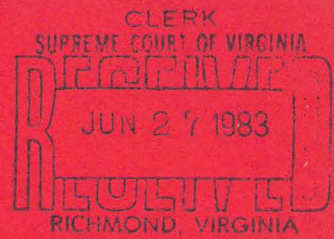


230 VA 413



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 821605

APR 8 1986

CAROLYN ELIZABETH ETGEN,

Appellant,

v.

J. GRANT CORBOY, ADMINISTRATOR, and
ADMINISTRATOR WITH THE WILL ANNEXED,
OF THE ESTATE OF FRANK I. WHITTEN, JR.,
RILLA M. KING, THE NATURE CONSERVANCY,
CHRIS L. FLESTER and THE EPISCOPAL DIOCESE
OF SOUTHWESTERN VIRGINIA,

Appellees.

JOINT APPENDIX

D. Stephen Haga, Jr.
Attorney at Law
21 East Main Street
Post Office Box 338
Christiansburg, Virginia 24073

Counsel for Appellant

Gary C. Hancock
Gilmer, Sadler, Ingram, Sutherland
& Hutton
Midtown Professional Office Building
Post Office Box 878
Pulaski, Virginia 24301

Counsel for Appellees

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VIRGINIA: IN THE CLERK'S OFFICE, CIRCUIT COURT OF GILES COUNTY,
August 4th, 1978.

IN RE: LIST OF HEIRS FOR FRANK I. WHITTEN, JR., DECEASED

In the Clerk's Office of the Circuit Court of the County of Giles

Estate of Frank I. Whitten, Jr., deceased:

~~W~~
I, the undersigned, who this day qualified before the Clerk of the Circuit Court of the
County of Giles as ~~XXXXXX~~ Administrator of the estate of Frank I. Whitten
Jr., deceased, late of the County of Giles

Virginia, on my oath do say that I ~~XX~~ have made diligent inquiry and that I ~~XX~~ believe the follow-
ing to be a true and correct list together with the ages and the addresses of the heirs of my ~~XX~~ decedent
Frank I. Whitten, Jr. who died testate/ ~~XXXXXX~~ on March 2, 1978

LIST OF HEIRS

| NAME | Approximate AGE | Relationship | ADDRESS |
|--------------------|-----------------|--------------|--|
| David G. Whitten | 55 | Uncle | 7206 Lanark Rd., Baltimore, MD. |
| Gerald Whitten | 55 | Uncle | 1089 West Huron St., Pontiac, MI |
| Rilla Wise W. King | 55 | Aunt | 37 May Day Ave. Pontiac, MI. |
| Ruth Blumer | 55 | Aunt | Merrill Bldg., Apt. T, Saginaw MI. |
| Laura Agsten | 35 | Cousin | 405 W. Bogart Rd., Sandusky, OH |
| Jane Witt Kisler | 55 | Aunt | Black Hawk Apts., #K-9, 603 E. Lancaster, Downingtown, PA. |
| Louise McDaniel | 55 | Aunt | 218 W. Asher St., Culpepper, VA |
| Marguerite Statz | 55 | Aunt | 4900 Battery, Apt. 414, Bethesda, MD. |

Given under my hand, this 4th day of August, 19 78

Administrator
~~XXXXXXXXXX~~

~~XXXXXXXXXX~~
~~XXXXXXXXXX~~

Subscribed and sworn to before me, this 4th day of August, 19 78

Ted J. Johnson, Jr.

Clerk.

1

Scott H. Miller, Deputy Clerk.

Virginia: In the Clerk's Office, Circuit Court of Giles County.
August 4th, 1978.

The foregoing List of Heirs for Frank I. Whitten, jr. deceased
was this day presented in said office and admitted to record.

Teste:

Copy Teste:

Ted J. Johnson, Jr., Clerk

June 13 1983

Scarlet B. Ratcliffe
Scarlet B. Ratcliffe, Deputy

Clerk

LAW OFFICES
MARTIN & CORBOY
PEARISBURG, VIRGINIA 24134
503 MOUNTAIN LAKE AVENUE

SAMUEL A. MARTIN
J. GRANT CORBOY
JAMES A. HARTLEY

TELEPHONE 921-1703
AREA CODE 703
P. O. BOX 511

August 4, 1978

RE: Estate of Frank I. Whitten, Jr.

This is to advise all of you that I have qualified as Administrator of the above estate in the Giles County Circuit Court Clerk's Office.

As most of you know, I attempted for some time to obtain access to the safety deposit box which was in the name of Frank I. Whitten, Jr. at the First National Bank, Narrows, Virginia. Due to the fact that we never received the key to the safety deposit box from Oakey Funeral Home, Roanoke, Virginia, it was necessary for the bank to hire a locksmith from Roanoke, Virginia, to drill open the safety deposit box.

On June 28, 1978, I personally traveled to the First National Bank, Narrows, Virginia, for the purpose of being present at the opening of the safety deposit box. When this box was opened, there were no contents therein. I have in my possession a signed and notarized statement from myself and two other witnesses that the box was in fact empty when it was opened.

I have not been able to locate the original of the Last Will and Testament of Mr. Whitten, and now that I know that the safety deposit box did not contain that original, I do not have plans to search any further for the original of that Will.

As I informed Mrs. Etgen and the relatives of Mr. Whitten, by my letter of March 13, 1978, I do have in my possession a photostatic copy of a Will of Frank I. Whitten, Jr. dated September 6, 1977. It appears that the photostatic copy of the Will was made before the Will was executed by Mr. Whitten and the witnesses, and the photostatic copy of the Will was then apparently signed by Frank I. Whitten, Jr. and the two witnesses. When I received this photostatic copy of the Will from David G. Whitten on March 6, 1978, the paragraph initially designated as "Sixth" was lined through, the paragraph initially designated as "Thirteenth" had been changed, and all paragraphs after the original paragraph "Sixth" had been renumbered. I am enclosing a copy of the Will for the benefit of the beneficiaries named in the Will as well as the relatives of Mr. Whitten.

I will present the Will to the Clerk of the Giles County Circuit

RE: Estate of Frank I. Whitten, Jr.
August 4, 1978
Page 2

Court and move the Clerk to admit the Will to probate. I will contact the two witnesses to the Will, both of whom live in Bluefield, West Virginia, and request that one of them go to the Giles County Circuit Court Clerk's Office for the purpose of proving the Will.

There are serious and complicated legal questions concerning the fact that this Will is a signed photocopy of the original and also concerning the fact of the changes made in the Will.

Under Virginia Law, the Administrator only has power over the personal property of the decedent's estate, and said personal property is used first of all for the purpose of paying the debts of the deceased. The real estate becomes liable for the debts of the decedent only if the personal property has been depleted and debts are still owing.


As Administrator, I will most probably find it necessary to file a suit in the Giles County Circuit Court requesting a determination by that Court as to the validity of the Will and the various provisions therein. I have absolutely no idea as to what legal position the various beneficiaries named in the Will wish to take.

As of this date, I am not aware of enough personal property to cover the debts of the decedent, and I am not yet advised as to all of the debts of the decedent.

I have received inquiries from some of the heirs concerning the disposition of the ashes of Frank I. Whitten, Jr. I do not feel that this is an area in which I should participate, and I would request that the various relatives decide among themselves what steps they wish to take.

I also wish to advise all parties that I am not retained as an attorney by anyone involved in this matter, and therefore, my compensation shall consist of the statutory fee of 5% of the value of the personal property as well as a fee to this law firm for legal services in assisting the Administrator.

Very truly yours,


J. Grant Corboy

JGC/clm

Enclosure

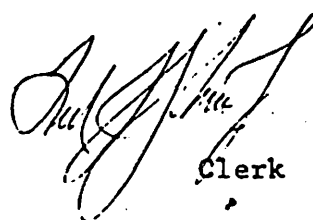
VIRGINIA: IN THE CLERK'S OFFICE, CIRCUIT COURT OF GILES COUNTY,
AUGUST 30, 1978.

IN RE: PROBATE OF WILL OF FRANK I. WHITTEN, JR., DECEASED.

It appearing that Frank I. Whitten, Jr. departed this life
testate on the 2nd day of March, 1978, at the age of years, and
that his known place of residence was Giles County, Virginia.

A writing purporting to be the Last Will and Testament of
the said Frank I. Whitten, Jr., deceased, bearing date of the 6th
day of September, 1977, was this day produced before me in my said
office and proven by the testimony on oath of R. Allen Evans, Jr.,
one of the subscribing witnesses thereto, who also testified to the
signature of Paul F. Baker, Jr., the other subscribing witness there-
to. The said R. Allen Evans, Jr., did further state under oath that
no pencil interlineations were present on the paper writing when
he and the other subscribing witness, witnessed the testator's
signature. The Clerk having examined the paper writing and consider-
ed the testimony on oath of the subscribing witness, the said Will
was duly admitted to probate and ordered to be recorded as the true
Last Will and Testament of Frank I. Whitten, Jr., deceased.

Teste:


Clerk

Copy Teste:

Ted J. Johnson, Jr., Clerk
June 12 1983


Scarlet B. Ratcliffe, Deputy

Filed in the Circuit Court Clerk's Office
the 23 day of April, 1979
Will Tax \$ 5.00 Testor
Fee 3.50
Expenses 30.00
Total Paid \$ 42.50 Robert L. Powell

BILL OF COMPLAINT

TO: THE HONORABLE ROBERT L. POWELL, JUDGE OF SAID COURT:

Your Petitioner respectfully represents as follows:

1) That Frank I. Whitten, Jr., died a resident of Giles County, on the 2nd day of March, 1978. His Last Will and Testament, dated September 6, 1977, was probated in the Clerk's Office of this Court on the 30th day of August, 1978, and recorded in Will Book No. 23, at Page 181. The will is a signed, original photostatic copy. No other testamentary papers have been offered for probate.

2) That subsequent to the death of the said Frank I. Whitten, Jr., J. Grant Corboy, Pearisburg, Virginia, qualified as Administrator of said Estate before the Clerk of the Giles County Circuit Court on August 4, 1978. The said J. Grant Corboy then qualified in said Court as Administrator with the Will Annexed of said Estate on April 9, 1979.

3) That the order of probate dated August 30, 1978, states that R. Allen Evans, Jr. "did further state under oath that no pencil interlineations were present on the paper writing when he and the other subscribing witness, witnessed the testator's signature."

4) That paragraph sixth (6th) of said will provides:
"I give the entire balance of my estate, both real and personal

to my friend Carolyn Elizabeth Etgen, who shares my household here on rural route 1 out of Narrows, Virginia. If she predeceases me; or is engaged or married to another man as of the date of my death I assign my property as follows in sections seventh through twelfth."

5) That paragraph thirteenth (13th) of said will provides as follows: "I hereby appoint my friend Carolyn Elizabeth Etgen Executor of this my Last Will and Testament. If she predeceases me, or is engaged or married to another man as of the date of my death, I appoint her brother, Michael.W. Etgen, of Shawsville, Virginia, as Executor of my Last Will and Testament."

6) That when said will was offered for probate there were lines drawn through the aforesaid paragraphs sixth (6th) and thirteenth (13th), and all paragraphs after original paragraph sixth (6th) were re-numbered.

7) That paragraph tenth (10th) (originally paragraph eleventh (11th)) of said will provides as follows: "I give and bequeath any remaining cash, bank accounts, gold coins, silver coins, precious metal boullion, and securties I may have, to the Episcopal Diocese of Southwestern Virginia, to be used by the Bishop of that Diocese at his discretion for the relief of residents who suffer damage from strip mining in the southwestern counties of Virginia. This includes legal expenses the Diocese may incur to require effective enforcement of applicable strip mining laws."

8) That paragraph thirteenth (13th) (originally paragraph twelfth (12th)) of said will provides as follows: "I give all remaining property I may have, personal and otherwise,

to my cousin, Richard Kisler, of Downingtown, Pennsylvania. If he predeceases me, to his brothers and sister and their issue, share and share alike."

9) That at the time of death of Frank I. Whitten, Jr., he owned the following real estate:

(a) Eight (8) tracts of land purchased by Frank I Whitten, Jr., from Rhoda Buckland in 1974.

(b) A farm known as the O. H. Hopkins farm purchased by Frank I. Whitten, Jr., in 1976.

That said real estate was not disposed of by Frank I. Whitten, Jr. in his lifetime.

