IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BOBBY DEAN CARPENTER — APPELLANT

VS — NO. 2009-CA-00114

AUTUMN COSBY — APPELLEE

APPEAL FROM THE CHANCERY COURT OF GRENADA COUNTY, MISSISSIPPI
CAUSE NO. 07-06-159VC

BRIEF OF THE APPELLEE

CLIFF R. EASLEY, JR., (MSB#[redacted]
EASLEY & COOPER, PLLC
119 S. Newberger St.
P.O. Box 607
Bruce, MS 38915
(662) 983-4331
Fax: (662) 983-4354
ATTORNEY FOR APPELLEE

ORAL ARGUMENT NOT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order for the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Bobby Dean Carpenter, Appellant
2. Autumn Cosby, Appellee
3. William L. Maxey, Counsel for Appellant;
4. Cliff R. Easley, Jr., Counsel for Appellee;
5. Hon. Vicki B. Cobb, Chancery Judge

RESPECTFULLY SUBMITTED, this the 6th day of August, 2009.

AUTUMN COSBY, Appellee

By: _____
CLIFF R. EASLEY, JR.,
MSB#5285
Attorney for Appellee

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REFERENCES IN BRIEF TO PARTIES AND DECEDENT

The Appellant, Bobby Dean Carpenter, may be hereinafter referred to as "Bobby". The Appellee, Autumn Cosby, may be hereinafter referred to as "Autumn"; and the decedent, Lura Foster Carpenter, may be hereinafter referred to as "Decedent".

REFERENCES IN BRIEF TO TRIAL TRANSCRIPT, CLERK'S PAPERS AND RECORD EXCERPTS

References herein to Trial Transcript as prepared by the Court Reporter, shall be designated by pages as "(T: ___-___)"; References herein to the Clerk's Papers, pleadings, orders, etc., shall be designated by pages as "(R:__-__)"; and references herein to Appellant's Record Excerpts shall be designated by pages as "(RE: __-__)".

I. STATEMENT OF ISSUES

Pursuant to the Rules of Appellant Procedure, Rule 28(b), the Appellee is not filing a "Statement of Issues".

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE:

The decedent, Lura Carpenter, departed this life on May 27, 2007, with a fixed place of residence in Grenada County, MS, and she left an instrument of writing dated February 26, 1999, which was probated in the Chancery Court of Grenada County, MS, as her Last Will and Testament. The decedent's husband predeceased her, and one daughter, Sandra Carpenter Cosby, (Autumn's mother) predeceased the decedent. The decedent left three living children namely Bobby Dean Carpenter, Jerry Wayne Carpenter and Nancy Lynn Dempsey.

It is agreed and undenied by the parties that after the decedent executed her Will on February 26, 1999, and prior to her death on May 27, 2007, she made numerous interlineations and markings on her Will that totally obliterated some paragraphs of said Will, and made writings on her Will to the effect and with the intent that Autumn Cosby, her granddaughter, would receive a child's part of the decedent's real and personal property. The parties do not question her competency or that she made the markings or obliterations and interlineations to her Will. Since these facts were agreed to by the parties, the same were submitted to the Court by each of the parties on Motion for Judgment on the Pleadings, as it relates to Autumn's Petition to Construe Decedent's Will.

B. COURSE OF PROCEEDINGS IN THE TRIAL COURT:

Bobby Dean Carpenter filed a Petition to Probate the Last Will and Testament of Lura Foster Carpenter on June 20, 2007, and alleged that the decedent's entire estate was devised unto her three living children, Jerry Wayne Carpenter, Bobby Dean Carpenter and Nancy Lynn Carpenter Dempsey, the same day a Decree was entered admitting said Will to probate, and the Will contained numerous interlineations, deletions and writings.

On October 23, 2007, Autumn Cosby, the only child and next of kin of her mother, Sandra Carpenter Cosby, (a predeceased child of the decedent) requested that the decedent's Last Will and Testament as probated be construed to have been either partially or totally revoked. The Petition made Defendants thereto: Bobby Dean Carpenter, individually and as Executor, and the other two beneficiaries, Jerry Wayne Carpenter and Nancy Lynn Carpenter Dempsey.

Defendants filed an Answer to the Petition to Construe Will on November 16, 2007. Discovery was conducted, and all the parties agreed to sell the decedent's real property consisting of her home and approximately 9.3 acres of land, and the parties obtained a Court Order authorizing the sell of said property. The proceeds from said sale totaling approximately $150,000.00, less expenses of sale, were paid to the registry of the Chancery Clerk of Grenada County, MS, until further Orders of the Court. A deed to the property was executed by the three children and Autumn Cosby (the parties in this matter).

