

**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. 07-06-159 VC**

**BRIEF OF THE APPELLANT**

**WILLIAM L. MAXEY  
ATTORNEY AT LAW  
42 SOUTH MAIN STREET  
P.O. BOX 5010  
GRENADA, MS 38901-5010  
(662) 226-4080  
(662) 226-0107 (FAX)  
MSB [REDACTED]**

**ATTORNEY FOR APPELLANT**

**ORAL ARGUMENT REQUESTED**

**SUPREME COURT OF MISSISSIPPI**  
**COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

BOBBY DEAN CARPENTER

APPELLANT

VS.

NO. 2009-CA-00114

AUTUMN COSBY

APPELLEE

**CERTIFICATE OF INTERESTED PERSONS**

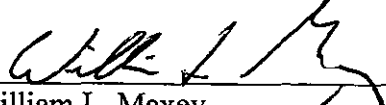
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order for the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Bobby Dean Carpenter .....Appellant
2. Autumn Cosby.....Appellee
3. Cliff E. Easley, Jr.....Counsel for Appellee
4. William L. Maxey.....Counsel for Appellant
5. Honorable Vicki B. Cobb.....Chancellor

This the 8<sup>th</sup> day of July, 2009.

Respectfully submitted,  
Bobby Dean Carpenter

By:

  
\_\_\_\_\_  
William L. Maxey  
Attorney of Record for Appellant  
MSB 1947

## **TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS.....	2
TABLE OF CONTENTS.....	3
TABLE OF AUTHORITIES.....	4
STATEMENT OF THE ISSUES.....	6
STATEMENT OF THE CASE.....	7
STATEMENT OF THE FACTS.....	9
SUMMARY OF THE ARGUMENT.....	11
ARGUMENT.....	14
CONCLUSION.....	19
CERTIFICATE OF SERVICE.....	20

## **TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<u>Crosby v. Alton Ochsner Medical Foundation</u> , 276 So.2d 661 (Miss. 1973).....	12,17
<u>Estate of Lou Ella A. Lyles et al. v. Howell</u> , 615 So.2d 1186 (Miss. 1993).....	11,12,14,16,17
<u>Estate of Seth E. Crawford v. Crawford</u> , 82 So.2d 823; 225 (Miss. 1955).....	16
<u>In the Matter of the Estate of Dowdy</u> , 818 So.2d 1255, 1258 (Miss.Ct.App. 2002)...	15
<u>In the Matter of Palmer's Will v. Harpole</u> , 359 So.2d 752 (Miss. 1978).....	13,17
<u>Matter of Estate of Leggett</u> , 584 So.2d 400 (Miss. 1991).....	15
<u>Rasco v. Estate of Rasco</u> , 501 So.2d 421, 423 (Miss. 1987).....	16
<u>Trotter v. Trotter</u> , 490 So.2d 827 (Miss. 1986).....	11,15,16

<b>RULE OF COURT</b>	<b>PAGE</b>
M.R.C.P. 12 ( c ).....	7,9

<b>STATUTES</b>	<b>PAGE</b>
Section 91-5-1 of the Mississippi Code of 1972, Annotated, as amended.....	12,13,17
Section 91-5-3 of the Mississippi Code of 1972, Annotated, as amended.....	11,14

### **REFERENCES IN BRIEF TO PARTIES AND DECEDENT**

The Appellant Bobby Dean Carpenter shall be hereinafter referred to as “Bobby”. The Appellee Autumn Cosby shall be hereinafter referred to as “Autumn”. The Decedent, Lura Foster Carpenter shall be hereinafter referred to as “Decedent”.

### **REFERENCES IN BRIEF TO TRIAL TRANSCRIPT AND RECORD EXCERPTS**

References herein to the trial transcript shall be designated by page as [T - \_\_]; references herein to the lower court record shall be designated by page as [(R-\_\_)] and references herein to Appellant’s record excerpts shall be designated by page as [RE-\_\_].