10) That as of the date of filing of this suit, the estate of Frank I. Whitten, Jr., consists of the following assets and liabilities:

(a) ASSETS:

(I) Assets which have come into the hands of the Administrator since the death of the testator:

| | |
|---|---------|
| Southwest Virginia National Bank - Savings account | \$ 3.94 |
| U.S.A.A. Insurance - Stock refund | 38.81 |
| Independence Federal Savings and Loan - Savings account | 14.73 |
| Chevy Chase Savings and Loan - Savings account | 119.50 |
| U.S.A.A. Growth Fund - Surrender of stock | 332.30 |
| D. C. National Bank - Savings | 137.06 |
| Commonwealth of Virginia - Tax refund for 1977 | 97.11 |
| U.S.A.A. Group - Dividend | 101.51 |

| | |
|---|----------|
| Prudential Insurance Company - Life insurance paid | 1,087.07 |
| Social Security - Reimbursement of ambulance charges | 76.60 |
| United States Auto Association - Refund of premium | 13.98 |
| Government Employees Insurance Company - Dividend | 8.00 |
| 100 shares of Government Employees Insurance Company common stock (approximate value) | (827.83) |
| 20 shares of Government Employees Insurance Company preferred stock (approximate value) | (322.30) |

(II) Assets located at residence of testator:

| | |
|--|--------------|
| Sparse household furnishings, radio, equipment, coins, stereo, etc., approximate resale value of | 1,250.00 |
| Livestock | <u>50.00</u> |

| | |
|---|-----------------|
| <u>TOTAL APPROXIMATE VALUE OF PERSONAL PROPERTY</u> | <u>4,480.74</u> |
|---|-----------------|

(III) Real estate located in Western Magisterial District, Giles County, Virginia:

| | |
|---|---------------------|
| O. H. Hopkins Farm, assessed in 1979, by Giles County Reassessment Board at | \$102,300.00 |
| 8 tracts of real estate purchased from Rhoda Buckland, assessed in 1979 by Giles County Reassessment Board at | <u>37,000.00</u> |
| <u>TOTAL APPROXIMATE VALUE OF REAL ESTATE</u> | \$139,300.00 |
| <u>TOTAL APPROXIMATE VALUE OF ALL ASSETS</u> | <u>\$143,780.74</u> |

(b) LIABILITIES:

(I) Liabilities which have been paid by
Administrator:

| | |
|---|---------|
| Department of Health - Death Certificate for Frank I. Whitten, Sr. (father) | \$ 2.00 |
| Register of Wills - Certificate of no probate | 1.00 |
| Giles County Ambulance Service - Trans- portation charges | 110.00 |
| Giles County Health Department - Death Certificate | 6.00 |
| Martin & Corboy - Reimbursement of qualifi- cation costs and death certificate | 107.00 |
| Seaboard Surety Company - Bond for reis- surance of stock certificate | 20.64 |
| Department of Health - Death certificate search for Catherine Whitten (mother) | 2.00 |
| Department of Public Health - Death cer- tificate for Catherine Witt Whitten (mother) | 1.00 |
| J. Bentley Hall - cost of corporate surety on bond of Administrator with the Will Annexed | 20.00 |

(II) Outstanding liabilities at time of filing
suit

| | |
|--|---------|
| Broker's commission on sale of Government Employees Insurance Company stock (<u>ap- proximate cost</u>) | (50.00) |
| New River Supply - Open account | 24.90 |
| Rushbrooke Cleaners - Open account | 26.46 |
| Exxon Company - Open account | 196.98 |
| First National Bank - Note dated January 1, 1978, principal (\$430.00) plus interest | 447.20 |

Appalachian Power Company - Electricity
bill

62.83

W. D. Bane, Treasurer of Giles County:
1978 personal property taxes
1978 real estate taxes

49.84
172.86

Virginia Inheritance Tax (approximate
amount)

(11,650.00)

TOTAL APPROXIMATE LIABILITIES OF ESTATE

\$12,950.71

11) That since the decedent was living alone at the time of his death, was not married, and had no relatives living in this area, your Administrator has been forced to piece together what information he can concerning the assets and liabilities of the estate, and thus there are other assets and/or liabilities which may appear before the conclusion of this suit.

12) That the decedent owned at the time of his death large holdings of real estate in Giles County, Virginia, of considerable value, and it does not appear that there will be sufficient personal property to pay all of the liabilities of the estate, in which case said real estate must become liable for the payment of his debts.

13) That your Petitioner, as Administrator and Administrator with the Will Annexed, is not certain as to the correct and proper distribution of any personal property that may remain after the payment of all liabilities; that questions may exist as to the validity of said will and the interpretation of said will; that questions have arisen as to the effect upon said will of the pencil interlineations which appear therein; that if said personal property is not sufficient to satisfy in full all of the debts of the estate then all or a portion of said real estate must be subjected to the payment in full of all of

said debts; that your Petitioner as Administrator and Administrator with the Will Annexed of the estate of Frank I. Whitten, Jr. has not and will not take any sides or favor any parties concerning the distribution of said estate and/or the interpretation of said will; that in the interest of justice and the promotion of judicial economy all of these matters should be brought before the Court in one (1) proceeding involving all beneficiaries under the will and all individuals who would be the heirs at law of Frank I. Whitten, Jr. if he died intestate.

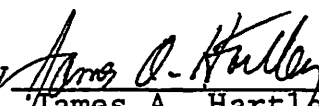
14) That your Petitioner verily believes that Frank I. Whitten, Jr., at the time of his death was unmarried, did not have any children or issue, and had no brothers or sisters; that Frank I. Whitten, Sr., the father of the testator, and Catherine Witt Whitten, the mother of the testator, both predeceased him; that Frank I. Whitten, Sr. had five (5) brothers and sisters, namely: David G. Whitten, Gerald W. Whitten, Rilla M. Whitten King, Ruth Whitten Blumer, and a sister, Eleanor Whitten Woodrow, who predeceased him, survived by one (1) child, Laura Woodrow Agsten; that Catherine Witt Whitten had one (1) full sister, Jane Witt Kisler; three (3) half sisters, namely: Mrs. Louise McDaniel, Mrs. Marguerite Statz, and a third half sister, Minnie Perry who predeceased Frank I. Whitten, Jr. and was survived by three (3) children, namely: O. H. Perry, John W. Perry and Emma Perry Pearson; and one half brother, Emmitt Witt, who predeceased Frank I. Whitten, Jr. and was survived by one (1) son, namely: Emmitt Witt, Jr. That your Petitioner verily believes that all of the persons named in this paragraph would be the sole heirs at law of Frank I. Whitten, Jr. if he had died intestate on March 2, 1978.

WHEREFORE, due to the fact that the will of Frank I. Whitten, Jr., as probated, is a signed, original photostatic copy, contains various pencil interlineations, and has conflicting residuary clauses, your Petitioner prays that the Court construe said will as provided by law, and direct your Petitioner, as Administrator and Administrator with the Will Annexed, as to the distribution of the net thereof; that the Court decree as to the ownership of the personal property and real estate owned by Frank I. Whitten, Jr. as of the time of his death; that the Court decree as to the proper manner for subjecting said real estate or any portions thereof, for the payment of the liabilities of the estate; that the Court decree as to the fee of the Administrator, the costs of administration; attorney's fee for counsel for the Administrator, and court costs; and that the Court decree as to all other matters which may arise herein or be necessary to fully accomplish the purposes of this suit.

J. Grant Corboy, Administrator, and
Administrator with the Will Annexed,
of the estate of Frank I. Whitten,
Jr.

By Counsel

MARTIN & CORBOY
Attorneys at Law
Pearisburg, Virginia

By 
James A. Hartley,
Counsel for Petitioner

ANSWER TO
BILL OF COMPLAINT

TO: THE HONORABLE ROBERT L. POWELL, JUDGE OF SAID COURT

COMES NOW Carolyn Elizabeth Etgen, one of the defendants served with a Bill of Complaint duly filed in the above styled case, and she does make appearance in this Court by Counsel through the following Answer:

(1) The Defendant feels that she is an heir to the Estate of Frank I. Whitten, Jr., and that the Will admitted for probate on the 30th day of August, 1978, which is of record in Will Book 23, at Page 181, is a proper Will fully enforceable and that the real and personal property as detailed in Paragraph Six (6) of said Will is entitled to the Defendant.

(2) That the Defendant places the protection of her rights before the Court through her Counsel and respectfully moves the Court for a time and place in which to present such evidence as she deems fit and necessary for her protection.

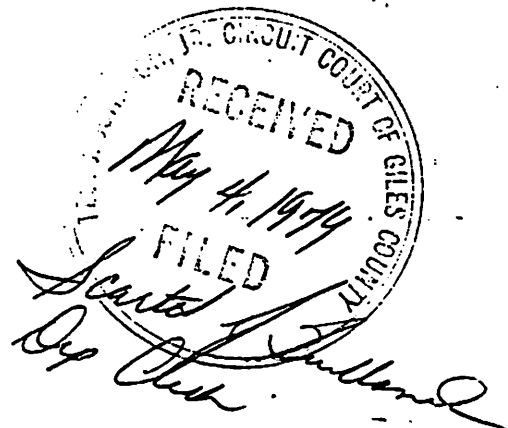
Respectfully,

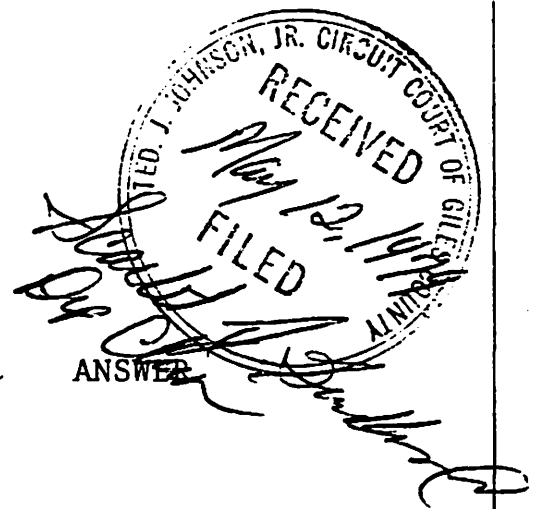
CAROLYN ELIZABETH ETGEN

BY:

William T. Winder
COUNSEL

William T. Winder
William T. Winder
Attorney at Law
207 West Main Street
P. O. Box 338
Christiansburg, Virginia 24073





TO THE HONORABLE ROBERT L. POWELL, JUDGE OF SAID COURT:

COMES NOW, Chris L. Flester, by counsel, as respondent in a Bill of Complaint filed against him and others in this cause, and in response thereto does answer as follows:

1. Respondent admits that Frank I. Whitten, Jr., died on the 2nd day of March, 1978, and that a certain will was admitted to probate in the Circuit Court Clerk's Office of Giles County, Virginia, on the 30th day of August, 1978, said will being of record in Will Book 23, at page 181.

2. Respondent does not have sufficient information at this time to either admit or deny any of the facts set forth in paragraphs one through eight (1-8).

3. Respondent does not have sufficient information to either admit or deny any of the facts and allegations contained in paragraphs one through twelve (1-12) and fourteen (14) of the Bill of Complaint and, therefore, demands strict proof thereof.

4. Respondent acknowledges that certain questions have arisen concerning the Last Will and Testament of Frank I. Whitten, Jr., and that it is proper for this Court to resolve those questions in this proceeding; however, Respondent respectfully submits that he is entitled to take that property known as the "O. H. Hopkins farm" as set out in paragraph seven (7), re-numbered paragraph six (6), in the Last Will and Testament of

Frank I. Whitten, Jr., which was admitted to probate on the 30th day of August, 1978, before the Circuit Court Clerk of Giles County, Virginia, and which is of record in Will Book 23, page 181.

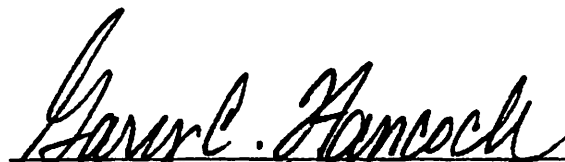
5. Respondent denies each and every allegation contained in the Bill of Complaint not specifically admitted herein.

WHEREFORE, Respondent, Chris L. Flester, prays that his interests in this cause, as a beneficiary under the Last Will and Testament of Frank I. Whitten, Jr., be fully protected by the equitable powers of this Court; and respondent further prays for the opportunity to present law and evidence in support of his interests and necessary for his protection.

Respectfully submitted,

CHRIS L. FLESTER

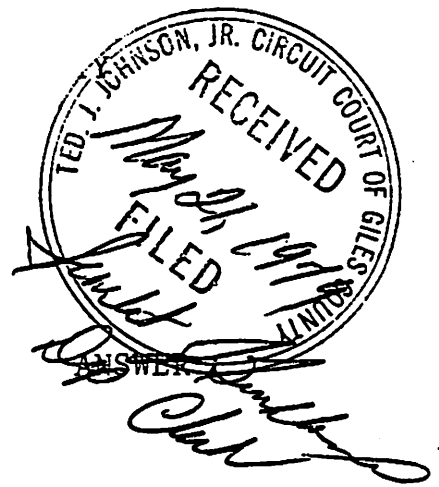
By Counsel



Gary C. Hancock, Counsel for
Respondent, Chris L. Flester
Gilmer, Sadler, Ingram,
Sutherland & Hutton
65 East Main Street
P. O. Box 878
Pulaski, VA 24301

CERTIFICATE

I, Gary C. Hancock, do hereby certify that I have mailed a true copy of the foregoing Answer to James A. Hartley, Attorney at Law, Pearisburg, Virginia 24134, counsel of record for the Petitioner; John S. Shannon, 8 North Jefferson Street, Roanoke, Virginia 24042, counsel of record for The Episcopal Diocese of Southwestern Virginia; and William T. Winder, Attorney at Law, 207 West Main Street, P. O. Box 338, Christiansburg, Virginia 24073, counsel of record for Carolyn Elizabeth Etgen, this 11th day of May, 1979.



TO THE HONORABLE ROBERT L. POWELL, JUDGE OF SAID COURT:

COMES NOW, The Nature Conservancy, a non-profit corporation incorporated under the laws of the District of Columbia, with principal offices in Arlington, Virginia, by counsel, as respondent in a Bill of Complaint filed against it and others in this cause, and in response thereto does answer as follows:

1. Respondent admits that Frank I. Whitten, Jr., died on the 2nd day of March, 1978, and that a certain will was admitted to probate in the Circuit Court Clerk's Office of Giles County, Virginia, on the 30th day of August, 1978, said will being of record in Will Book 23, at page 181.

2. Respondent does not have sufficient information at this time to either admit or deny any of the facts set forth in paragraphs one through eight (1-8).

3. Respondent does not have sufficient information to either admit or deny any of the facts and allegations contained in paragraphs nine through twelve (9-12) and fourteen (14) of the Bill of Complaint and, therefore, demands strict proof thereof.

4. Respondent acknowledges that certain questions have arisen concerning the Last Will and Testament of Frank I. Whitten, Jr., and that it is proper for this Court to resolve those questions in this proceeding; however, Respondent respectfully submits that it is entitled to take that certain property

located on Peters Mountain, Giles County, Virginia, and consisting of the eight (8) tracts purchased by Frank I. Whitten, Jr., from Rhoda Buckland in 1974, as set out in paragraph seven (7), renumbered paragraph six (6), in the Last Will and Testament of Frank I. Whitten, Jr., which was admitted to probate on the 30th day of August, 1978, before the Circuit Court Clerk of Giles County, Virginia, and which is of record in Will Book 23, at page 181.

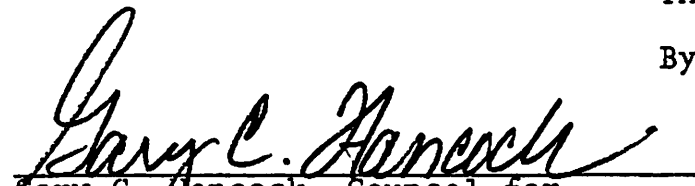
5. Respondent denies each and every allegation contained in the Bill of Complaint not specifically admitted herein.

WHEREFORE, Respondent, The Nature Conservancy, prays that its interests in this cause, as a beneficiary under the Last Will and Testament of Frank I. Whitten, Jr., be fully protected by the equitable powers of this Court; and respondent further prays for the opportunity to present law and evidence in support of its interests and necessary for its protection.