Motion for Judgment on the Pleadings, pursuant to Rule 12(c) of the Miss. Rules of Civil Procedure was filed by Bobby Dean Carpenter, Jerry Wayne Carpenter and Nancy Lynn Carpenter Dempsey on August 5, 2008, and an Answer and Cross-Motion for Judgment on the Pleadings was filed by Autumn Cosby on August 20, 2008. Defendants did

not file an Answer to Autumn's Motion for Judgment on the Pleadings. Shortly thereafter, Jerry Wayne Carpenter and Nancy Lynn Carpenter Dempsey agreed to settle Autumn Cosby's claim, under the Will or as an heir, and by agreed Order of the Lower Court entered on September 25, 2008, for partial disbursement and other relief, Jerry Wayne Carpenter and Nancy Lynn Carpenter Dempsey, settled Autumn's claim as it relates to their share of the estate, by Jerry and Nancy each reducing their potential one-third share to a one-fourth share, and paying the difference thereof to Autumn. Therefore, Jerry Wayne Carpenter and Nancy Lynn Dempsey, are no longer parties in interest in this matter. (R: 46)

By Agreed Order of Setting, the parties' Motion and Cross-Motion for Judgment on the Pleadings was heard by the Chancellor, Hon. Vicky B. Cobb, and a Judgment was entered on December 22, 2008, in favor of Autumn and denying Bobby's Motion. Bobby timely filed his Notice of Appeal on January 16, 2009.

STATEMENT OF FACTS

Bobby Dean Carpenter filed his Petition to Probate Will, requesting Letters Testamentary and Other Relief of the decedent, Lura Foster Carpenter, on June 20, 2007, therein alleging that her entire estate was devised unto her three living children, Jerry Wayne Carpenter, Bobby Dean Carpenter and Nancy Lynn Carpenter Dempsey. (R: 5-6)

The Last Will and Testament of the decedent, as admitted to probate, contained numerous deletions, interlineations, and added language written by the decedent. (R: 10-12) (R: 31-35) These changes to the decedent's Will were made by decedent with the intent to change her Will so as to allow Autumn to inherit a child's part. (R: 28-29) (T: 3-4)

A Decree admitting said Will to probate and granting other relief was entered on June 20, 2007, by the Clerk of the Court. (R:15-18)

Autumn Cosby, being the only child of Sandra Carpenter Cosby, a deceased daughter of Lura Foster Carpenter, decedent, filed a Petition to Construe the probated Will of the decedent on which decedent had made numerous deletions, interlineations and obliterations, as well as writings on said Will with the stated and clear intent that Autumn would inherit a child's part of the decedent's estate. (R:19-23)

Bobby Carpenter, individually and as Executor, Jerry Wayne Carpenter and Nancy Lynn Carpenter Dempsey filed an Answer to the Petition to Construe Will and admitted the decedent either partially or totally obliterated the request or devises made in several paragraphs of decedent's Will, and that the Court should interpret and construe said Will. (R:24-26)

The Defendants, Bobby Dean Carpenter, individually and as Executor, Jerry Wayne Carpenter, and Nancy Lynn Carpenter Dempsey, filed their Motion for Judgment on the Pleadings, pursuant to Rule 12(c) of M.R.C.P. on August 5, 2008. (R:27-35) (RE: 3-5)

Autumn filed her Answer to Defendants' Motion, and a Cross-Motion for Judgment on the Pleadings on August 20, 2008. The Defendants did not file an Answer to her Cross-Motion, and the facts are agreed that the decedent made the markings, obliterations, interlineations and writings on her Will with the intent that Autumn Cosby inherit her mother, Sandra Carpenter Cosby's share. (R: 36-40) (RE: 6-10) (T:3-4)

By agreement of the parties and Order of the Court entered on September 25, 2008, Autumn settled her claim with the Defendants, Jerry Wayne Carpenter and Nancy Lynn Carpenter Dempsey, as shown and reflected by said Court Order. (R:46-50)

By an agreed Order of the parties, the Chancellor set a hearing in the Chancery Court of Grenada County on December 11, 2008, on the Motion and Cross-Motion for Judgment on

the Pleadings filed by each of the parties herein, and after fully hearing and considering the pleadings on file in this matter, and arguments and stipulation of counsel, the Chancellor issued her bench opinion relating to her Findings of Fact and Conclusions of Law. (T:2-29) (RE: 14-22)