### **STATEMENT OF THE ISSUES**

1. Whether the lower Court erred in finding that the Last Will and Testament of Lura Foster Carpenter was totally revoked instead of partially revoked.
2. Whether the lower Court erred in applying the doctrine of implied revocation.
3. Whether the partial revocation of the Last Will and Testament of Lura Foster Carpenter can give rise to a beneficiary not named as a beneficiary in the original Last Will and Testament.
4. Whether the writings on the Last Will and Testament of Lura Foster Carpenter, not witnessed pursuant to Section 91-5-1 of the Mississippi Code of 1972, Annotated, as amended, have any legal relevance.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case:**

The essence of this case is whether the Decedent took sufficient steps under the law to totally revoke her Last Will and Testament in order for Autumn to inherit by intestate succession. The case is before the Court on appeal from the Judgment on the Pleadings entered by the Chancery Court of Grenada County, Mississippi, Chancellor Vicki B. Cobb presiding.

### **B. Course of Proceeding in the Trial Court:**

The case commenced with the Petition for Probate of Will, Letters Testamentary and Other Relief In the Matter of the Estate of Lura Foster Carpenter being filed on June 20, 2007 and alleging that her entire estate was devised to her children, Jerry Wayne Carpenter, Bobby Dean Carpenter and Nancy Lynn Carpenter Dempsey. The Last Will and Testament, as admitted to probate, contained numerous deletions and certain added language. The Decree Admitting Will to Probate, Granting Letters Testamentary and Other Relief was entered on June 20, 2007. The Petition to Construe Will was filed on October 23, 2007 by Autumn Cosby, the only child of Sandra Carpenter Cosby (Sandra was the child of, and predeceased, Lura Foster Carpenter), requesting the Last Will and Testament be construed in a manner for her to inherit a child's share. The Answer to Petition to Construe Will was filed on November 16, 2007. The Motion for Judgment on the Pleadings pursuant to Rule 12 ( c ) of the Mississippi Rules of Civil Procedure was filed by Bobby Dean Carpenter et al. on August 5, 2008. The Answer and Cross

Motion for Judgment on the Pleadings was filed by Autumn Cosby on August 20, 2008. By the Court's Order for Partial Disbursement and Other Relief entered September 25, 2008 Jerry Wayne Carpenter and Nancy Lynn Dempsey settled with Autumn and are no longer parties in interest. The Chancellor, the Honorable Vicki B. Cobb, held a hearing on the Motion and Cross Motion for Judgment on the Pleadings and entered Judgment on the Pleadings on December 22, 2008 for Autumn. Bobby timely filed his Notice of Appeal on January 16, 2009.

## **STATEMENT OF FACTS**

The case commenced with the Petition for Probate of Will, Letters Testamentary and Other Relief In the Matter of the Estate of Lura Foster Carpenter being filed on June 20, 2007 and alleging that her entire estate was devised to her children, Jerry Wayne Carpenter, Bobby Dean Carpenter and Nancy Lynn Carpenter Dempsey. [R 5-6] The Last Will and Testament, as admitted to probate, contained numerous deletions and certain added language. [R 10-12] The Decree Admitting Will to Probate, Granting Letters Testamentary and Other Relief was entered on June 20, 2007. [R 15] The Petition to Construe Will was filed on October 23, 2007 by Autumn Cosby, the only child of Sandra Carpenter Cosby (Sandra was the child of, and predeceased, Lura Foster Carpenter), requesting the obliterations and markings on the Decedent's Last Will and Testament be construed in a manner for her to inherit a child's share. [R 19-23] The Answer to Petition to Construe Will was filed on November 16, 2007 asserting that while the deletions to the Decedent's Will constituted a partial revocation, certain additions to the Will were not legally effective. [R 24-26] The Motion for Judgment on the Pleadings pursuant to Rule 12 ( c ) of the Mississippi Rules of Civil Procedure was filed by Bobby et al. on August 5, 2008. [R 27-35] [RE 3-5] The Answer and Cross Motion for Judgment on the Pleadings was filed by Autumn on August 20, 2008. [R 36-40] [RE 6-10] By the Court's Order for Partial Disbursement and Other Relief entered September 25, 2008 Jerry Wayne Carpenter and Nancy Lynn Dempsey settled with Autumn and are no longer parties in interest. [R 46-50] The Chancellor, the Honorable Vicki B. Cobb, held a hearing on the Motion and Cross Motion for Judgment on the Pleadings and entered Judgment on the Pleadings on December 22, 2008 for Autumn ruling that the Decedent's obliterations and other interlineations on the Will resulted in

