SUPREME COURT OF FLORIDA

IN RE: THE ESTATE OF
ALEXANDER TOLIN,

CASE NO. 79,632

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

PETITIONER'S BRIEF ON THE MERITS

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PREFACE

The Appellant in the District Court case is the Respondent and the Appellee in the District Court case is the Petitioner herein.

Respondent is also referred to by name as Broward Art Guild, Inc. and Petitioner is referred to by name as Adair Creaig.

POINTS ON APPEAL

ISSUE ONE

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?

ISSUE TWO

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.

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?

STATEMENT OF THE CASE AND OF THE FACTS

In the proceedings before the Fourth District Court of Appeal, the parties elected to have the case handled on a "Fast Track". In accordance with the procedures for governing "Fast Track" cases, the parties agreed to a statement of the essential facts.[1] The "Fast Track" procedure provides that if the parties disagree on any fact it shall be noted. The parties did not disagree on any of the facts. The following is the Agreed Statement of the Facts set forth verbatim.

AGREED FACTS

On November 7, 1984, Alexander Tolin executed a Last Will and Testament (R15-20). Under this Will the residue of the decedent's estate was devised to his friend, Adair Creaig. The Will was prepared by his attorney, Steven Fine, and executed in the attorney's office. The original Will was retained by the attorney and a blue-backed photocopy of the original executed Will was given to Mr. Tolin. On July 14, 1989, Alexander Tolin executed a Codicil to the Last Will and Testament which changed the residuary beneficiary from Adair Creaig to Broward Art Guild, Inc. (R21-23). This Codicil was also prepared by his attorney, Steven Fine, at the attorney's office. Again, the attorney retained the original in his office and Mr. Tolin was given a blue-backed photocopy of the original executed Codicil.

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[1] Therefore, there is no transcript of the testimony at the final hearing.

Alexander Tolin died on October 14, 1990. Approximately six months prior to his death, Mr. Tolin advised his neighbor, and a retired New York attorney, Ed Weinstein, that he had made a mistake and that he wished to revoke the Codicil and reinstate Adair Creaig as the residuary beneficiary. Mr. Weinstein advised him that he could accomplish his purpose by tearing up the original Codicil. At a meeting at which Mr. Tolin and Mr. Weinstein were present, Mr. Tolin handed Mr. Weinstein a blue-backed document which he represented was his original Codicil. Mr. Weinstein looked at the document. It appeared to him to be the original Codicil and he handed it back to Mr. Tolin. Mr. Tolin then tore it up and destroyed it. **It is not disputed that this document was torn up and destroyed with the intent, and for the purpose of revocation.**

However, soon following Mr. Tolin's death, Mr. Weinstein spoke with Steven Fine and discovered for the first time that Mr. Fine had in his possession the original Will and Codicil. The document which Mr. Tolin tore up was actually the blue-backed photocopy which Mr. Fine had given to Mr. Tolin at the time of its execution. **It is undisputed that this was an exact copy of the fully executed original Codicil and was in all respects identical to the original except for the original signatures.**

COURSE OF THE PROCEEDINGS

The attorney and Personal Representative, Steven Fine, petitioned to have both the original Will and the Codicil admitted to probate and on November 28, 1990, the Trial Court admitted the originals of both documents to probate (R31-32). However, (knowing

about the destruction of the photocopy of the Codicil), the Personal Representative also filed a Petition for Determination of the validity of the Codicil requesting that the Court conduct an evidentiary hearing (R33-35).

Adair Creaig filed her own Petition for Revocation of Probate, a copy of which was served upon the Broward Art Guild, Inc. and the Broward Art Guild, Inc. responded by simply denying the allegations (R 52).

At the final hearing, Adair Creaig presented the testimony of several witnesses, including herself, Ruth Raff, Mr. Fine, and Mr. Weinstein, who testified in conformity with the Agreed Facts stated hereinabove. The Broward Art Guild did not present any evidence.