Respectfully submitted,

THE NATURE CONSERVANCY

By Counsel


Gary C. Hancock, Counsel for
Respondent, The Nature Conservancy
Gilmer, Sadler, Ingram,
Sutherland & Hutton
65 East Main Street
P. O. Box 878
Pulaski, VA 24301

Frank I. Whitten, Jr., died a resident of Giles County, Virginia, on March 2, 1978. The Last Will and Testament of Frank I. Whitten, Jr., dated September 6, 1977, was probated in the Clerk's Office of the Circuit Court of Giles County on August 30, 1978, and recorded in Will Book 23, at page 181. This Will was titled "LAST WILL AND TESTAMENT OF FRANK I. WHITTEN, JR." and consisted of 2 pages. The instrument (hereinafter referred to as the "Will") admitted to probate was signed, original photostatic copy, properly executed by the decedent and attested and acknowledged by two witnesses. The Will as originally executed complied with all formalities necessary for a valid, attested Will.

Subsequent to the death of the said Frank I. Whitten, Jr., J. Grant Corboy, Esquire, Pearisburg, Virginia, qualified as Administrator of said Estate before the Clerk of the Giles County Circuit Court on August 4, 1978. The said J. Grant Corboy then qualified in said Court as Administrator with the Will Annexed of said Estate on April 9, 1979.

The Will of Frank I. Whitten, Jr., was found among the personal effects of Mr. Whitten at his home in Giles County, Virginia. No other or subsequent Wills executed by Mr. Whitten have been found, or offered for probate.

When the Will of Frank I. Whitten, Jr., was found, as aforesaid, the document had certain interlineations drawn through certain passages, namely, marks or lines drawn across the written parts of paragraphs sixth and thirteenth.

The sixth paragraph of said Will originally provided as

follows: "I give the entire balance of my estate, both real and personal, to my friend Carolyn Elizabeth Etgen, who shares my household here on rural route 1 out of Narrows, Virginia. If she predeceases me, or is engaged or married to another man as of the date of my death, I assign my property as follows in sections seventh through twelfth."

Lines were drawn through and across the entirety the written portion of this sixth paragraph.

4/6/61
R.E.P.
The thirteenth paragraph of said Will originally provided as follows: "I hereby appoint my friend Carolyn Elizabeth Etgen Executrix of this my last Will and Testament. If she predeceases me, or is engaged or married to another man as of the date of my death, I appoint her brother, Michael W. Etgen, of Shawsville, Virginia, as Executor of my Last Will and Testament."

Lines appeared through a portion of the written part of this thirteenth paragraph leaving only "I hereby appoint execut(or) of this my last Will and Testament." The last three letters of the word executrix had been crossed out with the letters "or" handwritten in.

All paragraphs were numbered in the original document. When found, all paragraphs commencing with the seventh paragraph were renumbered to compensate for the deleted sixth paragraph with the changed numbers being handwritten in.

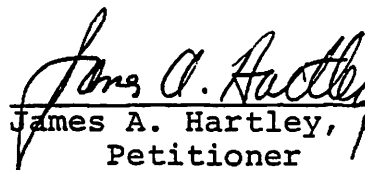
A copy of the Will of Frank I. Whitten, Jr., is attached hereto as Exhibit A to more fully illustrate the interlineations found on the decedent's Will. Paragraphs 6th through thirteenth (originally seventh through thirteenth) of said will contain secondary and residuary bequests.

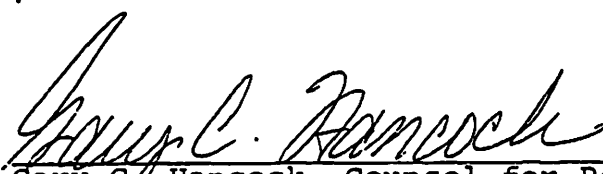
The aforesaid Will was in the custody of the testator, Frank I. Whitten, Jr., after its execution until it was found among his personal effects after his death. The order of probate dated August 30, 1978, states that R. Allen Evans, Jr. "did further state under oath that no pencil interlineations were present on the paper writing when he and the other subscribing witness, witnessed the testator's signature."

At the time of the making of the aforesaid Will, the testator was a close friend of Carolyn Etgen, a named defendant herein, and, in fact, cohabited with Ms. Etgen at his home in Giles County, Virginia, until a short time prior to his death. At some point, Ms. Etgen moved out of the testator's home in Giles County, and their relationship was severed.

The above set forth facts were orally agreed to and stipulated by counsel of record at a hearing before this Court on August 13, 1979. It is respectfully submitted that the sole question for determination by this Court is the legal effect of the interlineations and deletions found on the Will of Frank I. Whitten, Jr., with regard to whether the testator effected a partial revocation or total revocation of his Will or whether the interlineations were of no effect.

The above-stated facts are stipulated this 6th day of April, 1981.


James A. Hartley, Counsel for
Petitioner


Gary C. Hancock, Counsel for Respondents,
The Nature Conservancy and Chris L.
Flester

William W. Haga

Stephen D. Haga, Jr., Counsel for
Respondent, Carolyn Etgen

David T. Mullins

David T. Mullins, Counsel for
Respondents, Heirs of Frank I.
Whitten, Jr.

TWENTY-NINTH JUDICIAL CIRCUIT VIRGINIA

COUNTIES OF BLAND, BUCHANAN, DICKENSON, GILES, RUSSELL AND TAZEWELL

CIRCUIT COURT JUDGES:

November 4, 1981

GLYN R. PHILLIPS
CLINTWOOD, VIRGINIA 24228

NICHOLAS E. PERSIN
GRUNDY, VIRGINIA 24614

ROBERT L. POWELL
PEARISBURG, VIRGINIA 24134

Mr. James A. Hartley
Attorney at Law
Box 511
Pearisburg, VA 24134

Mr. Gary C. Hancock
Attorney at Law
Box 868
Pulaski, VA 24301

Mr. John S. Shannon
8 North Jefferson Street
Roanoke, VA 24042

Mr. David Mullins
Attorney at Law
Box 25
Blacksburg, VA 24060

Mr. William T. Winder
Attorney at Law
Box 388
Christiansburg, VA 24073

Mr. William O. Smith
Attorney at Law
Box K-229
Richmond, VA 23288

Re: J. Grant Corboy, Administrator, etc.

vs.

Rilla M. King

Gentlemen:

In this case you have stipulated the evidence and agreed that the wills originally executed by Frank I. Whitten, Jr., complied with all formalities necessary for a valid attested will.

The question for the Court to determine is whether the will of Frank I. Whitten, Jr. that was probated in the Clerk's Office of this Court on August 30, 1978, was revoked in whole or in part by the interlineations appearing on paragraphs originally numbered "Sixth" and "Fourteen". Virginia Code Section 64.1-58 is applicable to this determination.

It appears that Mr. Whitten made provision in his will for his friend, Carolyn Elizabeth Etgen, and also provided that upon certain conditions or happenings the provisions for her would lapse into certain other paragraphs in the will.

Sometime prior to Mr. Whitten's death, Ms. Etgen left the house where she had lived with Mr. Whitten, which would indicate a break in their friendship. Interlineations were made through the two paragraphs by which provisions were made for Ms. Etgen.

Mr. James A. Hartley, al
Page 2
November 4, 1981

Upon consideration of the evidence and briefs of counsel, the Court is of the opinion that Mr. Whitten, by his interlineations renumbering paragraphs, intended to and did effect a partial revocation of the will so as to eliminate Ms. Etgen as a beneficiary. The evidence negatives an intent to revoke the entire will.

Please submit an appropriate decree.

Very truly yours,

Robert L. Powell
Robert L. Powell

RLP/r

VIRGINIA

IN THE CIRCUIT COURT OF GILES COUNTY

J. GRANT CORBOY, ADMINISTRATOR
AND ADMINISTRATOR WITH THE WILL
ANNEXED, OF THE ESTATE OF
FRANK I. WHITTEN, JR.,

Petitioner,

v.

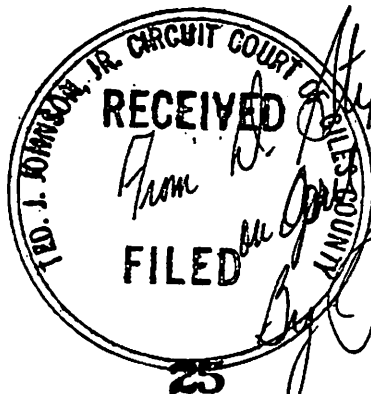
RILLA M. KING, et als,

Respondents.

MEMORANDUM OF RESPONDENT
CAROLYN ELIZABETH ETGEN

D. STEPHEN HAGA, JR., Esq.
Counsel for the Respondent

April 26, 1982



STATEMENT OF THE CASE

Frank I. Whitten died by his own hand on March 2, 1978, a resident of Giles County, Virginia. At the time of his death, Whitten, the testator herein, owned certain real and personal property located in Giles County, and elsewhere. On August 30, 1978 a document found among the papers of the deceased was presented to the Clerk of Court of Giles County, and he heard the statements of the witnesses to the attestation of the document as the "LAST WILL AND TESTAMENT OF FRANK I. WHITTEN, JR."

The document offered, and admitted to probate at that time, was a photostatic copy of a typed original, which had been attested at the same time as the then missing original, before the witnesses. The witness R. Allen Evans, Jr., stated under oath that "no pencil interlineations were present on the paper writing when he and the other subscribing witness, witnessed the testator's signature."

The document offered carried pencil marks through the sixth and thirteenth paragraphs. These marks did not render the text illegible. The sixth paragraph is entirely legible, and the thirteenth is almost entirely legible. The subjects of these paragraphs was the devise and bequest of property to Carolyn Elizabeth Etgen, a close personal friend of the testator. The name Caroline Elizabeth Etgen is legible in both paragraphs, and the dispositive and appointive contexts of these paragraphs are entirely beyond dispute. See Respondent's

Exhibit One, *attached*.

J. Grant Corboy, Esquire, had qualified on August 4, 1978 as Administrator, and commenced the execution of the provisions of the document after April 9, 1979. On August 13, 1979, a hearing was conducted before the Honorable Robert Powell, Circuit Judge, where the issues of the effects of the interlineations were argued. Subsequent to that hearing the counsel for all parties then engaged submitted a number of Memoranda of Law and Evidence to the Court.

On January 28, 1982, a safe deposit box belonging to Frank I. Whitten, Jr. at the time of his death was opened by Mr. Corboy in the presence of witnesses. Among other things the box at First Virginia Bank Roanoke - West, Numbered 32, and belonging to the decedent there was found the original typewritten LAST WILL AND TESTAMENT OF FRANK I. WHITTEN, JR. See Respondent's Exhibit Two, *attached*. This Will was attested, and it bore no interlineations at the places where pencil lines were found on the executed copy previously submitted. This box Number 32 also contained at the time a number of the items sought to be distributed under the provisions of the Will left there. See, Respondent's Exhibit Three, *attached*.

It is submitted by the Respondent Carolyn Elizabeth Etgen that the discovery of the testator's original will intact, in his possession renders the previous issues contested among the parties hereto moot, or at least resolves them by persuasion as to the intent of the testator. The objective conclusion must

favor her inheritance, and authority as administratrix.

QUESTIONS PRESENTED

1. DID FRANK I. WHITTEN JR. DIE TESTATE OR INTESTATE?
2. IF THE DECEDENT LEFT A WILL, WHICH OF THE TWO DOCUMENTS EXECUTED AND DISCOVERED SHOULD BE ADMITTED TO PROBATE?
3. DID THE DECEDENT DIE TESTATE BUT WITH A PARTIAL REVOCATION OF THE INSTRUMENT ADMITTED TO PROBATE?

CONCLUSIONS

1. Frank I. Whitten, Jr., died testate, a resident of Giles County, Virginia, on March 2, 1978.
2. Of two documents discovered in the testator's possession after his death, executed original, and executed copy, bearing marks, the attested will is the executed original, where the two differ.
3. The marks found upon the executed copy of the will have no legal effect, in view of the discovery of the original bearing no marks.

ARGUMENTS AND AUTHORITIES

1. DID FARNK I. WHITTEN DIE TESTATE OR INTESTATE?

The respondent Carolyn Elizabeth Etgen maintains that her former friend and companion Frank Whitten died testate on March 2, 1978. Two documents apparently executed with testamentary intent have been produced. One is a copy of the other, and bears diagonal marks through the sixth (6th) and thirteenth (13th) paragraphs, and is renumbered throughout. all of which are marks of a pencil on photostatic copy. One is the original typewriting entitled LAST WILL AND TESTAMENT OF FRANK I. WHITTEN, JR.

It is unfortunate, but it is the case, that the original

will of the testator was lost among his possessions in a safe deposit box at a bank for nearly four years after his death. Regardless of the time and expense which have passed since the time of death, however, the will in its original form is in evidence for all to consult.

Untouched are the words of the original will:

"Sixth. I give the entire balance of my estate, both real and personal, to my friend Carolyn Elizabeth Etgen who shares my household here on rural route 1 out of Narrows, Virginia. If she predeceases me, or is engaged or married to another man as of the date of my death, I assign my property as follows in sections seventh through twelfth."

by any marks or other evidence of the testator's intention otherwise than as clearly shown upon the face of the typed original.

This typed original was properly executed by the testator under the statutes of Virginia; it was signed and published, or declared by Frank Whitten to be his ambulatory will in the presence of two witnesses all together at the same time. In fact, care was taken to fully execute and witness a photostatic copy, which the testator retained at home, while the original was safely deposited in his bank.

No properly attested codicil or other document giving any indication that the testator intended otherwise than the provisions of the will express has been produced. But the remote family, and other friends of the testator maintain that the pencil marks effect a partial or total revocation of those provisions, which are intact on the original recently

produced. The ambiguity upon which the legal contest has been based has been resolved by the discovery of the original will. It has never been established that the testator made the marks upon the copy. Resort to authorities far from this jurisdiction has been made in the effort to advance the position that the will was either partially or totally revoked by the placement of the marks, whatever agency may have done so. But the law of cases and statutes in Virginia will suffice to make the point that the will should be admitted to probate in its original form.