The Chancellor entered a Judgment in favor of Autumn on December 22, 2008, finding that the decedent's obliterations and interlineations resulted in the revocation of the decedent's Will, enabling Autumn to inherit a child's share of the decedent's estate. (R:41-43) (RE: 11-13)

The Chancellor found and determined as a factual matter that the decedent did intend to revoke her Will by making the interlineations, obliterations and marking out of words and paragraphs in her Will, as is authorized and permitted by the statute. The writings on the decedent's Will were invalid to amend same, under the statute, but did clearly reflect the intent to revoke her Will, and that she would rather have the said Will totally revoked and permit Autumn to take a child's part under descent and distribution, the same as if the decedent had died intestate than to have died testate. (T:21-26) (RE:14-19)

The Defendants, Bobby Dean Carpenter, et al, admitted in their Answer to Autumn's Petition to Construe the Will, that the decedent either partially or totally obliterated the bequests made in paragraphs VII, VIII, IX, X, and XI of decedent's Last Will and agreed the Court should interpret and construe said Last Will and Testament, and determine the validity of same. (R: 25)

The Defendants also alleged that for the purposes of the Rule 12(c) Motion, assuming the following allegations of Autumn are true: :

(a) The document of writing probated in this cause clearly shows a total or partial revocation of said Last Will and Testament was made, by the cancellation or liberation, by decedent in her handwriting, and certain interlineations to said Last Will and Testament were made by decedent, changing the effect of said Will, to her intent of how she desired to leave her property; and she had advised members of her family the way she desired her property be left.

(b) Sandra Carpenter Cosby was a daughter of Lura Foster Carpenter,

(c) Autumn Cosby is the only child of Sandra Carpenter Cosby;

(d) It was the intent of the decedent, as indicated by the markings and writings on the Will, that Autumn Cosby inherited the sole share of Sandra in equal shares with the other children. (R: 28-29) (RE: 4-5)

That the handwritten notations of decedent (writing in the word "will" and the name "Autumn Cosby") would have no testamentary effect on her Will, unless the same is properly witnessed. Autumn agrees that the said writings are invalid under the statute for decedent to amend her Will, and this issue was not disputed.

Autumn's Answer and Cross-Motion for Judgment on the Pleadings, agreed that paragraphs a, b, c and d of Defendants' Motions, as stated above, were true and asked the Court to assume same as being true and correct. (R: 37) (RE: 7)

Autumn's Motion alleged it was the intent of decedent, in making the markings, mutilations, obliterations and cancellations in the paragraphs of her Will, that Autumn Cosby inherit her mother, Sandra Carpenter Cosby's share, in equal shares with the other children. (R:38-39) (RE: 8-9)

The Defendants did not file an Answer or deny the allegations of Autumn's Cross-Motion. The admitted and agreed facts were presented to the Chancellor by the parties on their motions for judgment on the pleadings in relation to the Chancellor's construction of Decedent's Will, pursuant to Autumn's Petition.

SUMMARY OF ARGUMENTS

Standards of Review:

Appellant acknowledged on the Motions for Judgment on the Pleadings, that this case is somewhat unusual, in that the parties basically concede, for purposes of this Motion that it was the decedent's intent to change her Will, and conceded that the facts alleged in Autumn's motion are controlling, and the issues presented is whether a partial revocation of a Will is allowed, and whether the Will of decedent was partially or totally revoked; and whether a partial revocation can give rise to a beneficiary not in the original Will; and whether the writings on the Will have any legal significance. In other words, the parties agreed on the facts, as alleged. (T: 3)

The standard of review is the same for a Judgment on the pleadings, as it is on Summary Judgment, in that the non-moving party is favored in the review of facts. It is reviewed by the Appellant Court de novo. Huff-Cook, Inc. v. Dale, 913 So 2d 988, 990 (¶10)(Miss. 2005)

Also, this Court must review the decision of the Chancellor to determine if effect was given to the testator's intent. Mississippi Baptist Foundation, Inc. v. Estate of Matthews, 791 So 2d 213, 219 (¶25) (Miss. 2001)

Under a well established rule, the standard of review, Appellant Courts of this State employ the limited standard of review on appeals from Chancery Courts. The Court will

accept the Chancellor's Findings of Fact, as long as the evidence in the record reasonably supports those findings. That means the Court will not disturb the findings of a Chancellor, unless those findings are clearly erroneous or an erroneous legal standard was applied. However, when presented with a question of law, the Court will conduct a de nova review. (Citation omitted) Lenoir v. Anderson, 2008-CA-00148-COA (Miss. 2009)(¶6)

I. WHETHER THE LOWER COURT WAS CORRECT IN FINDING THAT THE LAST WILL AND TESTAMENT OF LURA FOSTER CARPENTER WAS TOTALLY REVOKED BY HER.