DISPOSITION IN TRIAL COURT

Following the final hearing, the Trial Court entered an Order granting Adair Creaig's Petition for Revocation of Probate revoking probate of the Codicil and reinstating the provisions of the Last Will and Testament that were changed or revoked by the Codicil as if the Codicil had never been executed (R57-58). The Broward Art Guild appealed from this Order (R68).

DISPOSITION IN DISTRICT COURT

The issues on appeal before the Fourth District Court of Appeal were as follows:

> 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.

> WHETHER THE PAROLE EVIDENCE RULE BARS TESTIMONY REGARDING THE INTENTION OF A TESTATOR TO REVOKE, OR NOT TO REVOKE, THE CODICIL TO HIS WILL WHEN THE ORIGINAL EXECUTED WILL AND CODICIL REMAIN IN EXISTENCE, WERE ADMITTED TO PROBATE, AND THE PROVISIONS OF BOTH ARE CLEAR AND UNAMBIGUOUS.

In an opinion filed January 3, 1992, the Fourth District Court of Appeal reversed the Trial Court Order revoking probate of the Codicil and reinstated the Codicil[2]. Upon rehearing, the District Court certified the following question to be of great public importance:

> 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?

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[2] There is a dissenting opinion.

SUMMARY OF THE ARGUMENT

Competent substantial (undisputed) evidence contained in the Agreed Statement of the Facts demonstrates Alexander Tolin destroyed a photocopy of a Codicil to his Will with the intent and for the purpose of revocation under the genuine, albeit, mistaken belief the copy was the original. Section 732.506, Florida Statues, which governs revocation of Codicils by destruction, does not expressly require the destruction of the original. There are no judicial decisions in Florida which either require, or permit, revocation by destruction of a photocopy. However, it is well established in Florida that the principle objectiive in a Will construction case is to ascertain or determine, and give effect to, the intention of the Testator. There is no question the Testator intended to revoke the Codicil.

Even if Section 732.506, were interpreted to prohibit revocation by destruction of a photocopy, Adair Creaig would still be entitled to the relief she seeks by virtue of the long established principle under Florida law that a court may impress and enforce a trust in lieu of the provisions of a Will, if "something more than the frustration of a mere intent to revoke the Will" is demonstrated. Without question, such a showing is made in this case.

With regard to the second issue concerning the Parol Evidence Rule, it is well established under Florida law that parol evidence is admissible to show what acts were done by the Testator and what his intentions were in cases involving the revocation or

destruction of a Will or Codicil.

ARGUMENT

ISSUE ONE

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?

As set forth in the Agreed Statement of the Facts, it is undisputed that the Testator, Alexander Tolin, tore-up and destroyed a formal or "blue-backed" ("xerox") photocopy of his original Codicil, with the intent and for the purpose of revoking it, under the geniune, albeit, mistaken belief it was the original. The Testator and his attorney/friend, Ed Weinstein, were mislead by the high quality of the photocopy and by the fact it was "blue-backed".[3]

In this sense, Alexander Tolin, can truly be said to be a victim of modern law office technology in which the use of "xerox" machines and laser printers has resulted in photocopies which are difficult to distinguish from originals.[4]

At the hearing to determine whether the Codicil was revoked by destruction of the photocopy, substantial parol evidence was admitted demonstrating that the Testator intended to revoke the

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[3] This was a photocopy of the executed original Codicil so it contained photo images of the original signatures including the Testator and the witnesses.

[4] Many attorneys have adopted the practice of using solely blue-ink pens to avoid this problem.

