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 REPLY BRIEF

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ARGUMENT

POINT ONE

The Respondent's first argument that the Petitioner has "unilaterally changed the Agreed Statement of this case" has been disposed of by this Court in its June 23, 1992 Order denying the Respondent's Motion to Strike the Petitioner's Brief.

The next argument made by the Respondent on Page 3 of its Brief, deals with the issue of intent. The Respondent is suggesting to this Court that the Testator, Alexander Tolin, might have had other motives for destruction of the photocopy of his Codicil. This argument is not supported by the record on appeal. The parties have stipulated that the photocopy of the Codicil was "torn up and destroyed with the intent, and for the purpose of revocation." (A 2) In their Statement of the Issues on Appeal before the District Court, the parties stipulated what was destroyed was an "exact electronic photocopy of a properly executed Codicil and it was destroyed with the intent and for the purpose of revocation **while under the mistaken belief that it was the original Codicil.**" (A 3-4) In his dissenting opinion, Justice Anstead of the Fourth District Court of Appeal noted that the "parties have stipulated that the Testator believed he was destroying the original of the Codicil." IN RE: Estate of Alexander Tolin, 17 FLWD 160 (4 DCA Fla. Jan. 3. 1992).

As pointed out in the Appellant's Brief on the Merits, the District Court's majority opinion is in error on this issue. The majority of the District Court of Appeal, stated that "the

Appellant raises questions, **in argument**, of other possible motives." (A 17) The majority opinion is extremely brief. Considering that their opinion is only two paragraphs, it is reasonable to assume that the existence of other "possible motives" played a significant part in the majority's decision. The fact this is mere argument, unsupported by the record, was pointed out to the District Court of Appeal by the Petitioner in her Motion for Rehearing. However, the Motion for Rehearing was denied.

Argument not supported by the record is, of course, improper. There is now pending before this Court a Motion to Strike portions of the Respondent's Answer Brief.[1] Petitioner has been informed by the Clerk that her Motion to Strike will be considered at the time this Court determines oral argument and does not toll time to file her Reply Brief. If the Motion to Strike is granted, then significant portions of the Answer Brief may become irrelevant.

In any event, the Respondent does concede "intent" is central to this case. As this Court has held on numerous occasions, the primary consideration in construing a Will is ascertaining and giving effect to the intent of the Testator. See e.g. Elliott v. Krause, 531 So.2d 74 (Fla. 1987). This Court need not ascertain the intent of the Testator, Alexander Tolin. The parties have stipulated that his intent was to revoke the original Codicil. However, at Page 7 of its Brief, the Respondent argues that "not

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[1] The Respondent has served a Response to Petitioner's Motion to Strike Petitioner's Brief which counters: "Any point made allegedly outside the record in this cause is argument and proper because in essence this whole cause is nothing but argument of counsel. Afterall, the Testator is dead and buried."

one of the statutory requirements were complied with because any act of revocation must be carried out on the original of the Codicil and not a photocopy."

This is a misleading and inaccurate claim. The fact is that all of the Statutory requirements are met except (arguably) one: destruction of the original. The Statutory requirements are that the Will or Codicil be revoked (1) by the Testator, (2) by tearing or destroying **it**, (3) with the intent, and for the purpose of revocation. Sec. 732.506, Fla. Stats (1975) The original Codicil was not destroyed because it was in the possession of Alexander Tolin's attorney. It is important to remember that the Testator did not intend to destroy a copy. Both Alexander Tolin **and** the retired attorney who assisted him (Ed Weinstein) **thought** they were destroying the original. The formal blue-backed copy which the drafting attorney had given to Alexander Tolin was of such high quality, that neither Alexander Tolin, nor Ed Weinstein, could distinguish it from the original.[2]

The practice of providing photocopies of Wills in lieu of multiple or duplicate originals is widespread among Florida attorneys. This was the practice of the Testator's attorney, Steven Fine, in this case. Redford, "Wills and Admin. in Florida", Section 6.10 (6th Add.) recommends against the execution of Wills in duplicate because of the numerous problems involved. In this case, the Trial Judge believed the use of "xerox" copies in lieu

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[2] This was a copy of the signed original so the signatures of the Testator and the witnesses did appear on it.