The Mississippi Supreme Court in Matter of Will of Palmer, 359 So 2d 752, 753 (Miss. 1978), held that Section 91-5-3 of the Miss. Code of 1972, clearly authorizes a total or partial revocation by either cancellation or obliteration by a testator of her Will; and stated that the general law relative to cancellation or obliteration, as found in 95 C.J.S. Wills, Section 280 is as follows:

> "Usually in legal, as well as, in common acceptance cancellation is accomplished by a drawing of lines over or across words with the intent to nullify them, and the form and extent of the lines are totally unimportant, as long as they are a physical token of the intent to revoke. Revocation by obliteration may be affected by erasing, drawing lines across signatures of the testator and the witnesses, or blotting out the words of the Will. Obliteration does not require the effacing of the letters of the Will so completely that they can not be read."

As the court can clearly see from review of the decedent's Last Will and Testament, probated in this cause, in paragraph III she struck out the words "will not" and wrote in the word "will" inherit. The writing in the word "will" certainly may be considered, along with the stipulation that the decedent intended to change her will so Autumn would inherit a child's part. In review of all of the other paragraphs that were totally or partially marked out

or deleted, and by adding Autumn Cosby's name in paragraph XIII, after the other children named, clearly goes to show her intent; but it is recognized these writing to the Will would not be legally sufficient to amend same, under the statute. (R: 31-33) (RE: 23-25)

The statement in Appellant's Brief, at page 11, next to the last sentence under the Summary of Argument on this Issue, alleges there was no allegation in the pleadings that the decedent revoked her entire will by destroying, canceling or obliterating same is misplaced. Appellant acknowledges in the last paragraph of his Statement of Facts, (page 10), that Autumn's Petition to Construe the Will alleged that the decedent partially or totally obliterated the bequest or devises made in these paragraphs, and that it was the intention of the decedent that Autumn be declared a beneficiary under the decedent's Last Will and Testament, and she inherit and take as the other children of the decedent.

Autumn's Petition clearly alleges that said document of writing probated in this cause clearly shows a total or partial revocation of said Last Will and Testament was made by the cancellation and/or obliteration of same by decedent, in her handwriting, and certain interlineations to said Last Will and Testament were made by the decedent, changing the effect of said Will, and shows decedent's intent of how she desired to leave her property, and had so advised members of her family of same. (R-20)

Also, Autumn's Cross-Motion for Judgment on the Pleadings stated the testator's Last Will and Testament was, in fact, revoked by decedent, under the statute, and it was her intention to so revoke same, resulting in Autumn being entitled to inherit, under the Laws of Descent and Distribution of the State of Mississippi, a child's part of the real and personal property of the testator . . . (R:38-39) (RE: 8-9)

The Chancellor in the Lower Court was correct in finding and determining that the decedent intended to revoke her entire Will. The Chancellor relied on the case of The Estate of Lyles , 615 So 2d 1186, 1188, 1189 (Miss. 1993), which held that when a will is found in testator's effects, after her death, in such a mutilation, obliteration, or cancellation, as represents a sufficient act of revocation of the meaning of the applicable statute, it will be **presumed** in the absence of evidence to the contrary that such act was performed by the testator with the intention of revoking the instrument. In this case it is also admitted that decedent intended to change her Will so that Autumn would inherit a child's part. The decedent's intent was shown by clear and convincing evidence.

This Court has commonly recognized, the fundamental rule governing the construction of a will is to ascertain the intent of the testator. It has been said that in construing a Will, the most solemn obligation that any Court can have is to see that the true intent of the testator is carried out. *The Mississippi Practice Series Vol. 9, Section 75:60,* Matter of the Estate of Vic, 557 So 2d 760 (Miss. 1989) Intent was a question of fact and the fact in this case was agreed to. Estate of Lyles, supra @ pg.1191

II. WHETHER THE LOWER COURT WAS CORRECT IN APPLYING THE DOCTRINE OF IMPLIED REVOCATION.

The basic facts of this case, as presented to the Lower Court and this Court, are undisputed, in that the decedent marked out several paragraphs in her Will, and marked out portions of other paragraphs, and made writings on her Will, with the intent to provide that Autumn Cosby would inherit a child's part of her estate, as her other children. As the Lower Court found, the issue was whether Mrs. Carpenter intended to revoke her entire Will, or

whether she intended to just revoke portions of the Will, and if she was given a choice, would she have chosen revocation of the entire will, or just a portion of the Will.