Codicil by destroying the photocopy in the presence of witnesses. In fact, the Broward Art Guild offered no testimony or witnesses to the contrary. However, on Page 4 of its Initial Brief filed with the District Court, the Broward Art Guild made the following argument:

> According to the witnesses at the hearing, the Testator satisfied one of the two conditions imposed by the statute. He allegedly intended to revoke the Codicil, but he failed to destroy **it** (the original executed Codicil as mandated by statute). The evidence shows he destroyed a photocopy for the purpose of revocation. He destroyed only a photocopy of the executed Codicil which was a "correct copy" in legal jargon. We submit the possibility of fraud in the attempt of Appellee to establish revocation. The probability of fraud is strong that the 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. (emphasis in original).

It is unfortunate the Broward Art Guild made this argument. Please note there are no citations to the record. In fact, this argument is a deliberate misstatement of the facts of the case, which, (unfortunately) affected the District Court's decision. The majority of the District Court seized upon this point:

> We reverse an Order revoking the probate of a Codicil to a Will. The Order also reinstated the Will as if the Codicil had never been executed. The evidence reflects that the Testator attempted to revoke the Codicil by destroying a photostatic copy. **However, the Appellant raises questions, in argument, of other possible motives.**

Appellate review is, of course, confined to the record on appeal. The record on appeal contains an agreed statement of the facts which is set forth in its entirety in this Brief. There is not even a suggestion of fraud in these facts. It was totally improper for the Broward Art Guild to go outside the record and make this argument and it is obvious that it had an impact upon the District Court's decision.

The only legitimate argument available to the Broward Art Guild relies upon strict compliance with the requirements set forth for the revocation of a Codicil in Section 732.506, Florida Statutes (1975). That Section reads 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, cancelling, defacing, obliterating or destroying **it** with the intent, and for the purpose, or revocation. (emphasis supplied)

The Broward Art Guild submits the word "it" can only refer to the **original** Codicil. In support of this argument the Respondent will cite, IN RE: Bancker's Estate, 232 So.2d 431 (Fla. 4 DCA), cert. den., 238 So.2d 111 (Fla. 1970). However that case does not deal with the question of the destruction of a photocopy. In Bancker the Testator's Will was destroyed, not by the Testator, but by his wife's stepdaughter, and her husband, and not in the Testator's presence. The Testator was not even in the same room and did not see the destruction. None of the statutory requirements were complied with.

In this case, all of the requirements of Section 732.506 have

been strictly complied with except, arguably, the destruction of the original instrument. However, it could be argued even this requirement is met. Alexander Tolin genuinely believed the document he detroyed was the original. He told his attorney/friend, Ed Weinstein, it was the original Codicil and Mr. Weinstein thought it was the original after looking it over. There is no doubt, subjectively speaking, it was the original. However, there is also no doubt - objectively - it was not the original because the original was still with the attorney who prepared it.

Does Section 732.506 require the destruction of the original if all other conditions have been met? This is the question which has been certified by the District Court as being of great public importance. A brief analysis of the legislative history of this Section is in order.

The predecessor to Section 732.506 is Section 731.14(1) (1973). That Section read as follows:

> A Will may be revoked by the Testator himself or by some other person in his presence and by his direction, by burning, tearing, cancelling, defacing, obliterating or destroying the same, with the intent and for the purpose of revocation."

In 1974, the Legislature repealed Section 731.14 and enacted a new Section 732.506 which at that time read as follows:

> A Will is revoked by the Testator, or some other person in his presence and at his direction, by burning, tearing, cancelling, defacing, obliterating, or destroying the Will with the intent, and for the purpose, of revocation.

In 1976, Section 732.506 was amended by adding the words "or Codicil" and "it". If the Legislature had intended to limit the application of the Statute, then it could have used the word "original" rather than "it". In point of fact, the use of the generic term "it" rather than the word "original" strongly suggests the Legislature intended to leave this question open to judicial interpretation.

