke a will or codicil. Each change has endeavored to "nail down" the proper method for revocation of a will or codicil.

Sect. 732.506 - Revocation by Act - Fla. Stat. (1989) presently provides as follows:

> A will or codicil is revoked by the testator, or some other person in his presence and at his direction, by burning, tearing, canceling, defacing, obliterating, or destroying <u>it</u> with the intent, and for the purpose, of revocation. (emphasis added).

In 1933, the legislature added the phase "in his

presence" to the then Sect. 731.14 Fla.Stat., which was the predecessor of the present Sect. 732.506 Fla.Stat. Effective January 1, 1976, the legislature with the assistance of The Florida Bar again revised the statute and added the words "or codicil" and changed two words "the same" or "the will" to "it". A will and codicil may now be revoked by the testator or some other person in his presence .... by destroying "it" and not by destroying "the same" or "the will". Clearly, the legislature and The Florida Bar has endeavored to tighten up the statute. Providing for the statute to apply to codicils is indicative that the legislature intended for the statutory prerequisites to apply and be strictly construed as to both the revocation of wills and codicils. Any revocation must be accomplished on the will or codicil itself and not on a photocopy.

Recently, just after the district court's opinion in this case was published, Cecil T. Farrington, Esquire of Fort Lauderdale, Florida, a long standing member of The Florida Bar Probate Rules committee, called the undersigned to announce the *West's Southern Second* cite of the district court's opinion in this case. Mr. Farrington asked what the recommendation would be to clear up the problem evidenced in this case. The answer was a resounding "change the word 'it' to 'the original'". Mr. Farrington stated that he did not think the statute could be any clearer with the word "it" in it, but that his recommendation at the next probate committee meeting would be to change the statutory wording from "it" to "the original".

In re: Bancker's Estate, 232 So.2d 431 (Fla. 4th DCA), *cert. denied*, 238 So.2d 111 (Fla. 1970) stands for the principle that an original will or codicil may only be revoked consistent with the provisions of Section 732.506, Fla. Stat. (1975). The Fourth District Court of Appeal held that strict compliance with statutory requirements is a prerequisite for the valid creation or revocation of a will. In *Bancker*, the testator sought to revoke his will by having his wife, step-daughter, and her husband remove the will from a wall safe, tear it up and flush it down the toilet. Because the testator was in another room at the time and not in their presence, and did not see the destruction, the court held that the acts of the other parties did not constitute an effective revocation. In the case at bar, not one of the statutory requirements were complied with because any act of revocation must carried out on the original of the codicil and not a photocopy.

The district court noted in its opinion that *Lowy vs. Roberts*, 453 So.2d 886 (Fla. 3d DCA 1984) holds that simply destroying an unsigned copy, even one containing a photo image of the original signature, is insufficient to accomplish that end, that is the revocation of the original codicil. See also, *In re: D'Agostino's Will*, 9 N.J. Super. 230, 75 A.2d 913 (1950); *In re: Will of Wehr*, 247 Wis. 98, 18 N.W.2d 709 (1945).

In *Lowy*, the issue was that certain provisions in the will had been altered or spoliated following execution without the required statutory formalities. The court held as follows:

> There is no question that no post execution change in or to a will, whether accomplished

> without adherence to the statutory testamentary prerequisites by the testator himself, *Trotter v. Pan Pelt*, 144 Fla. 517, 198 So. 215 (1940): *In re: Shifflet's Estate*, 170 So.2d 96 (Fla. 3d DCA 1965), *In re: Estate of Bancker*, 232 So.2d 431 (Fla. 4th DCA 1970) which is called an "alteration," or - as is strongly implied occurred in the present instance - or by unauthorized third person e.g., *In re: Deane's Estate*, 153 So.2d 26 (Fla. 3d DCA 1963), which is referred to as "spoliation," 2 Page on Wills, Section 22.5 (new rev. ed. 1960), has any legal effect whatever upon the will itself, which must be probated as if it had not taken place. 79 Am.Jur.2d Wills, Sect. 562 (1975); 2 Page on Wills, Sects. 22.1-22.7 (new rev. ed. 1960);

The court went on further to state in *Lowy*:

> .... in accordance with the universal rule that in the case of alteration or spoliation, the court must, to the extent possible through the reception of competent evidence, determine and enforce the contents of the true, unaltered will. 3 Page on Wills, Sects. 29.164-29.166 (new rev. ed. 1960).