the total revocation of the Will enabling Autumn to inherit a child's share of the estate. **[R 41-43]**

**[RE 11-13]** Bobby filed his Notice of Appeal on January 16, 2009. **[R 43A]**

The Petition to Construe Will alleged that Lura Foster Carpenter departed this life on May 27, 2007, with a fixed place of residence in Grenada County, Mississippi, and left an instrument of writing dated February 26, 1999, which was admitted to probate as her Last Will and Testament. **[R 20]** The Petition to Construe Will alleged that the Decedent obliterated portions of her Will, by blacking out with her own markings and handwriting. **[R 20]** The Petition to Construe Will alleged that in paragraph III of the Last Will and Testament of Lura Foster Carpenter, "will not" is stricken out and the word "will" written in by the Decedent regarding the intent for Autumn to inherit as the only child of Sandra Gwyn Carpenter McSheffrey. **[R 10 and R 20-21]** The Petition to Construe Will alleged that in paragraphs VII, VIII, IX, X and XI of the Last Will and Testament the Decedent either partially or totally obliterated the bequest or devises made in those paragraphs. **[R 11 and R 21]** The Petition to Construe Will alleged that in paragraph XIII of the Last Will and Testament the Decedent in her own handwriting added the name of Autumn Cosby. **[R 12 and R 21]** The Petition to Construe Will alleged it was the intention of the Decedent that Autumn Cosby be declared a beneficiary under the Decedent's Last Will and Testament and that she inherit and take thereunder as the other children of the Decedent. **[R 21-22]**

## SUMMARY OF THE ARGUMENT

1. **Whether the lower Court erred in finding that the Last Will and Testament of Lura Foster Carpenter was totally revoked instead of partially revoked.**

Section 91-5-3 of the Mississippi Code of 1972, Annotated, as amended and Estate of Lou Ella A. Lyles et al. v. Howell, 615 So.2d 1186 (Miss. 1993) clearly provide for partial revocation of a Will. The Decedent made certain deletions to revoke those portions of the Will; i. e., in paragraph III of the Last Will and Testament of Lura Foster Carpenter with “will not” is stricken out and the word “will” written in by the Decedent regarding the intent for Autumn Cosby to inherit as the only child of Sandra Gwyn Carpenter McSheffrey. [R 10 and R 20-21] [RE 23] In paragraphs VII, VIII, IX, X and XI of the Last Will and Testament the Decedent either partially or totally obliterated the bequest or devises made in those paragraphs. [R 11] [R 21] [RE 24] There is no allegation in the pleadings that the Decedent revoked her entire Will by “destroying, canceling, or obliterating the same” to show the Decedent intended to revoke her entire Will. The lower Court’s ruling that the Will of the Decedent was revoked in its entirety is erroneous.