The Statute does not specifically require the destruction of the original and there are no judicial decisions in Florida on point. According to 79 Am. Jur. 2d, Wills, Sec. 611, the general rule is that the intentional destruction or cancellation by the Testator of the copy of his duplicate Will retained in his possession raises the presumption of an intent to revoke the Will. Similarly, in cases involving duplicate original Wills, if a duplicate cannot be found after the Testator's death, a rebuttable presumption arises that he destroyed it with the intention of revoking both it and any other duplicate. Florida recognizes the proposition that when a Will has been lost or destroyed, there is a presumption that the Testator destroyed it with the intention of revoking it. Estate of Parson, 416 So.2d 513 (4 DCA Fla. 1982). The language of Section 732.506 does not **prevent** a revocation of a Codicil by means of physical destruction of a copy bearing photo images of the original signatures. Other jurisdictions have held the destruction of a copy is sufficient if coupled with competent evidence of the necessary intent.

The Supreme Court of Illinois in IN RE: Holmberg's Estate,

81 NE.2d 188 (Ill. 1948) held that the writing of the word "void" and her name by the decedent across each page of a carbon copy[5] of the Will constituted an effective revocation of the original. At the time this case was decided, the Illinois Statute, Ill. Rev. Stat. 1947 Chap. 3, Par. 197, read almost identical to the existing Section 732.506, Florida Statutes. The Illinois statute read:

> A Will may be revoked only (a) by burning, cancelling, tearing, or obliterating it by the Testator himself or by some other person in his presence and by his direction and consent...(emphasis supplied).

The proponents of the Will in Holmberg's Estate contended the writing of the revocatory words on the carbon copy was not the same as writing those same words on the original. They argued that the word "void" referred to the carbon copy alone. In rejecting this argument the Illinois Supreme Court referred to the general principle of giving effect to the Testator's intent. The decedent's actions clearly evidenced her intent to cancel the Will in its entirety.

It is well established in Florida that the principle objective in a will construction case is to ascertain or determine, and give effect to, the intention of the Testator. Mosgrove v. Mach, 133 Fla. 459 (1938). Redfern, Wills and Adm. in Fla. Section 8-6 (6th Ed.) which relates to revocation by destruction, explains:

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[5] The Florida Probate Code does not distinguish between a carbon copy and a photocopy. Both are defined as a "correct copy". IN RE: Estate of Ruth W. Parker, 360 So.2d 1034 (4 DCA Fla.), rev. 382 So.2d 652 (Fla 1980).

> Whenever the question is raised as to whether or not there has been a revocation by any destruction or obliteration, parol and other extrinsic evidence is necessarily admissible to show what acts were done by the Testator and what his intentions were.

As has been said, there are no Florida decisions directly on point. However, in IN RE: Estate of Griffis, 330 So.2d 797 (4 DCA Fla. 1976), the District Court was confronted with an analogous problem. In that case, the Testator physically destroyed two Codicils to his Will. However, the case was governed by the 1974 version of Section 732.506 which permitted the revocation of Wills by destruction, but did not include Codicils. After finding no assistance in the Statute, the Court considered the undisputed fact that the Testator intended to revoke the Codicil and concluded as follows:

> If the law is such as to permit an interpretation and application resulting in accomplishing the intent of the Testator, surely it is the duty of the Courts to so hold. Rhetorically, is not justice thereby done both to the spirit and letter of the law and to the parties in the cause?

The Broward Art Guild is left with the following argument: It does not matter what Alexander Tolin intended - it does not matter that he did not intend the Broward Art Guild to become the residuary beneficiary of his estate - what does matter is that he made a mistake and they can benefit by that mistake. But can they? Assuming for purposes of argument Section 732.506 **implicity** requires destruction of the original. Is there some other remedy

available to Adair Creaig which would carry out the Testator's intent while, at the same time, giving deference to the Legislative intent? The answer to this question is, yes.