Under our facts, even if the lower circuit court somehow determined that the testator's act of tearing up a photocopy of the codicil altered the original codicil, the lower circuit court was still bound to strictly interpret the statute and to determine and enforce the contents of the true, unaltered will and codicil. The all consuming reason for reaching this conclusion is that the testator did not follow the mandatory statutory prerequisite to destroy the original codicil.

Lastly, under this issue, petitioner seeks to have this appellate Court impose a trust in equity in her favor on the residue estate of the testator which is the left over money. Petitioner alleges that because the testator made a mistake in

revocation, she should be allowed to capture the estate residue for equity reasons. But really, did the testator make a mistake when he tore up the photocopy of the codicil? Twice the testator went to his attorney for the preparation and execution for testamentary purposes of his last will and codicil. He properly allowed his attorney to keep the original of the documents. The testator knew what he was doing and he was familiar with testamentary procedures.

Petitioner cites *Moneyham v. Hamilton*, 124 Fla. 430, 168 So. 522 (Fla. 1936) in support of her impressed trust argument. The case holds against her. Even though the testator's daughter pretended to the testator, her father, that she could not find the will which her father intended to revoke, this Court upheld the probate of the will and did not impress a trust upon the estate for the benefit of the daughter and the other heirs of the testator. This Court stated:

> To hold that a last will and testament may be utterly destroyed by merely alleging and proving that the testator requested a beneficiary to bring the will to him, that he might destroy it, and that the beneficiary falsely pretended to be unable to find the will would be, indeed, a dangerous enunciation, and would doubtless lead to much fraud and the undoing of many devises by unscrupulous and designing persons who may be cut off from inheritances which they might share except for the exercise of the right of the owner to dispose of the same by will. *Moneyham v. Hamilton, supra.*

Frustration of mere intent to revoke a will is not sufficient to impress a trust on a devise. *Moneyham v. Hamilton, supra.* If the allegation of fraud to resist revocation is not enough to impress a trust, surely the mere allegation of mistake is

not enough in Florida for any court to impress a trust against the testator's estate.

This mistake issue was considered by the First District Court of Appeals more recently. A testator disinherited four beneficiaries with $1.00 bequests, but the will did not have a residuary clause. The reason for the lack of a residuary clause was established through affidavits to be inadvertent omission. Even though an earlier will had a residuary clause, the court held that parol evidence could not be used to establish a residuary clause in the probated will which was omitted by mistake. *In re: Estate of Barker*, 448 So.2d 28 (Fla. 1st DCA 1984). This court went on to explain its decision:

> We do not understand that the "dependent relative revocation" doctrine, useful and salutary as it is in a proper case, carries with it the authority to disregard so well-established a rule as that which forbids us to write a new will for the testator in the face of a clear intent expressed in a proper instrument. In the much-cited article to which we have alluded, Warren, Dependent Relative Revocation, the author states in part [33 Harv.L.R. at pp. 348-9]:
>
> > A will cannot be set aside for mistake in either the United States or in England where the testator knew and approved its contents....
> >
> > The testator is dead, and it is too dangerous to inquire what motives induced his action. This was to be done for the construction of the document; it should not be resorted to for alteration of it. *Barker, supra.*

ISSUE ONE
(Same as agreed to in Fourth DCA Fastrack Appeal)