The Court found that it would have been the decedent's intent to revoke her entire Will, and let the estate descend by intestate succession. (R: 21-28) (RE: 14-22)

The Chancellor in the Lower Court did state that she thought, based upon and relying upon the Lyles case (615 So 2d 1186) that she could apply the doctrine of implied revocation to the case. The Supreme Court recognized in the case of Crawford's Estate v. Crawford, 225 Miss. 208, 82 So 2d 823, 825 (1955), that:

> "From the time of earliest reported cases down to the present, the Courts, English and American, have held that execution of a Will disposing of the entire estate of a testator in a manner absolutely inconsistent with the provisions of an earlier Will revokes by implication, the earlier Will, though the Will latter in time contains no words of revocation, and no mention of this earlier Will." (Citations omitted)
>
> In other words, a Will may be just as effectively revoked by a subsequent Will making an inconsistent disposition of the property, providing it is of the entire estate, as the revocation in express terms."

It is respectively submitted that the testator expressly revoked certain paragraphs of her Will, and the writings and the facts agreed to clearly show that it was the intent of the testator to revoke her Will, both expressly by the acts she performed, pursuant to the statute for revoking Wills, as well as, by implication from the writings she made on said Will, which were legally ineffective for decedent to amend same. Although said writings would support the Chancellor's finding of testator's intent.

The case of Trotter v. Trotter, 490 So 2d 827, 832 (Miss. 1986), provides that the only means that a Will may be expressly revoked is pursuant to Section 91-5-3 of the Miss. Code of 1972. (¶10). However, Trotter recognizes that a Will may also be impliedly

revoked, but that statements of the testator alone, that she intends to revoke the Will are not enough. (¶11-13)

Even if the Chancellor erred by considering the Doctrine of Implied Revocation, under the facts of this case, it would be harmless error. Stovall's Will, 211 Miss. 15, 50 So 2d 635, 638 (1951)

III. WHETHER A PARTIAL REVOCATION OF A LAST WILL AND TESTAMENT CAN GIVE RISE TO A BENEFICIARY NOT NAMED AS A BENEFICIARY IN THE ORIGINAL LAST WILL AND TESTAMENT.

Autumn contends that the Appellant, Bobby Carpenter, is misplaced in his argument on this issue for several reasons. First, the lower Court did not find a partial revocation. There are no pleadings or argument to the Lower Court of either party, that dependent relevant revocation was applicable in this case, nor did the Court find that it was relevant, nor did Autumn argue that the decedent's writing of her name on the Will was valid. As the Court found, the decedent made the markings and interlineations and obliterations of her Will with the intent to revoke same, and in finding if the decedent had been given a choice of whether to partially revoke said Will, or to revoke said Will in its entirety, and allow her property to be taken under the Laws of Intestate, she would have chosen the revocation of her Will. (RE: 14-21) (R:21-28)

The Estate of Lyles, case supra, @ pg. 1190, holds that dependent relative revocation doctrine is a not a substantive rule of law, but is rather a rule of presumed intention. Autumn does not contend she rebutted the presumption that testator intended the revocation to be effective only if the substituted disposition was valid. Neither The Estate of Lyles case or the

case of Crosby v. Alton Ochsner Medical Foundation, 276 So 2d 661, 666 (Miss. 1973) provides any support to Bobby in his argument on this issue.

Bobby's argument that Autumn was not a named beneficiary in the original Will has no relevance on this issue, because Autumn was not found to be a beneficiary of the Will, even though Bobby's argument is without merit, it does appear Autumn was named in one of the paragraphs that were completely obliterated by the decedent, specifically paragraph VIII, of said Will, that left her granddaughter a sum of money. Bobby's argument is totally inapplicable to the facts of this case, as Autumn is an heir of the decedent under the Laws of Dissent and Distribution, because decedent was found to have totally revoked her Will, under the statute allowing same. She was not a beneficiary of decedent's Will.

IV. WHETHER THE WRITINGS ON THE LAST WILL AND TESTAMENT NOT WITNESSED PURSUANT TO SECTION 91-5-1 OF THE MISS. CODE OF 1972, ANNOTATED, AS AMENDED, HAVE ANY LEGAL RELEVANCE.