2. **Whether the lower Court erred in applying the doctrine of implied revocation.**

The lower Court ruled that the doctrine of implied revocation applied in the instant case with the property passing by intestate succession satisfied the intent of the Decedent. [T 25] [RE 18] In Trotter v. Trotter, 490 So.2d 827 (Miss. 1986), the Supreme Court, in reversing the

lower Court's that an earlier Will had been revoked, discussed the doctrine of implied revocation and stated that it should be carefully limited and not rely on statements by the testator of the intent to revoke the Will. Id. at 832. In the instant case the doctrine of implied revocation was expanded by the lower Court in order to fit some unfortunate facts into a legal theory not supported by law. In the instant case where there is clearly a partial revocation of a Will as provided by statute, the doctrine of implied revocation of the entire Will simply has no application.

**3. 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.**

In the instant case, Autumn was not named as a beneficiary in the original Will. The Decedent attempted to add Autumn by writing her name on the non-holographic Will. The doctrine of dependent relative revocation, provides that if "the testator by codicil (or physical act), revokes a portion of a prior testamentary instrument and makes a substituted disposition under a mistake of fact or of law with the result that the later disposition is invalid, the prior disposition is revived on the theory that had the testator not been mistaken in his belief he would not have revoked the original gift." Estate of Lou Ella A. Lyles v. Howell , 615 So.2d 1186, 1190 (Miss. 1993) quoting Crosby v. Alton Ochsner Medical Foundation, 276 So.2d 661, 666 (Miss. 1973). Since Autumn was not provided for in the original Will, the partial revocation could not, under the theory of dependent relative revocation, revive any disposition to her. The only way that Autumn can receive a bequest when there has been a partial revocation, is for her name to be added in compliance with Section 91-5-1 of the Mississippi Code of 1972,

Annotated, as amended, i.e., by attestation by two witnesses or by a holographic instrument. Neither was done in the instant case.

**4. Whether the writings on the Last Will and Testament, not witnessed pursuant to Section 91-5-1 of the Mississippi Code of 1972, Annotated, as amended, have any legal relevance.**

In the Matter of Palmer's Will v. Harpole, 359 So.2d 752 (Miss. 1978) the Supreme Court acting through Commissioner for the Court, John C. Love, Jr., reversed and remanded a decision wherein the parties stipulated the Will was validly executed, the Codicil was validly executed and the words written on and deletions from the Will were in the Testator's own handwriting. The lower Court had held that the amended Will was valid. The Supreme Court reversed and remanded and held that the "provisions written on the Will relative to the W.F. Bond Home for Older Men and those written on the separate document relative to the sale of the place, are invalid, not having been signed by the Testator..." Id. at 754. In paragraph XIII of the Last Will and Testament the Decedent in her own handwriting added the name of Autumn Cosby. [RE 12] [RE 21] In the instant case, the writings on the Will by the Decedent are likewise invalid, in that they are neither properly witnessed nor fall within the purview of a holographic Will as required by Section 91-5-1 of the Mississippi Code of 1972, Annotated, as amended.

## ARGUMENT

1. **Whether the lower Court erred in finding that the Last Will and Testament of Lura Foster Carpenter was totally revoked instead of partially revoked.**

The statutory and case law of the State of Mississippi provide for the total or partial revocation of a Will. See Section 91-5-3 of the Mississippi Code of 1972, Annotated, as amended and Estate of Lou Ella A. Lyles et al. v. Howell, 615 So.2d 1186 (Miss. 1993). The Last Will and Testament of the Decedent in the instant case indicates clearly that certain deletions were made that evince an intent by the Decedent to revoke those portions of the Will; i. e., as provided by Section 91-5-3, an “obliteration” was made by the Decedent in paragraph III of the Last Will and Testament of Lura Foster Carpenter with “will not” stricken out and the word “will” written in by the Decedent regarding the intent for Autumn to inherit as the only child of Sandra Gwyn Carpenter McSheffrey. [R 10] [20-21] [RE 23] In paragraphs VII, VIII, IX, X and XI of the Last Will and Testament the Decedent either partially or totally obliterated the bequest or devises made in those paragraphs. [RE 11] [RE 21] [RE 24] It is clear that the obliterations by the Decedent constituted a partial revocation “of any clause thereof” of her Last Will and Testament. See Section 91-5-3 of the Mississippi Code of 1972, Annotated, as amended. In Estate of Lou Ella A. Lyles et al. v. Howell, 615 So.2d 1186 (Miss. 1993) the lower Court held that deletions and additions in the Will involving Mr. Howell, including adding his name to a devise, were the product of her intent to amend. Id. at 1189. The Supreme Court