of duplicate originals is the current practice as evidenced by his comments at trial. (Broward Art Guild, Inc.'s Appendix, Pages 13-15) Incredibly, the most current Continuing Legal Education Manual, "Florida Will and Trust Drafting" (1982) still refers to carbon paper and manual typewriters in its "Mechanics of Drafting" section. As this Court is aware, word processors and laser printers have replaced typewriters and carbon paper. This Court probably prohibits the use of onion skin or similar quality copies in briefs. How does an attorney drafting a Will produce duplicate originals without the use of carbon paper and onion skin? What is done, is exactly what was done in this case: the attorney produces a photostatic copy of the original signed document.[3] The more advanced "xerox" machines become, the more likely it is that the unusual fact pattern in this case may be repeated. Consider the problems the new **color** photocopies and laser printers will create. The blue-ink signature on the original will become a blue signature on the copy! Alexander Tolin may have been the first, but he will not be the last victim of modern law office technology.

There is nothing magic about an original Will, or Codicil. A photostatic copy of a Will is a "correct copy" within the meaning of Section 733.207, and may be admitted to probate upon the testimony of one witness. IN RE: Estate of Ruth W. Parker, 382 So.2d 652 (Fla. 1980). Section 732.506 does not specify that the original must be destroyed. It provides that the Testator must

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[3] Often the drafting attorney stamps the copy with the word "copy", but there is no evidence that was done in this case.

destroy **"it"**, with the intent and for the purpose of revocation. Obviously, the purpose in requiring destruction of the original is to prevent fraud and abuse. But what about this case where there is no evidence of fraud or abuse and where the Testator thought he was destroying the original. The only abuse here is if the Broward Art Guild becomes the residuary beneficiary. Clearly, that is not what the Testator intended.

The Respondent argues that the case of Moneyham v Hamilton, 168 So. 522 (Fla. 1936) holds against Petitioner. Respondent is correct. In Moneyham nothing more than mere intent was shown. There was no act of the Testator to carry-out the intent. None of the requirements of revocation by destruction were shown. To hold that a Will or Codicil make be revoked by merely showing the Testator intended to revoke it would unquestionably lead to fraud and abuse. However, to hold that the destruction of a photocopy of a Will or Codicil by the Testator with the intent and for the purpose of revocation while under the mistaken belief that it is the original Codicil, constitutes an effective revocation, would not encourage fraud or abuse. In fact, such a holding would be in the public interest if the prevailing practice among attorneys is to retain the original in their possession while giving the client a high-quality "formal" blue-backed photocopy of the **signed** original.

Lastly, at Page 7 of its Answer Brief, the Respondent states that the case of Lowy v. Roberts, 453 So.2d 886 (Fla. 3 DCA 1984) "holds that simply destroying an unsigned copy, even when

containing a photo image of the original signature, is insufficient to accomplish that end, that is, the revocation of the original Codicil." This was not the holding of that case.[4] That case dealt with the substitution of the first four pages of the Will with pages that did not appear to be part of the original. In Lowry, the Court was dealing with a question involving the facial sufficiency of a Petition to Revoke Probate. Lowry may be cited for the general proposition that an alteration by an unauthorized third person (which is referred to as "spoliation") has no legal effect whatever upon the Will itself, but the case adds nothing to the Respondent's argument. It certainly does not contain the holding that Respondent attributes to it.

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[4] As the District Court correctly pointed out there are no Florida decisions directly on point and the law in other jurisdictions is conflicting.

ARGUMENT

POINT TWO

The law on this issue as cited in the Petitioner's Brief on the Merits is so well settled that no reply to the Respondent's argument is necessary. Parol and other extrinsic evidence has always been admissible to show what acts were done by the Testator and what his intentions were when ever a question is raised as to whether or not there has been a revocation by any destruction or obliteration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by the U. S. Mail this 29 day of July, 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 2626, Fort Lauderdale, FL, 33394.

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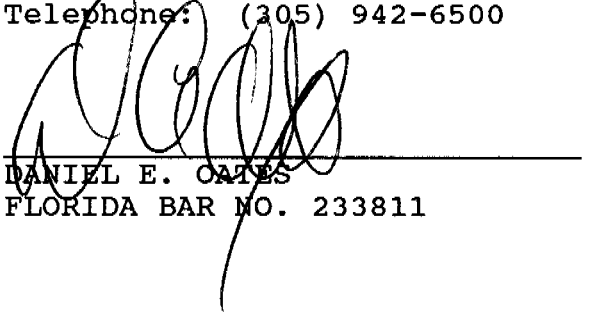

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