> **I. WHETHER DESTRUCTION OF AN EXACT ELECTRONIC PHOTOCOPY OF A PROPERLY EXECUTED CODICIL WITH THE INTENTION AND FOR THE PURPOSE OF REVOCATION WHILE UNDER THE MISTAKEN BELIEF THAT IT IS THE ORIGINAL CODICIL, CONSTITUTES AN EFFECTIVE REVOCATION.**
>
> **THE ANSWER IS IN THE NEGATIVE.**
>
> **CERTIFIED QUESTION: MAY A CODICIL TO A WILL BE REVOKED BY DESTROYING A PHOTOGRAPHIC COPY IF THE TESTATOR BELIEVED THAT BY SUCH ACT HE WAS DESTROYING THE ORIGINAL AND THE TESTATOR INTENDED TO REVOKE THE CODICIL?**
>
> **THE ANSWER IS IN THE NEGATIVE.**

Respondent will not restate its arguments presented herebefore, but will incorporate all of the foregoing arguments above with the exception of the impressed trust issue argument which petitioner newly incorporated at this level of the appeal.

As additional argument, respondent presents the remarks of D.H. Redfearn in his book, *Redfearn, Will and Administration in Florida*, Section 8-5 (6th Edition) wherein he discusses and refutes the proposition that petitioner asserts that a revocation is effective if the necessary intent to revoke is coupled with an act done to some other piece of paper.

> This is a dangerous doctrine to follow; for, if a will can be revoked by intention combined with an act done to some other paper which the testator destroys, thinking it is his will, then by the same logic a will could be executed by the testator's intending to do so but failing through fraud or through mistake in signing some other paper. A will could not be executed in such a manner, as it must signed by the testator, under Florida statutes in order to be a valid will. Florida statutes provide that, in order for a

> revocation by burning, canceling, tearing, or obliterating to be effective, such acts must be done to the instrument itself. This is declaratory of the common-law rule. *Redfearn, supra*, at the middle of page 99.

ISSUE TWO
(Same as agreed to in Fourth DCA Fastrack Appeal)

> **II. WHETHER OR NOT THE PAROL EVIDENCE RULE BARS TESTIMONY REGARDING THE INTENTION OF A TESTATOR TO REVOKE THE CODICIL TO HIS WILL WHEN THE ORIGINAL EXECUTED WILL AND CODICIL HAVE BEEN ADMITTED TO PROBATE AND THE PROVISIONS OF BOTH ARE CLEAR AND UNAMBIGUOUS.**
>
> **THE ANSWER IS IN THE AFFIRMATIVE.**

In her Supreme Court brief, petitioner summarily discards this issue because the Broward Art Guild allegedly failed to object to the testimony of her three friends, the petitioner, her girl friend, and her retired New York attorney friend, at the initial hearing before the circuit court. Surely, such a inference is false. See a copy of two pages (5 and 6 of respondent's Appendix B) of the transcript of the hearing for respondent's motion for rehearing and starting at line 18 on page 5, respondent "objected strenuously" on grounds of both the Dead Man's Statute, Florida Statute Sect. 90.602 (1991), and the parol evidence rule. In as much as petitioner has decided not to argue to this agreed issue two, respondent presents verbatim its arguments presented before the court below in the Fourth District Court of Appeals.

The parol evidence rule has a limited application in probate when a court is seeking a testator's intentions. Simon and Redfearn in *Redfearn, Wills, Fla.*, Sect. 6.10 (5th Ed.) state:

> Such evidence (parol evidence, sic.) is not admissible for the purpose of adding pro-

> visions to the will, varying its clearly expressed terms, or contradicting the intentions of the testator as plainly expressed in the will.
>
> Parol and other extrinsic evidence is admissible to show the circumstances surrounding the testator at the time of the execution of the will and to explain latent ambiguities, but an ambiguity or uncertainty must exist before parol evidence will be admitted to explain the terms of the will.