First it is necessary to examine the relevant statute, Sec. 64.1-58, Code of Virginia, as amended, which provides in pertinent part:

"Revocation of wills generally. -- No will or codicil, or any part thereof shall be revoked unless by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, executed in the manner in which a will is required to be executed, or by the testator, or some person acting in his presence and by his direction, cutting, tearing, burning, obliterating, canceling or destroying the same, or the signature thereof, with the intent to revoke."

There is no subsequent will or codicil in the present case. There is no writing declaring any intention to revoke. And, there is no affirmative evidence, in the face of the present circumstances, of any obliteration made by the testator with any objective intention of revocation, or *animus revocandi*. The most generous interpretation of the present evidence would reflect only that some person or persons unknown applied pencil interlineations to the copy of the will of the

testator first found, but that the original, with the personal effects of the testator found in a security box at his bank, bore no such interlineations. The presumption claimed by the parties adverse to respondent Etgen break down; maintaining that testator must have made the marks himself, in dealing with an instrument as carefully and properly designed as an attested will. After the discovery of the original, placed by the testator in a secure location, with other items, some of which were disposed of under the terms of the will, it seems clear that the testator's intention was not to revoke the provisions which had been penciled through. The evidence does not seem to support the requirements of the case of Thompson vs. Royall, 163 Va. 492, 175 S.E. 748 (1934). In that case the court held that:

"To effect revocation of a duly attested will, in any of the methods prescribed by Sec. 64.1-58, two things are necessary. The first requirement is the doing of any of the acts specified in the statute. Secondly, it is essential that the doing of the act specified be accompanied by the intent to revoke, the *animus revocandi*. Proof of either without proof of the other is insufficient."

In the case presently under consideration *neither* of the foregoing requirements has been met. As if the testator had been found with one of these two documents in each hand, the Court must look to the objective indications of testamentary intention. Further, on the point of the application of the presumption from HARRISON ON WILLS AND ADMINISTRATION Sec. 152 (2d edition; 1960), that the act of striking out words in a will "was done by the testator's own hand for the purpose of

deleting them from the will", the appearance of the original typed will, without interlineations should in Equity shift the burden of proof back to the proponents of the position that the lines were drawn by the testator *concurrently* with his intent to revoke portions of his attested will, while preserving other, conflicting residuary provisions. The production of the original typed will provides evidence objectively to the contrary of the presumed intention to effect a partial revocation, regardless of the applicable Virginia rule which prohibits partial revocation of attested wills without observation of dignities of execution equal to those required in the original document. See Triplett's Executor, et als. v. Triplett, 161 Va. 906, 172 S.E. 162 (1934), adopting Larue v. Lee, 63 W. Va. 388, 60 S.E. 388, and Malone's Administrator v. Hobbs, 40 Va. 346. These sources have been previously cited in memoranda to the Court for the proposition that the attempt to effect a partial revocation of an attested will in Virginia results in total revocation of the will. We respectfully submit that in cases dealing with differing documents, such a rule is logical and practical to apply. But where the photocopy of an attested will, incidentally also executed in attested form, not in the handwriting of the testator but rather typewritten, bears marks of dissimilar origin from the original writing; the original in its condition when discovered renders meaningless the condition or altered content of the photocopy. No case presenting this precise pattern of facts in Virginia could be discovered

by this author. But there are indications in the dicta of the Triplett case, *supra*, which are valuable, regarding the effect of interlineations and alterations in the context of holographic wills, as opposed to attested wills:

... "The answer to this question depends upon when changes were made which appear in the will which purports to have been attested. If they were made before attestation, the answer would be yes. If they were made afterward, it would be no."

In the present case it logically follows, as the witnesses' averments to the Clerk of Court of Giles County indicate, that the marks on the photocopy were not present at the time they executed their signatures; they were made subsequently. They were ineffective as codicils, for they were not attested themselves, nor were they initialled, or given any indication of authorship.

With both documents admitted in evidence, and under these unique circumstances, the respondent Etgen respectfully submits that Frank I. Whitten, Jr. died testate, as his will was discovered on January 28, 1982, although its contents had been known for several years.

2. IF THE DECEDENT LEFT A WILL, WHICH OF THE TWO DOCUMENTS EXECUTED AND DISCOVERED SHOULD BE ADMITTED TO PROBATE?

The respondent Etgen maintains that the original typed will, found on January 28, 1982 by Mr. Corboy and others in a lock-box belonging to the decedent is his valid attested last will and testament. In fact, it was that document which was

given an exact description by the witnesses when before the Clerk of the Circuit Court of Giles County. They stated that the copy before them was an executed copy of an original, and that the copy offered for probate bore marks in pencil which were not present at the time of the attestation. If the Court is to consider the contents of the paragraphs for any purpose whatsoever, it must give them their full effect. To do so would have the effect of resolving the question of the proper administrative party, as the testator clearly intended that the respondent Etgen serve in that capacity. The case of Harris v. Wyatt, 113 Va. 254, 74 S.E. 189 (1912) supports her claim that the marks on the photocopy were of no effect,

"Where a will finds its way into a probate court partially cancelled or obliterated, without other evidence as to the cancellation or obliteration than that the cancellation or obliteration had occurred since that will was executed, there is no presumption that the cancellation or obliteration was made by the hand of the testator...Although the name of a devisee in a will be entirely obliterated he will nevertheless, take under the will where the name can be clearly deciphered by the use of a magnifying glass, and he can otherwise be identified from the context, which gives such description of him as cannot be mistaken.

How, then, must the Court resolve the question of which of the documents is to be admitted? The fact is that there is only one involved, and if the law had been applied as above in the context of the simultaneous discovery of both, then the result would be to admit the original to probate, considering the marks as they were treated in Harris, as being of no legal significance whatever.

In any other result the Court would be extending the case interpretations of the statute, Sec. 64.1-58, Code of Virginia of 1950, as amended, which suit in the context of holographic wills, but not of attested ones, or which would necessarily create results contrary to other statutory provisions. If the testator could, for example, adjust the terms of his ambulatory, attested will by merely marking upon an executed copy thereof, there would hardly be any need for the rules pertaining to codicils, and their necessary execution with equal dignities to the will which they are intended to accompany. Likewise the fine points in dictum in the cases cited (Triplett and Harris) need never have been discussed.

In point of fact the statute does not admit of the ready interpretations previously advanced in this case. The reference to "part" of a will is not modified to require its application to attested wills, but might have easily been intended by the legislature to clarify the holographic partial revocation issues which had been so often litigated. As was set forth in the Triplett case:

"The true rule is that there is no presumption of law, and that the burden of proof is on the proponent that any alteration which he wishes to be considered effective was made before execution. But the face of the paper and the obvious circumstances may amply meet that burden, and the inference to be drawn is always one of fact. 161 Va. 906, 172 S.E. 162 (1934)

The result advanced by respondent Etgen satisfies the require-

ment of a more fundamental rule; hard cases make bad law. This is accomplished in two ways. First, it makes the contorted construction of Sec. 64.1-58 unnecessary allowing the plain words their plain, common meaning. Second, it allows the disposition of the property without reference to the many cases cited before, all of which involved holographs, and are therefore inappropriate as precedent, or are based on legal or equitable rules of other jurisdictions. To follow the provisions of the testators original document, under the circumstances of this case, is consistent with the statutes and cases, and simplifies the issues of testamentary intent as objectively proven.

3. DID THE DECEDENT DIE TESTATE BUT WITH A PARTIAL REVOCATION OF THE INSTRUMENT ADMITTED TO PROBATE?

The last central consideration to the case is that of the application of rules regarding partial revocation. This also involves the analysis of the admission of the contents of the sixth (6th) and thirteenth (13th) paragraphs to the decision of the finder of fact. In practical, procedural terms, the discovery of the original will has a great impact. Probate should be given to testamentary documents as soon as is practicable in each case. But equitable principles also observe the impact on individuals of the decrees, and reserve action which might spawn controversy, as this and other cases may.

It is the position of the respondent Etgen that new issues are now presented which might involve the decision of a jury as to certain facts, under applicable Virginia procedure pro-

vided.

It then becomes the problem to define the admissibility of the contents of the paragraphs involved, along with the characteristics of other interlineations of numbers, and their substitution in pencil numerals and letters. Conceivably the testimony of experts in forensic science should be consulted regarding the physical features of the photostatic copy and its pencil marks.

The Court has already observed that the words of the will are legible, and the observation that conflicting dispositive provisions for residuum are involved itself must rest on the meaning and content of the photocopy text. This comparison, of questionable evidenciary value, is avoided by the result suggested by the respondent Etgen; we respectfully suggest that the admission of the original will to probate, and the denial of legal effect to the marks on the photocopy, as a decision conservative in the application of law, and dispositive of the former controversies.

Two, diametrically opposed, positions have previously been taken with regard to the proper interpretation of the documents. The Flester/Nature Conservancy argument is that a complex construction of statute and Virginia, as well as much foreign, case authority, indicates for partial revocation, or the excision of the two (2) paragraphs involved, and the distribution of the remainders and residues to that side under paragraph "seventh" of the original will (6th interlineated on the copy). The

other parties, excepting respondent Etgen, persist in their position that Frank Whitten, Jr., died intestate, and that the heirs at law should share the estate. In view of the introduction of a perfectly proper original of the heretofore discovered testament, this conclusion would seem much more remote.

Now, your respondent proposes a third position which is both expedient and conservative judicially, and which serves logic and experience as best as such a situation might. That is; that no revocation, modification or other adjustment of the terms of the will was properly executed by the testator. No codicil, subsequent instrument, or other evidence of his speculated intention contrary to the terms of the said will to distribute property at his death is properly before the Court. At the time of the testator's death he left among his more valued possessions in his safe deposit box his meticulously drafted and attested last will and testament, and the copy found at the time of the partial inventory of his effects at his home, once shared by the respondent Etgen, bearing marks of unknown and unproven origin, had not permitted sufficient certainty in the intervening years for a conclusion of the terms.

The conclusion now emerging is strengthened by certain of the circumstances which may be important to the ultimate finder of fact in this matter. Particularly, that the testator was an engineer and had sympathy for the effects of strip-mining near the area which he took for his home. Without any

known legal consultation, he composes, drafts, and properly solicits the execution of the will in question, which contains clear, simple, expressions of his desires for disposition of his estate, and of his remains. Some time thereafter this testator made a legally calculated choice to end his life, and he took the time and method best suited to his solitary lifestyle.

These and other more detailed considerations begin to take on meaning as they are used to demonstrate the propriety and effectiveness of the testators will. One step less desperate, but less demanding, for the foreseeable effect of his death would certainly seem to be the retrieval and ordered substitution of another will, or at least some written indication, or other palpable proof, that his intentions formally attested, had changed.

A partial revocation of the will seems, after this has been shown, to be the Flester/Nature Conservancy side's position, but seems not to have the legal substance which sustained it until the discovery of January 28, 1982. To once again argue the complex "encyclopaedic references" from Virginia and from sister states would not serve the parties or reflect judicial economy, as other counsel herein have requested for their respective parties. And certainly to disregard the expressions entirely, and strike down the will would do even more violence to the known wishes of the testator, as he had made his devises and besquests largely otherwise.

Whether or not the circumstances immediately preceding the

testator's death support the contrary conclusions is respectfully submitted by the respondent Etgen to be a question of fact at this time, and she, by counsel, makes the requests, and averments, above, and those contained in the conclusion of this memorandum. Further, it is her position that the marks found on the executed copy of the will have no legal effect, in view of the discovery of the original thereof bearing no marks, in the possessions of the testator at the time of his death, March 2, 1978.

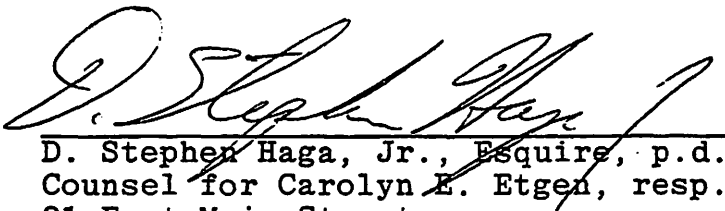
CONCLUSION

For the reasons set forth in this memorandum of law and facts, the respondent Carolyn Elizabeth Etgen, asks that this honorable Court rule as requested, that the markings, and the photostatic copy, representing not the best evidence of the intention of the testator, Frank I. Whitten, be disregarded, and the intact original will be admitted to probate, and such decrees and orders issue as will best effectuate the terms thereof, and as may be required by the nature of the matter.

Respectfully submitted,

CAROLYN ELIZABETH ETGEN

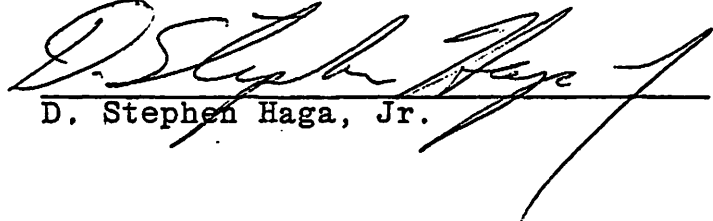
By Counsel


D. Stephen Haga, Jr., Esquire, p.d.
Counsel for Carolyn E. Etgen, resp.
21 East Main Street
P. O. Box 338
Christiansburg, Virginia 24073

C E R T I F I C A T E

I, D. Stephen Haga, Jr., Esq., substitute counsel for the respondent Carolyn E. Etgen, hereby certify that I have on this 26th day of April, 1982, mailed a true copy of the

foregoing Memorandum of Respondent, Carolyn Elizabeth Etgen, to Gary c. Hancock, Attorney at Law, P. O. Box 878, Pulaski, Virginia, counsel for Chris L. Flester and the Nature Conservancy; James A. Hartley, Attorney at Law, P. O. Box 511, Pearisburg, Virginia, counsel for the petitioner; John S. Shannon, Attorney at Law, 8 North Jefferson Street, Roanoke, Virginia, counsel for the Episcopal Diocese of Southwestern Virginia; and William O. Smith, Attorney at Law, P. O. Box K229, Richmond, Virginia, counsel for Rilla M. King; and David T. Mullins, Attorney at Law, P. O. Box 25, Blacksburg, Virginia, counsel for Jane Witt Kisler.


D. Stephen Haga, Jr.

LAST WILL AND TESTAMENT OF FRANK I. WHITTEN JR.

I, Frank I. Whitten Jr. of Giles County, Virginia, being of sound mind and memory, and not acting under duress or undue influence of any person, and wishing to dispose of my property and estate in case of my death, do make, publish, and declare this instrument as my Last Will and Testament, as follows:

First. I direct that expenses incident to my death and just debts be paid.