Autumn contends this argument, on behalf of Bobby, is misplaced, as the Chancellor in this case correctly found and determined that the handwriting of the decedent in paragraph III of her Will, wherein she added the word, after Autumn Cosby's name, of "Will" inherit (R: 10)(RE: 23); and in paragraph VIII of the decedent's Will, wherein the decedent wrote in the name "Autumn Cosby" was invalid within the purview of Section 91-5-1 of the Miss. Code of 1972, and under the holdings of the case In the matter of Palmer's Will v. Harpole, 359 So 2d 752 (Miss. 1978). (R:12) (RE: 25) However, because of other interlineations, obliterations, and markings on said Will, the Chancellor found in construing the Will that it was the intent of the decedent to revoke her Will. As a result thereof, Autumn would inherit a child's part.

The Chancellor in the Lower Court found the writings on decedent's Will, that Bobby is arguing, were invalid. This issue was found in Appellant's favor.

ARGUMENT

I. WHETHER THE LOWER COURT WAS CORRECT IN FINDING THAT THE LAST WILL AND TESTAMENT OF LURA FOSTER CARPENTER WAS TOTALLY REVOKED INSTEAD OF PARTIALLY REVOKED.

Autumn agrees with Bobby's argument, that the statutory and case law of the State of Mississippi provides that a decedent/testator may totally or partially revoke a Will, pursuant to Section 91-5-3, supra, and pursuant to the holdings of The Estate of Luela A. Lyles, supra. Autumn also agrees the Last Will and Testament of decedent in this case, indicates clearly that certain deletions made by decedent evidenced an intent to revoke those portions of her Will, as provided for in Section 91-5-3, supra, and that decedent made an obliteration to part of paragraph III, by striking out "will not" and writing in the word "will" which shows the decedent's intent for Autumn to inherit as the only child of her mother, Sandra Gwen Carpenter McSheffrey, who was deceased. (R:10) (RE: 23)

Autumn also agrees with Bobby's arguments that the bequest or devises in paragraphs VII, VIII, IX, X and XI of the decedent's Last Will and Testament, were either partially or totally obliterated by decedent. Autumn also agrees with Bobby's argument that it is clear that the obliteration made by the decedent in her Last Will and Testament constituted a partial revocation of "any clause thereof" of her Last Will and Testament.

The case of Luela Lyles, supra at page 1188 holds:

> "Cancellation, as interpreted by this Court, is "accomplished by the drawing of lines over or across words with the **intent to nullify** them, and the form and extent of the lines are totally

> unimportant, as long as they are a physical token of the intent to revoke." In Re: Will of Palmer, 359 So 2d 752, 753 (Miss. 1978)
>
> "Furthermore, as stated in Palmer: it is generally agreed that if the Will produced for probate, which is shown to have been in the custody of testator, after its execution was found among the testator's effects, after his death, in such a state of mutilation, obliteration, or cancellation, as represents a sufficient act of revocation within the meaning of the applicable statute, it will be **presumed** in absence of evidence to the contrary, that such act was performed by the testator with the intention of revoking the instrument." (Pg. 1188-1189)

Estate of Lyles, supra, at page 1191, also stated:

> "The central, depositive issue is whether the Chancellor was manifestly wrong in his determination that the circumstances did not rebut the presumption that Mrs. Lyles' revocatory intent was conditional.
>
> As mentioned already, the heart of doctrine of dependent relative revocation is the idea that, given the option, the testator or testatrix would prefer the Will as executed over intestacy. The wisdom of this concept is undeniable. There can be no doubt that the vast majority of testators, if provided with the knowledge that their alterations could not be given effect, would opt for the original Will as the next best thing. However, under the peculiar facts of this case, Mrs. Lyles would unquestionably chosen intestacy because it produces the precise result she intended when she attempted the ill-fated changes to her Will."

The findings being very similar to this case.

Autumn admits there were no allegations that decedent destroyed her Will, but there are numerous allegations in her Petition to Construe the Will, as well as, her Answer and Cross-Motion for Judgment on the pleadings, that decedent's Will shows a total or partial revocation by decedent, because of the cancellation, obliteration or interlineations of said Last Will and Testament by the decedent, with the intent that Autumn would share as a child. (R:20-21, 38-39) (RE: 8-9)

The case of In the Matter of the Estate of Dowdy, 818 So 2d 1255, 1258 (Miss. Ct. App. 2002) citing The Matter of the Estate of Leggett, 584 So 2d 400, 402-403 (Miss. 1991) are both cases dealing with destroyed Wills, in which the original Will could not be found, and in both cases the Court found the evidence was sufficient to revoke the presumption that the decedent revoked his Will by destruction of same, prior to his death. Also, it was questionable whether either of said decedents were mentally competent to destroy their Will. It is respectfully submitted, that both of these cases are clearly distinguishable from the present case.