stated that if the testatrix “intended to amend her will as found by the chancellor, the amendment was ineffective”. Id. at 1188. Clearly, adding the name of Mr. Howell, even though it was the intent of the testatrix to change her Will, was ineffective and resulted in the partial revocation of her Will. Id. at 1191. In the instant case, though it presumably was the intent of the Decedent to amend her Will by adding the name of Autumn, where such addition was made in an ineffective manner, it was of no legal consequence. In the instant case, clearly certain obliterations were made to the Will of the Decedent that demonstrates a partial revocation as contemplated by the applicable statute and case law. There is no allegation in the pleadings that the Decedent revoked her entire Will by “destroying, canceling, or obliterating the same” to show that she intended to revoke her entire Will. Indeed, a “testator’s intent to revoke a will must be shown to be clear and unequivocal”. In the Matter of the Estate of Dowdy, 818 So.2d 1255, 1258 (Miss.Ct.App. 2002) citing Matter of Estate of Leggett, 584 So.2d 400, 402-403 (Miss. 1991). It is submitted the lower Court’s ruling that the Decedent’s Will was revoked in its entirety was reversible error.

**2. Whether the lower Court erred in applying the doctrine of implied revocation.**

The doctrine of implied revocation of a Will is recognized under Mississippi law. In the instant case, the lower Court ruled that the doctrine of implied revocation applied and that the total revocation of the Will with the property passing by intestate succession satisfied the intent of the Decedent. [T 25] [RE 18] In Trotter v. Trotter, 490 So.2d 827 (Miss. 1986), the Supreme Court, in reversing the lower Court’s finding that an earlier Will had been revoked, discussed the doctrine of implied revocation and stated that it should be carefully limited and not rely on statements by the testator of the intent to revoke the Will. Id. at 832. In Trotter the Court gave an

example of a validly executed Will with inconsistent provisions but no express revocation clause, (by implication) revokes an earlier Will. Id. at 832. There are other instances where a Will is revoked by the doctrine of implied revocation; e.g., the Will of an unmarried man who marries and has children revokes a prior Will by operation of law. See Rasco v. Estate of Rasco 501 So.2d 421, 423 (Miss. 1987) and cases cited therein. The Supreme Court also considered the case where a subsequent Will revoked by implication an earlier Will because the latter Will disposed of the property in a manner absolutely inconsistent with the provisions of the earlier Will “revokes by implication the earlier Will, though the Will later in time contains no words of revocation and no mention of the earlier Will.” Estate of Seth E. Crawford v. Crawford 82 So.2d 823, 831 (Miss. 1955). In the instant case the doctrine of implied revocation was expanded by the lower Court in order to fit some unfortunate facts into a legal theory not supported by law. In the instant case where there is clearly a partial revocation of a Will as provided by statute, the doctrine of implied revocation of the entire Will simply has no application.

**3. 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.**

In the instant case, Autumn was not named as a beneficiary in the original Will. The Decedent attempted to add Autumn by writing her name on the non-holographic Will. The lower Court’s ruling in Estate of Lou Ella A. Lyles provides that the doctrine of dependent relative revocation, as determined by our Supreme Court, is as follows:

“The doctrine is not a substantive rule of law, but is rather a rule of presumed intent. Thus if the testator by codicil (or physical act), revokes a portion of a prior testamentary instrument and makes a substituted disposition under a mistake of fact or of law with the

result that the later disposition is invalid, the prior disposition is revived on the theory that had the testator not been mistaken in his belief he would not have revoked the original gift.” Estate of Lyles v. Howell , 615 So.2d 1186, 1190 (Miss. 1993) quoting Crosby v. Alton Ochsner Medical Foundation, 276 So.2d 661, 666 (Miss. 1973).