Second. I give my body to the Virginia State Anatomical Division, in Richmond, Virginia, for purposes of medical study and research, in accordance with the Anatomical Gift Act of Virginia. Should my death occur outside the jurisdiction of Virginia law, then to the nearest medical school desirous of accepting such gift. Should for some reason an anatomical gift not be acceptable, I desire cremation without casket or preparation or embalming or viewing. Ashes may be scattered in any convenient woodland.

Third. I give my antique cavalry sabre, of N. Starr trademark, and degrees, awards, photographs, citations, and plaques incident to the military and professional careers of my father and myself, to my aunt, Rilla King, of Pontiac, Michigan, if she predeceases me, to whoever in the Whitten family is maintaining her file of family genealogy and mementos.

Fourth. I give my mother's family heirlooms and mementos (except furniture) to my cousin, Richard Kisler, of Downingtown, Pennsylvania. If he predeceases me, then to his brothers and sister and their issue, share and share alike.

Fifth. I give my Virginia Polytechnic Institute cadet dress sabre to my friend Chris L. Flester, of Falls Church, Virginia. If he predeceases me, then to my aunt Rilla King of Pontiac, Michigan.

Sixth. ~~I give the entire balance of my estate, both real and personal, to my friend Carolyn Elizabeth Etgen, who shares my household here on rural route 1 out of Narrows, Virginia. If she predeceases me, or is engaged or married to another man as of the date of my death, I assign my property as follows in sections seventh through twelfth.~~

^{6TH} Seventh. Of the real estate I own on Peters Mountain, Giles County, Virginia, the eight tracts purchased by me from Rhoda Buckland in 1974 I give to The Nature Conservancy, a non-profit organization incorporated under the laws of the District of Columbia, and headquartered in Rosslyn, Virginia; the O.H. Hopkins farm purchased by me in 1976 I give to my friend, Chris L. Flester, of Falls Church, Virginia. If he predeceases me, then to the Episcopal Diocese of Southwestern Virginia, to be used at the discretion of the Bishop of that Diocese as a church retreat and as a working farm.

^{7TH} Eighth. I give my trucks and automobiles to my friend, E.M. (John) Rice, of Peterstown, West Virginia.

^{8TH} Ninth. I give any books I may have which can be identified as having come from the library of my late aunt, Mary Whitten, to my cousins, Dennis and Richard King, of Pontiac, Michigan, and their issue, share and share alike. The rest of my books I give to the Peterstown Public Library, Peterstown, West Virginia.

WITNESSES INITIALS: RE JR.

TESTATOR'S INITIALS: F. I. Whitten Jr.

^{NINTH}
Ninth. I give my phonograph records, amateur radio gear, and all other electronic equipment including stereo sets and television sets, to my friend Chris L. Flester, of Falls Church, Virginia.

^{TENTH}
Tenth. I give and bequeath any remaining cash, bank accounts, gold coins, silver coins, precious metal boullion, and securities I may have, to the Episcopal Diocese of Southwestern Virginia, to be used by the Bishop of that Diocese at his discretion for the relief of residents who suffer damage from strip mining in the southwestern counties of Virginia. This includes legal expenses the Diocese may incur to require effective enforcement of applicable strip mining laws.

^{THIRTEENTH}
Thirteenth. I give all remaining property I may have, personal and otherwise, to my cousin, Rickard Kisler, of Downingtown, Pennsylvania. If he predeceases me, to his brothers and sister and their issue, share and share alike.

¹⁴
~~Thirteenth. I hereby appoint my friend Carolyn Elizabeth Etgen executrix of this my last Will and Testament. If she predeceases me, or is married or married to another man as of the date of my death, I appoint her brother, Michael W. Etgen, of Shawsville, Virginia, as executor of my last Will and Testament.~~

¹⁵
Fourteenth. I hereby revoke any and all former Wills made by me at any time prior to this date. I am unmarried, have no children, and no siblings. Any person not provided for herein is intentionally omitted. Any person provided for herein shall be deemed not to have survived me if he or she should die either within sixty days after my death, or at the same time as I, or in a common disaster with me, or under such circumstances that it is difficult or impossible to determine which of us died first.

In witness, I sign, seal, and publish, and declare this as my Last Will and Testament, in the presence of the persons witnessing it at my request, this 6th day of September, 1977, in the Town of Bluefield, Tazewell County, Virginia.

Joseph L. Whitten, Jr. (SEAL)

The foregoing instrument, consisting of two typewritten pages, and one electrostatic copy of the same, was this 6th day of September, 1977, signed, sealed, published, and declared by the said testator as his Last Will and Testament, in the presence of us who, at his request, and in his presence, and in the presence of each other, here unto sign our names as witnesses.

WITNESSES: Paul F. [Signature]
R. Allen Evans Jr.

ADDRESSES: 909 AUGUSTA S.
BLUEFIELD, W.V. 24701
315 STOWERS ST.
BLUEFIELD, W.V. 24701

RESPONDENT'S EXHIBIT TWO

LAST WILL AND TESTAMENT OF FRANK I. WHITTEN JR.

I, Frank I. Whitten Jr. of Giles County, Virginia, being of sound mind and memory, and not acting under duress or undue influence of any person, and wishing to dispose of my property and estate in case of my death, do make, publish, and declare this instrument as my Last Will and Testament, as follows:

First. I direct that expenses incident to my death and just debts be paid.

Second. I give my body to the Virginia State Anatomical Division, in Richmond, Virginia, for purposes of medical study and research, in accordance with the Anatomical Gift Act of Virginia. Should my death occur outside the jurisdiction of Virginia law, then to the nearest medical school desirous of accepting such gift. Should for some reason an anatomical gift not be acceptable, I desire cremation without casket or preparation or embalming or viewing. Ashes may be scattered in any convenient woodland.

Third. I give my antique cavalry sabre, of N. Starr trademark, and degrees, awards, photographs, citations, and plaques incident to the military and professional careers of my father and myself, to my aunt, Rilla King, of Pontiac, Michigan; if she predeceases me, to whoever in the Whitten family is maintaining her file of family genealogy and mementos.

Fourth. I give my mother's family heirlooms and mementos (except furniture) to my cousin, Richard Kisler, of Downingtown, Pennsylvania. If he predeceases me, then to his brothers and sister and their issue, share and share alike.

Fifth. I give my Virginia Polytechnic Institute cadet dress sabre to my friend Chris L. Flester, of Falls Church, Virginia. If he predeceases me, then to my aunt Rilla King of Pontiac, Michigan.

Sixth. I give the entire balance of my estate, both real and personal, to my friend Carolyn Elizabeth Etgen, who shares my household here on rural route 1 out of Narrows, Virginia. If she predeceases me, or is engaged or married to another man as of the date of my death, I assign my property as follows in sections seventh through twelfth.

Seventh. Of the real estate I own on Peters Mountain, Giles County, Virginia, the eight tracts purchased by me from Rhoda Buckland in 1974 I give to The Nature Conservancy, a non-profit organization incorporated under the laws of the District of Columbia, and headquartered in Rosslyn, Virginia; the O.H. Hopkins farm purchased by me in 1976 I give to my friend, Chris L. Flester, of Falls Church, Virginia. If he predeceases me, then to the Episcopal Diocese of Southwestern Virginia, to be used at the discretion of the Bishop of that Diocese as a church retreat and as a working farm.

Eighth. I give my trucks and automobiles to my friend, E.M. (John) Rice, of Peterstown, West Virginia.

Ninth. I give any books I may have which can be identified as having come from the library of my late aunt, Mary Whitten, to my cousins, Dennis and Richard King, of Pontiac, Michigan, and their issue, share and share alike. The rest of my books I give to the Peterstown Public Library, Peterstown, West Virginia.

WITNESSES INITIALS: FB Jr.

RAE Jr.

TESTATOR'S INITIALS: F.I.W.

Tenth. I give my phonograph records, amateur radio gear, and all other electronic equipment including stereo sets and television sets, to my friend Chris L. Flester, of Falls Church, Virginia.

Eleventh. I give and bequeath any remaining cash, bank accounts, gold coins, silver coins, precious metal boullion, and securities I may have, to the Episcopal Diocese of Southwestern Virginia, to be used by the Bishop of that Diocese at his discretion for the relief of residents who suffer damage from strip mining in the southwestern counties of Virginia. This includes legal expenses the Diocese may incur to require effective enforcement of applicable strip mining laws.

Twelfth. I give all remaining property I may have, personal and otherwise, to my cousin, Rickard Kisler, of Downingtown, Pennsylvania. If he predeceases me, to his brothers and sister and their issue, share and share alike.

Thirteenth. I hereby appoint my friend Carolyn Elizabeth Etgen executrix of this my last Will and Testament. If she predeceases me, or is engaged or married to another man as of the date of my death, I appoint her brother, Michael W. Etgen, of Shawsville, Virginia, as executor of my Last Will and Testament.

Fourteenth. I hereby revoke any and all former Wills made by me at any time prior to this date. I am unmarried, have no children, and no siblings. Any person not provided for herein is intentionally omitted. Any person provided for herein shall be deemed not to have survived me if he or she should die either within sixty days after my death, or at the same time as I, or in a common disaster with me, or under such circumstances that it is difficult or impossible to determine which of us died first.

In witness, I sign, seal, and publish, and declare this as my Last Will and Testament, in the presence of the persons witnessing it at my request, this 6th day of September, 1977, in the Town of Bluefield, Tazewell County, Virginia

Charles L. Etgen, Jr. (SEAL)

The foregoing instrument, consisting of two typewritten pages, and one electrostatic copy of the same, was this 6th day of September, 1977, signed, sealed, published, and declared by the said testator as his Last Will and Testament, in the presence of us who, at his request, and in his presence, and in the presence of each other, here unto sign our names as witnesses.

WITNESSES: Paul S. Burk Jr.
Robert Evans Jr.

ADDRESSES: 202 Augusta St
Bluefield W.V. 24701
315 Stowers St
Bluefield, W.V. 24701

Contents found in safe deposit Box 32 of First Virginia Bank Roanoke - West on January 28, 1982.

- * 9 plastic canisters containing quarters
- * 6 " " " " demis
- * 1 " " " " misc. coins
- * 1 " " " " halves
- * 4 rolls of demis
- 1 envelope containing 4 gold coins
- 1 " " " 3 gold coins
- 1 " " " 3 gold coins
- 4 envelopes each containing 1 gold coin
- 4 \$20 gold coins
- ✓ 17 individual packets of demis each containing 1 demi
- ✓ 5 " " " quarters " " " 1 quarter
- ✓ 2 " " " Indian Head Pennies " " " penny
- 3 " " " nickels " " " nickels
- 45 " " " halves " " " half
- 8 silver dollars
- 2 Bi-centennial proof each containing 1 dollar, 1 half + 1 quarter
- 1 Carson City silver dollar
- 1 " " " uncirculated silver dollar
- 5 envelopes containing proof sets, each containing 1 half, 1 quarter, 1 demi, 1 nickel, 1 penny
- 3 packets containing proof sets, each containing 1 half, 1 quarter, 1 demi, 1 nickel, 1 penny
- 1 single demi - ~~2~~

- 3 one dollar silver certificates
- 4 one dollar Fed. Res. Notes
- 2 two dollar bills
- 3 five dollar Fed. Res. Notes
- 1 ten dollar " " Note
- 5 miscellaneous rings
- 2 Masonic lapel pins
- 1 old chain

JKC
M
me
CRK

⑧ Miscellaneous Group of Maps, Railroad Time tables & railroad tickets

- 1 Envelope containing 11 Military payment certificates
- ← 2 Australian paper currency bills (1 dollar + 2 bills)
- ← 2 Canadian " " " (1 dollar + 2 dollars)
- ← 4 Viet Nam " " " (twenty, twenty, fifty + five hundred)

- 1 Envelope of Misc receipts & papers
- 1 Birth Cert. of Frank Irving Whitten, Jr.
- 1 Hospital Birth Cert. " " " " "
- 1 Stock Certificate # NU 5811 - 400 shares of Auto Train Corporation
- 1 Honorable Discharge
- 1 Vaccination Booklet

- 1 Confirmation Reminder - USAA Capital Growth Fund, Inc. dated 6-9-71 showing current share bal. of \$ 37.244 shares
 - 1 open Acct. Statement - Keystone Custodian Service, Inc. dated 6-22-71 showing total shares owned 45.872 shares
 - 1 envelope containing Birth ^{cert.}, marriage ^{cert.}, death ^{cert.} + other misc. papers.
 - 1 envelope containing Appalachian Trail Log
 - 1 Photograph
 - 2 envelopes containing film negatives
 - 1 Prudential Life Insurance Policy # 14542106
 - ~~Washington Nat'l Life Insurance Policy # 1426694~~
 - 1 Washington Nat'l Life Insurance Policy # 1426694
 - 1 List of addresses of beneficiaries ^{list in} will
 - 1 Letter + 1 certificate for disposition of body to state anatomical division
- JSC
M
me
CRK

- 3
- 1 Home owner Policy
 - 2 Life Insurance Policies
 - 3 Deeds
 - 3 Affidavits
 - 1 Last Will + Testament dated 9-6-77
- Witnesses Paul F. Baker, Jr. + R. Allen Evans, Jr.
With initials of J. Grant Conroy, Margaret B. French,
Mary M. Collins + Colin R. Kellam

I acknowledge receipt of items listed on page 1,
page 2 and page 3 which were found in
safe deposit box # 32 of First Virginia Bank
Roanoke - West, Nanour, Va. on January 28, 1982

/s/ Kent Lohoy, Administrator of Frank
F. Whitten Estate

State of Va.
County of Giles } TO WIT:

Subscribed and sworn to before me on January
28, 1982

Margaret B French
Notary Public.