In fact, it is admitted by the parties in this case, the decedent made the interlineations, obliterations and markings on her Will with the intent to partially or totally revoke said Will so that Autumn could inherit a child's part. It is acknowledged that Bobby Carpenter believed that the Chancellor should only have found that the Will should have been partially revoked but not totally revoked. The Chancellor found, from the facts, it would have been the intent of the testator that her whole Will be revoked, if decedent's writings on said Will could not be given legal effect, because of the interlineations and obliterations of said Will.

Therefore, it is respectfully submitted that the Chancellor in the Lower Court was imminently correct in revoking the entire Will.

II. WHETHER THE LOWER COURT WAS CORRECT IN APPLYING THE DOCTRINE OF IMPLIED REVOCATION.

The Chancellor, in making construction of the decedent's Will, after hearing argument of counsel, and considering the undisputed facts that decedent, Lura Foster Carpenter, had made the interlineations, obliterations and cancellations of her Will, as

reflected by her original Will probated in this cause, found that it was her intent in doing so that Autumn would inherit a child's part, and that decedent would have intended her Will be revoked.. The Chancellor stated in her bench opinion that:

> "Relying on the Lyles case, and the interpretation that the Supreme Court there, I am going to find that applying the doctrine of implied revocation, and also applying the standard as set forth in the Lyles case, I am going to find that Mrs. Carpenter would have chosen basically to revoke her entire Will, and to have her property pass by intestate succession. So I am going to find that in effect, she revoked her Will and her estate will be handled as if there was no Will." (RE: 18-19)

The Judgment of the Chancellor reflects in paragraph 3 thereof:

> "The Court now finds and determines from the pleadings, stipulations and agreement of the parties, that the decedent, Lura Foster Carpenter, departed this life on May 27, 2007, and her Last Will and Testament was probated in this cause on June 20, 2007. That the decedent's Last Will and Testament contained several paragraphs in which the decedent made interlineations, deletions and obliterations and writings whereby the parties agree she intended to change and/or revoke partially or totally her Last Will and Testament." (RE: 12) (R: 42)

And in paragraph 4 thereof:

> "After reviewing the decedent's Last Will and Testament probated in this cause, and it being the duty of the Court in construing the Will to ascertain and give effect to the intention of the testator in construing the testator's entire Will, and considered a presumption required under the law, as it relates to the interlineations, obliterations and writings made by the testator on said Will. After considering the Will as a whole, the Court finds and determines that the decedent, Lura Foster Carpenter, did intend to totally revoke her Will so that the Petitioner, Autumn Cosby, would inherit her mother's share of her estate, as she would do under the Law of Descent and Distribution of the State of Mississippi, if said testator had died intestate." (R: 42-43) (RE: 12-13)

As the Court stated in the Lyles case, supra, at page 1191, ¶7:

> "The intent of the testatrix was a question of fact. . . The standard of review, therefore, is whether the Chancellor was clearly and manifestly wrong."

The Lyles case, supra, and the Palmer case, supra, are the two cases that were cited to the Chancellor by both the Petitioner and the Defendants in the Lower Court, and these are two cases she relied on in her Opinion, and in making her decision in this case.

If the Doctrine of Implied Revocation does apply to the writings that the testator made on her Will, although, agreed that decedent made said writings, error, if any, of the Chancellor relying on implied revocation, would be harmless error. Stovall's Will, supra @ pg. 638, it is respectfully submitted.

The case of Trotter v. Trotter, 490 So 2d 827 (Miss. 1986) Rasco v. Estate of Rasco, 501 So 2d 421, 423 (Miss. 1987), and Estate of Crawford v. Crawford, 225 Miss. 208, 82 So 2d 823, 831 (1955) recognizes that a Will may be impliedly revoked by conflicting deeds or other instruments, but that statements of the testator alone that she intends to revoke the Will are not enough, because generally the statements or inadmissible if offered to show an implied revocation. Trotter, supra, at 832.

However, in this case the facts, as agreed, reflect what decedent did, and what she intended. The Chancellor's decision was based on her personal review and inspection of the Will and the facts stipulated to her. It is respectfully submitted that the Chancellor's decision was correct, and error, if any, was harmless.