Since Autumn was not provided for in the original Will, the partial revocation could not, under the theory of dependent relative revocation, revive any disposition to her. The only way that Autumn can receive a bequest when there has been a partial revocation, is for her name to be added in compliance with Section 91-5-1 of the Mississippi Code of 1972, Annotated, as amended, i.e., by attestation by two witnesses or by a holographic instrument. Neither was done in the instant case. If the law is that a Will can be amended by simply obliterating part of the Will and writing in a beneficiary on a non-holographic Will, then statutory requirements are rendered null and void.

**4. Whether the writings on the Last Will and Testament, not witnessed pursuant to Section 91-5-1 of the Mississippi Code of 1972, Annotated, as amended, have any legal relevance.**

In the Matter of Palmer’s Will v. Harpole, 359 So.2d 752 (Miss. 1978) the Supreme Court acting through Commissioner for the Court, John C. Love, Jr., reversed and remanded a decision wherein the parties stipulated the Will was validly executed, the Codicil was validly executed and the words written on and deletions from the Will were in the Testator’s own handwriting. Id. at 753. The lower Court had held that the amended Will was valid. Id. at 753. The Supreme Court reversed and rendered and held that the “provisions written on the Will

relative to the W.F. Bond Home for Older Men and those written on the separate document relative to the sale of the place, are invalid, not having been signed by the Testator..." Id. at 754. In paragraph XIII of the Last Will and Testament the Decedent in her own handwriting added the name of Autumn Cosby. [R 12] [R 21] [RE 25] In the instant case, the writings on the Will by the Decedent are likewise invalid, in that they are neither properly witnessed nor fall within the purview of a holographic Will as required by Section 91-5-1 of the Mississippi Code of 1972, Annotated, as amended.

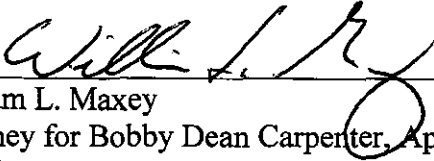
### CONCLUSION

In revoking the Will of the Decedent, the lower Court committed reversible error in ruling that the doctrine of implied revocation applied in this case. This case involved the partial revocation of Lura Foster Carpenter's Will and an ineffective hand written addition to her non-holographic Will attempting to amend her Will. Her intent to include Autumn in her Will, absent compliance with the statutory requirements, was ineffective as a matter of law. Bobby seeks to have the lower Court's decision reversed and rendered.

Respectfully submitted this the 8<sup>th</sup> day of July, 2009.

Bobby Dean Carpenter, Appellant

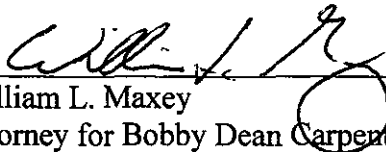
BY:

  
William L. Maxey  
Attorney for Bobby Dean Carpenter, Appellant  
P.O. Box 5010  
Grenada, MS 38901  
Tele: (662) 226-4080  
MS State Bar No. [REDACTED]

**CERTIFICATE OF SERVICE**

I, William L. Maxey, Attorney for the Appellant, Bobby Dean Carpenter, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to the Honorable Cliff E. Easley, Jr., Attorney for Appellee, at P.O. Box 607, Bruce, MS 38915 and to the Honorable Chancellor, Vicki B. Cobb, at P.O. Box 1104, Batesville, MS 38606.

This the 8<sup>th</sup> day of July, 2009.

  
\_\_\_\_\_  
William L. Maxey  
Attorney for Bobby Dean Carpenter, Appellant  
P.O. Box 5010  
Grenada, MS 38901  
Tele: (662) 226-4080  
MS State Bar No 