My Commission Exp. 3/24/84

He
MA
me
CRW

Gilmer, Sadler, Ingram,
Sutherland and Hutton

MIDTOWN PROFESSIONAL OFFICE BUILDING

PULASKI, VIRGINIA 24301

P. O. BOX 878 (703) 980-1360

LAW OFFICES

March 16, 1982

HOWARD C. GILMER, JR. (1906-1975)
ROBY K. SUTHERLAND (1909-1975)
PHILIP M. SADLER
ROBERT J. INGRAM
JAMES L. HUTTON
THOMAS J. MC CARTHY, JR.
BYRON R. SHANKMAN
RANDOLPH D. ELEY, JR.
~~XXXXXXXXXX~~
JOHN J. GILL (VA. & N.Y. BARS)
GARY C. HANCOCK
H. GREGORY CAMPBELL, JR.
JACKSON M. BRUCE
GRAHAM MARTIN PARKS

BLACKSBURG OFFICE

201 W. ROANOKE STREET
BLACKSBURG, VIRGINIA 24060
P. O. BOX 908
TELEPHONE 552-1061

GALAX OFFICE

209½ W. OLDTOWN
GALAX, VIRGINIA 24333
P. O. BOX 798
TELEPHONE (703) 236-6441

The Honorable Robert L. Powell
Judge, Circuit Court of Giles County
Giles County Courthouse
Pearisburg, Virginia 24134

Re: J. Grant Corboy, Administrator v. Rilla M. King, et al.

Dear Judge Powell:

Since your ruling on the above-styled case by letter of November 4, 1981, it has come to my attention that another safety deposit box has been discovered at the bank in the name of Frank I. Whitten, Jr. In that safety deposit box was the original of the Will which we had been litigating in this proceeding.

It is my opinion that the finding of this new Will does not in any way change the outcome of your ruling in that I believe that all of us have been aware that the original of the Will was somewhere in existence, but had simply been unable to locate it. Based upon the evidence before you to the effect that there were no changes on the Will when it was executed, it is obvious that the changes made on the Will were made after the time of its execution. Additionally, since the interlineations were made on an original signed copy of the Will, then I cannot see that the finding of this Will will in any way effect your decision.

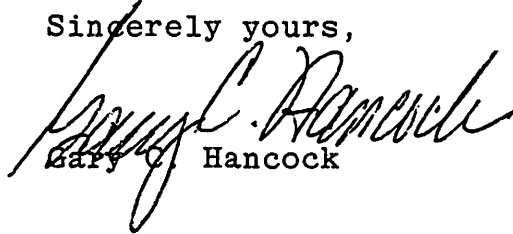
I would venture to submit to the Court that as Mr. Whitten did commit suicide, and since the original of his Will was in the safety deposit box, he made the changes on the signed copy which he had available to him rather than upon the original. I think this is consistent with the facts before the Court, and the only logical conclusion that comes to mind as to what transpired in Mr. Whitten seeking to effect a partial revocation of the Will.

If you are in agreement with the conclusions set out herein, I would be most appreciative if you could so advise, and I will

The Honorable Robert L. Powell
March 16, 1982
Page 2

be glad to proceed then to prepare an order in this proceeding.
Thank you for your cooperation.

Sincerely yours,



Gary C. Hancock

10/pas

cc: James A. Hartley, Esq.
Mr. John S. Shannon
David Mullins, Esq.
William T. Winder, Esq.
William O. Smith, Esq.

LAW OFFICES
D. STEPHEN HAGA, JR.
21 EAST MAIN STREET
P. O. Box 338
CHRISTIANSBURG, VIRGINIA 24073

TELEPHONE (703) 382-4401

March 26, 1982

The Honorable Robert L. Powell
Judge, Circuit Court of Giles County
Giles County Courthouse
Pearisburg, Virginia 24134

Re: J. Grant Corboy, Administrator v. Rilla M King, et al.

Dear Judge Powell:

7/1
Please be advised that I am in receipt of Gary C. Hancock's letter dated to you March 16, 1982. Miss Carolyn Elizabeth Etgen has retained me to represent her in this matter and it would appear at this time that we will be asking for leave of court to submit additional memorandum as well as new evidence. The letter which you received from Mr. Hancock quite frankly seems to be somewhat of an oversimplification of the issues involved in this case and it would appear that our position would be the finding of this additional will is extremely significant in nature. Next week I will be calling your office to discuss with you the procedures that you desire the attorneys to take in this case. In addition I will submit to you an order asking that I be substituted as counsel for Mr. William T. Winder and leave of court to present additional evidence as well as memorandum.

Sincerely yours,

D. Stephen Haga
D. Stephen Haga, Jr.

DSH: kfh

GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON

ATTORNEYS AND COUNSELLORS AT LAW

HOWARD C. GILMER, JR. (1906-1975)
ROBY K. SUTHERLAND (1909-1975)
PHILIP M. SADLER
ROBERT J. INGRAM
JAMES L. HUTTON
THOMAS J. MCCARTHY, JR.
BYRON R. SHANKMAN
RANDOLPH D. ELEY, JR.
JOHN J. GILL (VA. & N.Y. BARS)
GARY C. HANCOCK
H. GREGORY CAMPBELL, JR.
JACKSON M. BRUCE
GRAHAM MARTIN PARKS

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P. O. BOX 878

TELEPHONE 980-1360

AREA CODE 703

April 14, 1982

BLACKSBURG OFFICE

201 W. ROANOKE STREET
BLACKSBURG, VIRGINIA 24060
P. O. BOX 908
TELEPHONE (703) 552-1081

GALAX OFFICE

209 1/2 W. OLDTOWN
GALAX, VIRGINIA 24333
P. O. BOX 798
TELEPHONE (703) 236-6441

James A. Hartley, Esq.
503 Mountain Lake Avenue
Pearisburg, Virginia 24134

Stephen D. Haga, Jr., Esq.
207 West Main Street
Christiansburg, Virginia 24073

RE: Frank I. Whitten, Jr.
Estate

David T. Mullins, Esq.
105 Wilson Avenue, N.E.
Blacksburg, Virginia 24060

Gentlemen:

I appeared before Judge Powell yesterday at the Giles County Docket Call and requested that a hearing date be set in regard to the above-styled matter. Judge Powell indicated that he would request that Mr. Haga file his brief by the 26th day of April, and that any other attorneys involved who would wish to respond do so within a reasonable time thereafter. As soon as briefs were filed, he indicated that he would be willing to grant us a hearing.

Thank you for your cooperation, and hopefully we will be able to get a hearing date within the next month in order to have final disposition made on this case.

Sincerely yours,


Gary C. Hancock

10/pas

ORDER

This day came the respondent Carolyn Elizabeth Etgen, by counsel, and moved the Court for an Order substituting counsel of record representing her herein;

AND IT APPEARING from the representations made that she was formerly represented by William T. Winder, Esquire, the Winder Building, Christiansburg; the said counsel having closed his law offices previously, this matter was taken up by D. Stephen Haga, Jr., Esquire, with the consent of the respondent, Carolyn Elizabeth Etgen;

UPON CONSIDERATION OF WHICH, the Court being of the opinion that the foregoing request of the respondent Etgen should be granted it is accordingly

ADJUDGED, ORDERED, and DECREED, that D. Stephen Haga, Jr., Esquire, a member of the Virginia State Bar practicing in Christiansburg, Virginia, be and he is hereby substituted for William T. Winder, Esquire, as counsel of record herein for the respondent Carolyn Elizabeth Etgen.

And now this cause is continued.

ENTER: Robert L. Powell
Robert L. Powell, Circuit Judge

DATE: May 17, 1982.

I ask for this:

D. Stephen Haga, Jr.
D. Stephen Haga, Jr.

Seen and Consented to:

William T. Winder
William T. Winder

LAW OFFICES
D. STEPHEN HAGA, JR.
21 EAST MAIN STREET
P. O. Box 338
CHRISTIANSBURG, VIRGINIA 24073
TELEPHONE (703) 382-4401

June 3, 1982

The Honorable Robert L. Powell
Giles County Circuit Court
The Courthouse
Pearisburg, Virginia

Re: ESTATE OF FRANK I. WHITTEN, JR.

Dear Judge Powell:

Some time ago I submitted a Memorandum of Law and Fact in this matter which rather exhaustively treated the issues involved, and introduced the arguments which were indicated by the discovery of Mr. Whitten's original will in January of this year.

The Court indicated that counsel for the other contestants in the matter should have a reasonable time to submit reply memoranda if they felt so inclined.

*Rec'd
6/11/82
R.H.*
I hope that you will agree that such a period has passed, and only Mr. Mullins has supplied a responsive memorandum. Accordingly, I hope that the Court will entertain my motion, filed herewith, for summary disposal of the matter in favor of my client.

If the Court desires to hear oral argument on the points of contention, please advise me of the next available dates for hearing, and I will be happy to appear on behalf of Ms. Etgen.

With sincere thanks for your patience in this I am

Yours truly,


D. Stephen Haga, Jr.

Gilmer, Sadler, Ingram,
Sutherland and Hutton

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P. O. BOX 878 (703) 980-1360

June 10, 1982

LAW OFFICES

HOWARD C. GILMER, JR. (1906-1975)
ROBY K. SUTHERLAND (1909-1975)
PHILIP M. SADLER
ROBERT J. INGRAM
JAMES L. HUTTON
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P. O. BOX 798
TELEPHONE (703) 236-6441

The Honorable Robert L. Powell
Judge of the Circuit Court of
Giles County
Giles County Courthouse
Pearisburg, Virginia 24134

Re: Estate of Frank I. Whitten, Jr.

Dear Judge Powell:

11/1/82
6/11/82
R.H.
This letter will acknowledge receipt of Mr. Haga's letter of June 3, 1982 and also Mr. Haga's motion for summary judgment, as well as our conversation of this date.

As you know, Mr. Haga submitted his memorandum in this matter and reopened the decision heretofore made by this Court, by virtue of the location of the original will and trust of Mr. Whitten. I had spoken with Mr. Mullins several days ago and advised him that I was in the process of working on the memorandum, but had been unable to reach Mr. Haga.

As you already know, our position is that the location of the original will of Mr. Whitten does not affect the determination previously made by the Court. I expect that our memorandum in support of this will be to you by the end of next week.

I certainly apologize for any undue delay in submitting our memorandum to you, but things have been quite hectic here in Pulaski.

I agree with Mr. Haga that we probably should have a hearing on this matter in order to present oral argument on the points

The Honorable Robert L. Powell
Judge of the Circuit Court of
Giles County

June 10, 1982

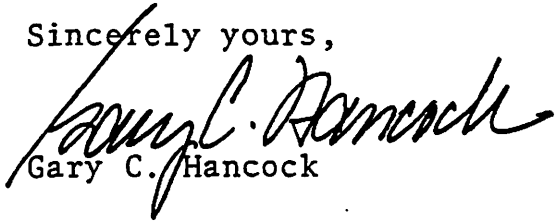
Page No. 2

of contention, and if you would provide me with your available dates, I would be glad to coordinate with the other attorneys in this matter as far as setting a hearing on this case.

Thank you for your cooperation and patience, and we will be submitting our brief by the end of next week.

With best regards, I remain,

Sincerely yours,



Gary C. Hancock

GCH:msw

Cc:

Stephen D. Haga, Jr., Esquire
David T. Mullins, Esquire

MOTION FOR SUMMARY
JUDGMENT

TO: THE HONORABLE R. POWELL, JUDGE OF THE SAID COURT:

Comes now the defendant Carolyn Elizabeth Etgen, and moves the Court as follows:

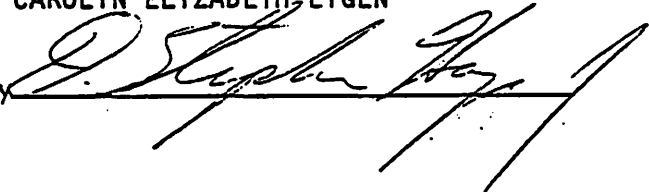
1. The defendant Carolyn E. Etgen previously filed with the Court a certain Memorandum of Law and Fact in this cause, and a reasonable time having elapsed, only one reply memorandum has been received by her counsel.

2. The defendant maintains that the factual basis of this cause has changed in such a way that the other defendants joined herein have no basis to claim property, or have any other interest in the estate of the decedent, as is maintained in the Memorandum of Carolyn Etgen mentioned above.

3. The defendant Etgen further maintains that the discovery of an unamended original copy of the will of the decedent herein disposes of the questions of fact previously before the Court, and nothing remains to be resolved by further litigation.

WHEREFORE the defendant Carolyn Elizabeth Etgen moves the Court for summary judgment herein in her favor, and such orders as will admit the original will aforementioned to probate, and effect the proper disposition of the property of the decedent as directed therein.

CAROLYN ELIZABETH ETGEN

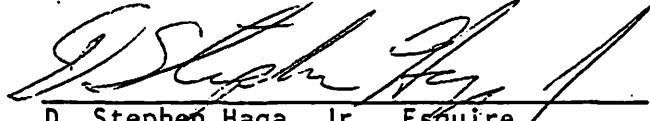
By 

D. Stephen Haga, Jr., Esq.
21 East Main Street
Christiansburg, Virginia 24073

C E R T I F I C A T E

I D. Stephen Haga Jr., counsel for Carolyn Elizabeth Etgen, hereby certify that I have this day, the 8th of June, 1982, mailed a true copy of the

foregoing motion for summary judgment to David. T. Mullins, Esq., 105 Wilson Ave., Blacksburg, Virginia; Gary C. Hancock, Esq., P. O. Box 878, Pulaski, Va., James A. Hartley, P. O. Box 511, Pearisburg, Virginia; John S. Shannon, Esq., 8 North Jefferson Street, Roanoke, Virginia; and William O. Smith, Esquire, P. O. Box K229, Richmond, Virginia; all counsel for the defendants herein.



D. Stephen Haga, Jr., Esquire
Counsel for Elizabeth Etgen

-2-

LAW OFFICES
D. STEPHEN HAGA, JR.
21 EAST MAIN STREET
P. O. BOX 338
CHRISTIANSBURG, VIRGINIA 24073
TELEPHONE (703) 382-4401

June 15, 1982

The Honorable Robert L. Powell
Circuit Court of Giles County
The Courthouse
Pearisburg, Virginia 24134

Re: Estate of Frank I Whitten

Dear Judge Powell:

On behalf of my client, Carolyn E. Etgen, I feel I must address the matters contained in a certain letter I have received by copy from Mr. Hancock, addressed to the Court.

First, I must take strenuous exception to the remark contained therein to the effect that "the location of the original will of Mr. Whitten does not affect the determination previously made" by the Court. This is the precise issue in litigation, and we feel that we have addressed the matter comprehensively in our memorandum submitted at the end of May.