III. WHETHER A PARTIAL REVOCATION OF A LAST WILL AND TESTAMENT CAN GIVE RISE TO A BENEFICIARY NOT NAMED AS A BENEFICIARY IN THE ORIGINAL LAST WILL AND TESTAMENT.

Bobby states that Autumn was not named a beneficiary in the original Will. Autumn would dispute this, but, whether or not Autumn was a beneficiary of the original Will is not an issue in this case. Autumn admits she was not named a beneficiary to the home and real property in decedent's Will until after decedent made the invalid writings on said Will.

Autumn respectfully submits Appellant's argument on this issue is misplaced, as there was no finding by the Lower Court that Autumn was a beneficiary of the Will, or that because decedent wrote her name and made writings on the Will was of any lawful effect. It is respectfully submitted that Appellant's argument on the Doctrine of Dependent Relative Revocation is not an issue in this case.

Appellant appears to argue the Lower Court's ruling in The Estate of Luela A. Lyles, but in that case, the Chancellor of the Lower court was reversed. There was no argument made to the Lower court in this case, by either party, nor is there any in the Appellant's argument now that the Doctrine of Dependent Relative Revocation is applicable.

Appellant's argument that Autumn was somehow made a beneficiary under the decedent's Will by the Lower Court, because of the writings on her Will is totally misplaced, as the decedent's Will was declared revoked by the Chancellor, and the only way Autumn inherits is through descent and distribution, under the Laws of the State of Mississippi. The Chancellor in the Lower Court specifically found that the writings made by the decedent on her Will did not comply with Section 91-5-1 of the Miss. Code, to make Autumn a beneficiary under the Will. (T:17)

IV. WHETHER THE WRITINGS ON THE LAST WILL AND TESTAMENT NOT WITNESSED PURSUANT TO SECTION 91-5-1 OF THE MISS. CODE OF 1972, ANNOTATED, AS AMENDED, HAVE ANY LEGAL RELEVANCE.

Autumn would respectfully submit that the arguments of the Appellant on this issue is basically the same as issue III, and is misplaced. There is no contention and no findings in the Lower Court that the words written on the Will by the decedent, being the word "will" and "Autumn Cosby" was considered by the Chancellor to have been valid in any respect, and in fact, the Chancellor found that they were not valid to amend or change the Will, pursuant to Section 91-5-1 of the Miss. Code of 1972. (R: 10-12) (RE: 23-25)

In fact, it was agreed by Autumn that the writings made by the decedent in her Will, were not valid under the Statute for an amendment or codicil, as it did not comply with the law, and the Court made no findings that said writings did comply. With that said, it is respectfully submitted, that the Chancellor made no error under this contention.

CONCLUSION

In the construction of decedent's Will in this case, based upon the Will and/or agreed facts, the Lower Court was imminently correct in finding that decedent, Lura Foster Carpenter, made the interlineations, obliterations and cancellations to her Will with the intent that Autumn would inherit a child's part, and in construing the decedent's Will, it was clear that decedent's markings, obliterations and writings showed decedent intended to revoke her Will, and would have rather have died intestate then to have died testate, if she had known her writings on said Will,adding Cosby to said Will would be invalid.

The Chancellor's consideration of the Doctrine of Implied Revocation, if inapplicable to this case, was harmless error. The Chancellor considered the facts, the presumption that arises when a decedent makes obliterations to her Will, as well as, the agreed intent of decedent in making said changes to her Will, and her entire Will in making the Court's decision, in this case.

WHEREFORE, Autumn respectfully ask this Court to affirm the final Judgment of the Chancellor.

RESPECTFULLY SUBMITTED, this the 6th day of August, 2009.

AUTUMN COSBY, Appellee

BY: _____

CLIFF R. EASLEY, JR., (MSB[redacted]
EASLEY & COOPER, PLLC
119 S. Newberger St.
P.O. Box 607
Bruce, MS 38915
(662) 983-4331
Fax: (662) 983-4354
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I, **Cliff R. Easley, Jr.,** Attorney for Appellee, Autumn Cosby, do hereby certify that I have this day mailed, postage pre-paid by United States Mail, a true and correct copy of the above and foregoing Appellee's Brief to:

Hon. William L. Maxey
Attorney for Appellant
P.O. Box 5010
Grenada, MS 38901

Hon. Chancellor, Vicky B. Cobb
P.O. Box 1104
Batesville, MS 38606

This the 6th day of August, 2009.

_____
CLIFF R. EASLEY, JR.