Those authorities which have criticized the proposition that a Will or Codicil can be revoked by the destruction of an instrument other than the original have also recognized the principal that a trust should be impressed in equity on the estate in favor of those persons who the Testator intended to benefit by his attempted, albeit, ineffective revocation. Redfern Wills and Adm. in Fla., Section 8-5 (6th Ed.) explains:

> Whether the Will should be declared valid and trust be impressed in equity in favor of the heirs or whether the Will should be considered as revoked are questions over which there has been a difference of opinion among the Courts of various states of the Union. The better rule seems to be that, where the Testator attempts to revoke his Will but is prevented from doing so by the fraud of some other person, or by undue influence, duress, **mistake**, or force, the Will is not revoked, but a trust should be impressed in equity on the legacies and devises in favor of the heirs of the Testator. (emphasis supplied)

The foregoing rule has been recognized by this Court. In Moneyham v. Hamilton, 168 So. 522 (Fla. 1936), this Court held a trust may be impressed and enforced in lieu of the provisions of the Will, if "something more than the frustration of a mere intent to revoke the Will" is demonstrated. In that case, it was alleged that the Testator (during his last illness and when he was unable to leave his bed) told his daughter to bring the Will to him so that he might destroy it. However, the daughter, who stood to gain

if the Will was not destroyed, pretended she could not find the Will, while in truth, and in fact, she found it and kept it in her possession until the Testator died, and then filed it for probate. The power of a court of equity to impress a trust in favor of the beneficiary of a revoked Will has been recognized in other decisions. Cf. Todd v. Fuller, 78 So.2d 713 (Fla. 1955); IN RE: Shepherd's Estate, 130 So. 2d 888 (2 DCA Fla. 1961); IN RE: Estate of Algar, 383 So.2d 676 (5 DCA Fla. 1980).

The facts of this case are unique and compelling. The fact that all of the requirements of Section 732.506 but (arguably) one, including intent, have been met, makes the case all the more compelling. Without question, a showing of "something more than mere intent" which this Court required in Moneyham v. Hamilton, has been made in this case.

ARGUMENT

ISSUE TWO

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 THAT PROVISIONS OF BOTH ARE CLEAR AND UNAMBIGUOUS.

The District Court of Appeal in its decision did not reach this issue, and this issue was not preserved for appellate review. There is no transcript of the hearing at which the Broward Art Guild claims that it made such an objection. There is no reference in the Agreed Statement of the Facts to such an objection. The rule in Florida is that a party, by failing to object, waives the right to exclude evidence offered in violation of the Parol Evidence Rule. The objection may not be raised first on appeal. Ross v. Florida Sun Life Insurance Co., 124 So.2d 892 (2 DCA Fla. 1960). It is of course incumbent upon the Broward Art Guild to show in the record that an objection was made. In the absence of such a showing a judgment on appeal must be sustained as it is clothed with the presumption of correctness.

Even assuming that such an objection had been made, it would still be unavailing. It is well established under Florida law that whenever the question is raised as to whether or not there has been a revocation by any destruction or obliteration, parol and other extrinsic evidence is necessarily admissible to show what acts were done by the Testator and what his intentions were. See, Redfern, Wills and Adm. in Fla., Section 8-6 (6th Ed.).

CONCLUSION

The certified question should be answered in the affirmative. In the alternative, if the certified question is not answered in the affirmative, then the lower Court should be directed to impress a trust upon the residue of the Estate in favor of Adair Creaig.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by the U. S. Mail this 6th day of MAY, 1992, to Charles P. Johnson, Jr., Esquire, Attorney for Broward Art Guild, 2170 Southeast 17th Street, Suite 204, Fort Lauderdale, FL, 33316-1787, and to Stephen F. Goldenberg, Esquire, 1 Financial Plaza, Suite 1300, Fort Lauderdale, FL, 33394.

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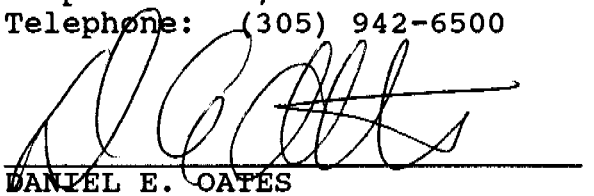

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