Second, we urge the Court to set an early time for the final arguments in this matter; there has already been delay exceeding four (4) years, which has been vexatious and very damaging to the interest of my client.

Finally, without intending to offend, we respectfully submit that ample time has elapsed for responsive memoranda to be prepared by counsel, and supplied to all parties.

Please advise us of your earliest available date for ruling herein, and my office will gladly respond. If the Court should feel that arguments are not necessary, then I would be happy to prepare any Order which the Court might request in concluding the Circuit Court phase of this case.

I am, with thanks for your patience

Very truly yours,


D. STEPHEN HAGA, JR.

DSH: daw
cc: Mr. Hancock) Mr. Hartley
Mr. Mullins) Mr. Smith
Mr. Shannon)
Mr. Corboy)

Gilmer, Sadler, Ingram,
Sutherland and Hutton

MIDTOWN PROFESSIONAL OFFICE BUILDING

PULASKI, VIRGINIA 24301

P. O. BOX 878 (703) 980-1360

LAW OFFICES

June 18, 1982

HOWARD C. GILMER, JR. (1906-1975)
ROBY K. SUTHERLAND (1909-1975)
PHILIP M. SADLER
ROBERT J. INGRAM
JAMES L. HUTTON
THOMAS J. MC CARTHY, JR.
BYRON R. SHANKMAN
RANDOLPH D. ELEY, JR.
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The Honorable Robert L. Powell
Judge of the Circuit Court of
Giles County
Giles County Courthouse
Pearisburg, Virginia 24134

Re: Estate of Frank I. Whitten, Jr.

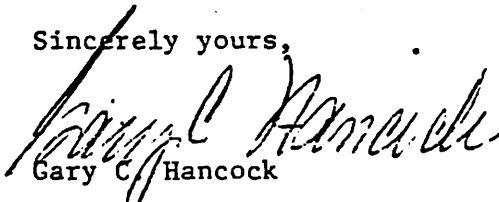
Dear Judge Powell:

Please find attached our Reply Memorandum of Law and Evidence responding to the discovery of the original copy of Mr. Whitten's will. We would like to request that we have a brief hearing on this matter in order to present final argument on this issue, if the Court deems it necessary after reviewing the Memoranda filed by the various parties.

I will look forward to hearing from you in this regard, and if you would like to have a hearing on this matter, I will be glad to obtain the available dates from the other attorneys so as to facilitate this.

Thank you for your cooperation, and with best personal regards,

Sincerely yours,


Gary C. Hancock

10/pas

enclosure

cc: James A. Hartley, Esq.
John S. Shannon, Esq.
William T. Winder, Esq.
David T. Mullins, Esq.
William O. Smith, Esq.

Will
GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON

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June 21, 1982

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Norfolk and Western Railway Co.
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file
David T. Mullins, Esquire
105 Wilson Avenue, N. E.
Blacksburg, Virginia 24060

Re: Estate of Frank I. Whitten, Jr.

Gentlemen:

Please advised that the above-captioned matter has been set down for hearing on July 7, 1982 at 10:00 A. M. before The Honorable Robert L. Powell, Circuit Court of Giles County, Pearisburg, Virginia, 24134.

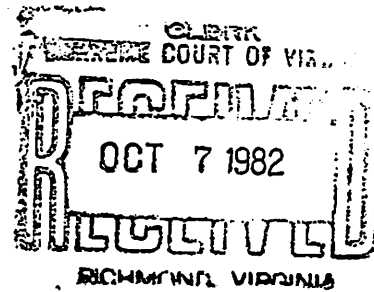
Sincerely yours,

Gary C. Hancock

✓ SCH:msw

Cc: The Honorable Robert L. Powell

821605



VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF GILES

J. GRANT CORBOY, ADMINISTRATOR
AND ADMINISTRATOR WITH THE WILL
ANNEXED, OF THE ESTATE OF
FRANK I. WHITTEN, JR.;

vs.

RILLA M. KING, et als

Hearing Date: July 7, 1982

Time: 11:00 a.m.

Place: Giles County Circuit Court
Pearisburg, Virginia

Present: The Honorable Robert L. Powell
Judge

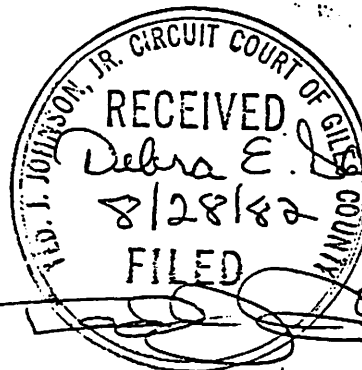
D. Stephen Haga, Jr., Esq.

Gary Hancock, Esq.

Samuel P. Campbell

David T. Mullins, Esq.

Debra E. Scott, Notary Public



JUDGE POWELL:

On pleadings and on the briefs the Court made its ruling and after that ruling was made the original of the will was discovered. The original proceeding came on the copy of the, of the will which was executed as an original will. As I understand it, the signatures were done as an original. And the Court made its ruling that it was of the opinion that based upon the finding of an intent to make partial revocation to the will. Ordered that the will was to be probated as it was submitted and then the original of the will appeared and that brings us to this stage. Mr. Haga, I believe in the course of the second lap you filed a motion for a summary judgment.

MR. HAGA:

Yes, sir.

JUDGE POWELL:

Is that right?

MR. HAGA:

Yes, sir.

MR. HANCOCK:

Your honor, we didn't file a written motion but I think we would make a oral motion for summary judgment to the same effect just as a matter of record based upon your earlier decision and the briefs we have submitted. Now, I can put that in writing if you would like for me to.

JUDGE POWELL:

Well, I will just take this motion for summary judgment under advisement because we will have

to hear the argument and make some decision on whether the new will has any effect on the Court's ruling. So I suppose, Mr. Haga, you're the one bearing the burden are you?

MR HAGA:

Yes, sir. I have a few things to say concerning this matter. I think there are some issues open to the Court needing to be resolved. First, did Frank I. Whitten, Jr. die testate or intestate? It is our position that Mr. Whitten died testate because he drafted a proper attested will. There was no subsequent codocil or revocation of his properly attested will which was found in a lockbox in January of this year. When the Court reviews the statutes in Virginia, specifically 64.1-58, which is we believe the controlling statute, the Court must interpret that statute strickly by using obviously some equitable principles but the legislature has construed the law for the Court and has directed the Court as to its findings. I think that it is obvious through these statutes that any change made by a testator for an attested will would have to be made using equal dignities. There was in the finding of the duplicate will in Mr. Whitten's home was no indication that he was the party who made pencil marks on that will. Specifically, there was no initial on

on the will evidencing that there was no signature. Any modification of a will will require animus revocandi indicating that the testator has to have an intent to change. Now Mr. Whitten made a calculated act in destroying himself. He was aware that the duplicate, the original if you will, was located in the lockbox among his most valued possessions. We submit to the Court that the will in his lockbox has absolutely no value to anyone but Frank Whitten. He prepared the will; he placed it in his lockbox. You don't put yesterday's newspaper in your lockbox. The evidence is before the Court is lacking to show a changed intent on Mr. Whitten's part as it relates to the modification of the will. Presumptions are overcome by the facts recently discovered. There is no doubt in anyone's mind that Mr. Whitten is the party that controlled the will in his lockbox. He had access to it; he had the key. Now, next question before the Court is how many wills are there? We submit to the Court that there is only one will. We submit to the Court that the quality of possession would indicate that the will found in the lockbox is the one that should be entered for probate. That again is the only will that Mr. Whitten was to have access to; he is the only person who could have access to that one. Now all of

the cases which we have seen sighted by those other parties interested in the Whitten estate regarding duplicate wills indicate situations in which the will was found in the possession of someone else. In this case Mr. Whitten took care to duplicate his will, execute both and maintain both in his possession. One, we submit to the Court in a better possession than the other; one in his lockbox again. All of the cases dealing with revocation or partial revocation submitted to the Court have dealt with holographic wills not with attested wills. Why did Mr. Whitten make two wills if he did not intend to give credence to both. Why did he put his original will in his lockbox then commit a calculated act without thinking that people, his heirs, whomever would enter his lockbox and discover this will amongst his most valued possessions, amongst his possession. Now suicide is calculated it is not an accident; suicide is calculated. Now the third question or point that we have before the Court at this time is why are these other parties arguing, why are they bringing forward their positions regarding this estate? I think it is quite obvious to the Court that it is a matter of greed. Mr. Whitten prepared duplicate wills, stated in his will that Mrs. Etgen was only

to be taken out of that will if she were engaged or married to another man. That can be read in both wills. And neither of those things has taken place. Another point I would ask the Court in regard to changing of the will; would the Court take a different position if the will with the interlineations and markings had been found in the lockbox; and the original without any markings had been found in the home of Mr. Whitten? Again pointing to the fact, the will in the lockbox is the one he had access to. And again he would not have prepared two wills had he not wanted both of them to be read. Or for some reason he wanted something when he prepared two wills. We think though, I believe in our society that the lockbox is where you put your most valued possessions. and again we know that both wills were in his possession but we don't know who had access to his home. We know who had access to the lockbox. We don't know who made the markings on the will. We don't know if in fact it was made by the testator or whether he had the proper animus revocandi when he made those markings. Now, the last point I would make to the Court concerning this case at this time is that there is a purpose in our society, and I think you

you can go back to some of your law school days and realize this, there is a purpose for us having a statute on wills because dead people can't come forward and tell us what was going on in their minds. Dead people can't come forward and say "No, I didn't make those markings". Some of the saddest case law that this Court or any of us have read have involved wills. The legislature is strict on the procedures that must be followed in executing a proper will and this Court is a court, a Circuit Court which obviously looks at cases on a case by case basis but also sets precedent and it is our position here that again you have to look at the statute. Now you have to interpret the statute carefully, you have to realize that the cases cited by the opponents dealt with holographic wills, and in addition, cases cited by the proponent deal with wills in the possession, if there were duplicate wills, possessions where never in the hands of both persons unless they found a case out of our jurisdiction. All of the cases in which I have been able to find have dealt with possession in the hands of another and then there had to be a finding of *aminus revocandi*. We submit to the Court, your Honor, that Mr. Whitten died testate with a will in his lockbox. We ask the Court for equity in favor of my client.

Thank you.

MR. HANCOCK:

Well the first issue that Steve addressed was that of whether or not there had been a proper cancellation or partial cancellation by revocation. I think the Court has already addressed that in its previous opinion and the Court ruled that there was indeed there was a partial cancellation and revocation in this particular case. I don't think we need to get into the facts of that. I think we have got that decision already made by the Court based on the facts that the Court has already concluded that Mr. Whitten did indeed have the required intent to accomplish a partial revocation and unless the new will that has been discovered in the lockbox in any way effects the previous decision I don't think we need to go into that issue. And it is certainly our position that the decision previously made by the Court is not effected by the will that was found in the lockbox. I don't really think I can say anything more than I said in my brief but as just a matter of summary as to what our position is; I think the general rule in this country and the only rule is that with respect to wills that are executed in duplicate is that when one will is revoked or cancelled then the other will or the duplicate

will is likewise revoked or cancelled. The, I think, is cited at the very beginning of our brief the general law from AOR Second, the annotation being entitled the destruction or cancellation of one copy of will being executed in duplicate has revocation of other copy and the general rule is with respect to the question as a matter of substantive law a testator can revoke a will executed in duplicate or triplicate by performing on one of the counterparts. The acts of destruction prescribed by statute for the revocation of a single will. There seems to be doubt that he can. I submit that there is no minority rule on this, the rule, the only rule is that when one executes a will in duplicate if you properly revoke or cancel one then the other one falls immediately behind. You don't have separate wills standing each individual and that is why it has been held that once a will, if a will is not found, for example it has been destroyed totally, or if it is found in a marked up or cancelled state then the law states that the burden then shifts to the proponent who would introduce any other copy of that will. Because the law presumes that when a will is found among the personal effects of the decedent in a cancelled state that he intended to cancel the will and that is the will under the law that is accepted into probate

unless and then the burden shifts to someone else to submit another will which may have been executed and not cancelled to show that there was no original proper cancellation by the decedent. There is a case, I think directly on point, that we cite in our brief, and that is the case of Blalock vs Riddock, 1974 case handed down by the Supreme Court of Virginia. If I could I will read basically the decision in that case. "Where a will has been executed in duplicate, and a copy has been retained by the testator and a copy left in the custody of another person" and in this case I believe an attorney, "if the will retained by the testator cannot be found after his death there is a rebuttable presumption that he has destroyed his copy for the purpose of revoking the will. Since the revocation of the will necessarily revokes a copy thereof" and here we had two executed copies thereof in this case "the copy left in possession of the other person may not be admitted to probate, unless or until the proponent proves that the copy retained by the testator was not destroyed by him animus revocandi" or with the intent to cancel or revoke. We have already gone beyond that factual point and decided that there was intent here and I think the law in Virginia and the law throughout the country says that when you

have wills executed in duplicate and you cancel or revokes one of them the other necessarily falls in line and is also revoked or cancelled. I site a number of cases, a North Carolina and a Pennsylvania case which holds like the Blalock vs Riddock case which has been affirmed by the Virginia courts. I site another full page of cases so holding on the facts we believe are comparable to the facts in this case. We believe that we have the presumptions which presumes that this will was properlyly revoked and the Court has so held. The burden we believe now shifts to Ms. Etgen to prove that the testator did not have sufficient intent to revoke his will. I don't think there is any evidence at all before the Court on that point. All the evidence points to the fact that he would want to cancel or revoke his will. He and Ms. Etgen had lived together in the same household, he had made her the primary beneficiary of his estate, they had had an arguement, she had left very shortly before his death and sometime after the point that she had left and he determined that he would commit suicide and prior to doing so he excised her name from the will and it is obvious why he did that, they had broken up and he didn't want to leave his estate to her. He obviously had other

beneficiaries in mind because there were secondary provisions made for beneficiaries in the will. Most of the older cases that you look at the copy, the second executed copy that is not cancelled or destroyed is usually in the hands of another person, usually an attorney, and I think back in the 30's and 40's probably people didn't use lockboxes and certainly not to the extent that they do today and I am not even sure if most of the banks around here have lockboxes. But I think today most of the attorneys do not want to keep original copies of the wills in their office and they recommend that they put their wills in a lockbox and he did that and certainly that was under his control. But he had an original executed copy of his will in his possession and when he decided to commit suicide I think it is quite easy to understand that he may not have wanted to go down to the bank and make the cancellation on the copy, he made it on the executed copy he had and that is sufficient to cancel the other will. I don't think there is any question about that in law in the State of Virginia or other States of the United States. We would submit to the Court then that based on the law that we have cited in our brief that there is no change in either facts of the law

the Court rendered its previous opinion and the Court should reaffirm that opinion.