The Third District Court has reviewed the use of parol evidence in probate cases and has held that parol evidence is not justified unless special circumstances exist. Special circumstances are created when it becomes necessary to supply and enlarge, or explain the intentions of a testator. In a case where the executor petitioned for a construction of the will because of uncertainties as to the method in which a marital trust should be funded, the Court held as follows:

> We have not been shown that the County Judge was clearly in error when he found that there were no special circumstances herein which required parol testimony to supply, enlarge, or explain the testator's intention ....
>
> It appears that the intention of the testator was ascertainable from the instruments before the County Judge and that he was correct in ruling. *In re: Estate of Cohen*, 196 So.2d 447 (Fla. 3d DCA 1967).

In a later ruling, the same court ruled on the construction of a will and a codicil thereto. The will gave the residuary estate to the brother of the testatrix if he did not predecease her. If he predeceased her, the estate was divided between five heirs. The codicil deleted an heir of the residuary estate if her brother predeceased the testatrix. The court held:

> The will and the codicil can be reconciled without resort to evidence outside of the will and, therefore, it was appropriate for the trial judge to deny the proffer of same and the exclude the testimony, even though he may have been right for the wrong reason. *In Re: Block's Estate*, 143 Fla. 163, 196 So. 410 (1940); *In Re: Estate of Cohen*, 196 So.2d 447 (Fla. 3d DCA 1967); *In Re: Estate of Yohn*, 238 So.2d 290 (Fla. 1970); *Firestone v. Firestone*, 263 So.2d 223 (Fla. 1972).

The Third District Court has continued to follow its prior judgments of its parol evidence rulings. In footnote 6 of *Hulsh v. Hulsh*, 431 So.2d 658 (Fla. 3d DCA 1983), the Court states:

> Finally, since the testator's intent could be and was gleaned from the will itself, parol evidence seeking to establish some contrary intent was inadmissible. See, *In Re: Block's Estate*, 143 Fla. 163, 196 So.2d 410 (Fla. 1940); *Adams v. Vidal*, 60 So.2d 545; *In Re: Estate of Lesher*, 365 So.2d 815 (Fla. 1st DCA 1979).

At the hearing to revoke probate of the testator's codicil, the trial judge allowed testimony regarding the testator's intent to revoke his codicil when he tore up a photocopy of the codicil in the presence of one witness. "Intent" must be implied from what the testator said and what he did. Can there not be at least two different intentions deduced from the act of tearing up a photocopy of a codicil? No one can testify as to what the testator was thinking, but only what he said which may have been said and done to hide his real intent from his beneficiary under the will. Can we assume that he was not knowledgeable of the law? Had not the testator received the advice of counsel when he made the will and codicil? Of course, he did.

It is uncontested that the will and codicil are clear and

unambiguous. If the testator effectively revoked his codicil by tearing up the photocopy, the petitioner receives the residue of the estate under the will. If the original codicil stands as previously probated, then the respondent receives the residue of the estate under the codicil. It was clearly error that parol evidence was allowed to be introduced at the hearing to establish some other testator intent than that established by the will and codicil as originally probated.

CONCLUSION

The certified question should be answered in the negative. An original will or codicil may only be revoked consistent with the provisions of Florida Statute 732.506 (1975). Simply destroying an unsigned copy, even one containing a photo image of the original signature, is insufficient to accomplish that end. A trust should not be impressed on the residue of the subject estate and any consideration of that issue is misplaced in this appeal.

Respectfully submitted,

Charles P. Johnson, Jr.
Attorney for Respondent

CERTIFICATION

I **HEREBY CERTIFY** that the original and seven copies of the Response Brief was furnished to the Clerk of the Supreme Court, and that a true and correct copy of the foregoing was furnished to Daniel E. Oates, Esquire, 1500 East Atlantic Boulevard, Suite B, Pompano Beach, Florida 33060, and Stephen F. Goldenberg, Esquire, One Financial Plaza, Suite 2626, Fort Lauderdale, Florida 33394, by mail, this 10th day of July, 1992.

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