Mr. Mullins:

Well, obviously, Judge, I think that I have made my points, I have tried to make my points in the memorandum that is already filed. I don't think there is much I can add for you here today. Of course I represent the intestate heirs who of course are saying that the confusion relating to this matter; two separate wills which have been found and whatever, states they have been found and wherever they have been found throws this matter into such confusion that there would appear to be no will that can be admitted to probate with regard to the residuary estate in this, in this matter. We feel that the newly discovered evidence, the discovery of that second will in the lockbox, certainly negatives the Court's earlier finding of intent and of the revocandi, or it certainly, at least, throws the question back out into the open with this newly discovered evidence gives something else to the Court which it must consider in deciding whether there was an intent to revoke in this matter. Ah, I think there are flaws in both Gary and Steve's position concerning either of the wills which have been presented to the Court being admitted to probate with regard to the residuary estate that is involved there. In our memo I feel that you can read the two wills together and possibly with the opening clauses a

few personal items, if you read the two wills together, each divides some personal property among some family members and friends of Mr. Whitten.

I feel that Gary's position in this matter begs the question; it assumes that partial revocation of the photocopy is valid even facing the newly discovered will. The rule that revocation of a executed copy of a will also revokes all other copies of the will as been recognized and applied in a number of cases that are listed. That is true. Certainly, the revocation of an executed will can revoke the copies but in this case the mere fact that we have discovered the an addition to the will that was in his possession another separate will which is in some way contradictory to that will opens the whole question up as to whether that revocation of the executed will in his possession in fact valid. And I think that question is back before the Court to be decided in light of those new facts.. As I pointed out in my memorandum, I think that the discovery shows us that the testator's intent or doesn't show us that the testator's intent is at all clear by the discovery of that other will. The mere fact that the executed wills were in existence after his death casts some confusion. We have a very meticulous individual here who had been very meticulous about drafting his will. Having a couple of copies around. Very carefully, meticulously disposing of every thing in his estate. Alternative beneficiaries:

Executing two copies and then you discover some loose ends, some undone things. You have a will which was in his possession which for all that we can tell determine from the facts may have been something that he was using as scratch paper. Deciding what he might want to do in redoing a will. Meticulously going forward and redoing his will. There is really no way of telling what his intent or testamentary capacity or feelings would have been at that particular point. Of course, the other position regarding Ms. Etgen taking the property certainly ignored the facts of what happened between those people and in the days before Mr. Whitten committed suicide and that to read those facts as showing an intent of his that his property going to Ms. Etgen I think may stretch the fact to some extent. A lot of cases have cited in the memorandum in a number of jurisdictions, Judge, we have cited a case, I think a case in Virginia law concerning a testamentary documents of the same date or undated. The case Whittel vs. Roper which I believe is set out in memorandum for you to read at your leisure. I feel that were there are two wills of the same date found together that it is up to the Court to try to read those two wills if possible and reconcile them and dispose of the individual's property. If they are inconsistent in facts, I think that case indicates that there is a void causing uncertainty of those wills then neither one of the

wills can be admitted to probate with regard to that residuary estate. And in this case there is certainly an inconsistency between the two wills which bear the same date. There is an assumption that the marks on the will found in Mr. Whitten's possession were made after the execution of the date. But I think after the execution before the witnesses but I think you you are left not having a holographic you are left with the date of the will when it was executed before the witnesses is the effective date of that will, and trying to read these two wills together I think their inconsistency would deny probate to either with regard to that residuary estate. For the reasons set out in our memo we would ask the Court render judgment on behalf of the intestate heirs with regard to that residuary estate.

Mr. Haga:

Judge, if I may say something short and rebuttal. Mr. Whitten died after executing two wills. He wanted his property passed testate. Now taking forward Mr. Hancock's earlier argument, and I think he has used a great deal of speculation. He has indicated that Mr. Whitten saw an attorney, that the attorney said put it in your lockbox. What do you put in your lockbox? Do you put the copy in the lockbox or do you put the original. You put the one you want to be submitted to probate in the lockbox or the one that you want to use for reference. Secondly, it has been proposed here that because Mr. Whitten committed suicide and because he and Ms. Etgen had had a temporary falling

out that he killed himself and has fallen out of love with her. I don't think that stands to reason that a man kills himself over a woman that he doesn't love and I don't think any of us here today can say why he killed himself. That is too speculative. Now, we would simply ask the Court again to take cognizance of the fact that this was an attested will, both wills being in the possession of the testator at his death, markings found on one of an unknown nature and by an unknown source on the one that was a copy that was in a place that could have most easily been tampered with by anyone. That the original was again in his lockbox and we would again ask the Court to strictly construe the statutes on wills.

Mr. Hancock:

May I make one final comment your honor? I don't mean to labor it the rest of the day but I think the (inaudible) will construction is that you, that Courts try to give testator's intent effect if they can do so within the law. He made those markings on his will obviously for some purpose. And the way they were made, the way the paragraphs were renumbered he obviously did it with the intent of changing the will. The question of two executed has come up before. It has come up in many, many states that are stated in our brief including Virginia. When there are two executed wills the Courts have presumed in following that cardinal principal of giving effect of the testator's intent. That the testator who has a will

in his possession and is accessible to him will very likely rip it up, burn it, make changes on that will because that is the one he has immediately available to him. And they presume that when there are two executed copies of the will, in all of the cases, they have held that the result is if one will is properly revoked or cancelled then the other will will be properly revoked or cancelled in the same manner. And, ah, I think that is the law. I think this issue has come up many, many numerous occasions but it has always been held in that manner unless some fraud or something could be shown, for example - someone else went in and tore up the will or something like that. I feel, however, the burden is not on us to show that. The law presumes that the will that has been partially cancelled be admitted in probate and the burden has shifted to the other side to show that sufficient intent was not there. I don't think that has been done.

Mr. Mullins:

There is nothing further I can add your honor.

Judge Powell:

We had a stipulation of fact. (looking through file). I think the first one here, Gary, is the one you fixed up.

Mr. Hancock:

I fixed up both of them actually.

Do you want me to see if I can locate that in there?

Judge Powell:

I had it here a moment ago. The reason I refer to the stipulation of facts is that I thought it was agreed, treated as agreed that he did make the

interlineations on the copy of the will. The one that was marked was the one to be entered to probate. And I suppose I read it because of the last part of the stipulation was that there was respectively submitted that the sole question for determination by this Court is the legal effect of the interlineations and the deletions found on the will of Frank I. Whitten, Jr. with regard to whether the testator made total or partial revocation of his will or whether the interlineations were of no effect. And we approached this thing and there has never been any indication that of any argument that I recall that any person other than the testator made any mark on the will. Has there ever been that question raised?

Mr. Hancock:

When we first got together, I know Mr. Winder was here, and there was never any question that he did it. The only question was what legal effect of his doing it did it have.

Mr. Haga:

Judge, I will say this, and Mr. Hancock is correct, this was before I was made a part in this.

Judge Powell:

Yes, I understand that ...

Mr. Haga:

But I would say this in defense of my client. Anything that Mr. Winder might have signed at that time without knowledge of the finding of the subsequent instrument. I think this has opened that issue up again all together. He would not have, I am certain, if the other will been found in the lockbox at that time, if the Court is interpreting the stipulation of facts that I am unfamiliar with, he would not have

endorsed that and suggested to the Court that we are certain that Mr. Whitten did it. The finding of the duplicate, the original changes that position entirely.

Mr. Hancock:

What I gather from what you're saying is you're questioning the fact that he made the interlineations, it's the questions of whether he did that with the intent....

Mr. Haga:

No. We are questioning whether, definitely, obviously, we are questioning, we don't know whether he made the, we are suggesting that he did not, obviously, make those interlineations.. We feel that he by the finding of this will in a lockbox in the points I made in argument here today indicate that we feel that is the will that he valued the most. And that we feel that some other source made those marks or that Mr. Whitten was an educated man, he prepared the will. He could have drafted a holographic will. He could have prepared a subsequent will. We don't feel that he made those marks. He knew what was involved.

Mr. Hancock:

Well, I think also though that he was a recluse. He lived by himself on a farm. He prepared this will himself, or at least we believe an attorney ever prepared it. We think he typed it up himself or at least that is what we said at the first hearing. Ms. Etgen has never raised before the Court rendered its last decision about, any question about whether he

made the marks himself. But I am not sure it makes any difference. I draw the Court's attention to Franklin v McClean which is Virginia Supreme Court case decided in 1951 which has been cited over and over again. In that case, a will was found with pencil lines through it in a locked closet in a bedroom of the testatrix. There was no evidence to who or when the lines were made. It was presumed by the Virginia Supreme Court that they were made by the testatrix with the intention of revoking the instrument. I think the presumption is in fact that if a will is found among the personal effects of the decedent in a totally or partially cancelled form then it is presumed that he did. And I think that presumption definitely governs here. I don't think it makes any difference.

Mr. Mullins:

My only understanding, Judge, on what we agreed to as far as who made those marks is simply to be guided by whatever the presumption would given facts as they are at the time as we know them. No one in the previous times brought forward any evidence to rebutt what was then our only presumption. Only one will found in Mr. Whitten's possession. No facts were brought forward to rebutt that. Now whether the presumption still holds, I guess, is the question we are raising here in which, I think Steve has a good point about it being reopened at this time, whether that presumption still holds.

Mr. Hancock:

Your honor, I really don't see any facts in my own

mind to change what the Court did before. He did what he did to the will he had there in the house and then he took his own life. I don't think...

Judge Powell:

Frankly, that is my thought. My ruling, first ruling may have been wrong, I don't know. But I felt I was comfortable with my ruling that he had intention to revoke, partially revoke that first will that was submitted to probate. And I felt that actually in

the back of all of our minds we felt that somewhere there was an original will floating around but no one had any evidence of any original will and I think it was perhaps after Mr. Corboy, the administrator of the estate, drilled the lockbox open wasn't it?

Mr. Hancock:

When we had our first hearing, he had gone to try and find the second lockbox because there were some other things that he was not able to find in the home and he went to this bank and said was there a second lockbox. And they said no. And somehow they mis-sent him a bill that first year. But then a bill came in last year and that is how he happened to find it. But of course the key was gone and he couldn't find the key so I think they did have to drill it open. It's a strange...

Mr. Campbell :

When the bank merged over to the Roanoke, when they merged with Roanoke, ah, the Roanoke told them to send out all these past due notices on lockboxes. That is when it was discovered.

Judge Powell:

What was in my mind on the first reading was that

he had that will at home where it was accessible

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to him and he lived back on the mountain top down here at wayside. That's been in our discussion, he owns a farm over there and that he had this will there available to him and as according to the stipulation that soon after his girlfriend left him that this change was made and considering the provision that he made in the will for her that she was to take under the will unless she did certain things which being engaged or taking up with someone else. It is a matter to consider for revocation provision to her. I felt satisfied that the intent of the testator to make a partial revocation to the will as far as any provision to his girlfriend was concerned. Now, I don't see how the Court can at that finding or in that opinion could reopen this stipulation of fact unless we were to say that every time we may have a change of counsel on a case we may have different ideas toward the case. Now, this stipulation was talked out a long time. I thought we might come close to having (inaudible) hearing. In fact I think I called the parties to see if we should have an evidential hearing and they all felt that they could stipulate the facts so that the Court might proceed in making a determination of the case. I really feel that he did what he wanted to do with that copy of the will he had at home and didn't think or feel it necessary to come to the bank and get the original will. The fact is that

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he may have forgotten about the lockbox himself.
I don't know about that. I feel that I would
rule that the first, the will that was admitted
to probate was in fact a partial revocation will
and that the subsequent will, original will would
not effect the probate.

Mr. Haga:

For the record, your honor, we would object to
the stipulation being made a part of the record
at this time because of the finding of the other
will.

Judge Powell:

Well you might refer an order setting forth
and providing in the Court's ruling about the
stipulation and assure your object and save all
your objections.

Mr. Haga:

Yes sir.

Mr. Hancock:

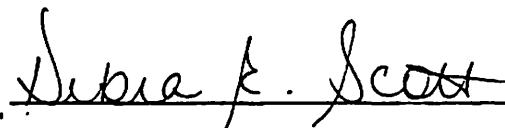
Do you want me to do the order?

Mr. Haga:

Yes.

Duly taken and transcribed by me, a Notary Public
in and for the State of Virginia on this 7th day of July, 1982.

My commission expires: July 27, 1984.


NOTARY PUBLIC

THIS CAUSE having regularly matured, been set for hearing and docketed, came on this day to be heard on the petition and exhibits filed therewith, upon answers of all respondents, upon numerous hearings ore tenus before the Court, upon the briefs and memoranda submitted by the parties and upon the Stipulation of Facts, and was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court:

1. That Frank I. Whitten, Jr., a resident of Giles County, Virginia, died on March 2, 1978.

2. That a signed, attested and properly acknowledged, and executed photostatic copy of his Last Will and Testament, dated September 6, 1977, was found among the decedent's personal effects and papers at his home shortly after his death, said will having been in the custody of the testator/decedent after its execution until the time it was found after his death.

3. That this copy of decedent's will was duly admitted to probate before the Clerk of this Court on August 30, 1978, and was recorded in Will Book 23, at page 181.

4. That petitioner, J. Grant Corboy, qualified as administrator and as administrator with the will annexed of decedent's estate.

5. That at the time the executed copy of decedent's will was admitted to probate, no other will, neither the original copy of the September 6, 1977 will nor a subsequent will, could be found amount the decedent's effects or in his known safety deposit box.

6. That lines were drawn through or across certain

passages of the executed copy of the will admitted to probate: namely, eleven diagonal lines were drawn through all provisions of the sixth dispository paragraph, which paragraph originally left the entire balance of decedent's estate to respondent, Carolyn Elizabeth Etgen; a single horizontal line through the word "seventh" in the seventh dispository paragraph with the renumbering "6th" penciled in above the stricken word; a single horizontal line through the word "eighth" in the eighth dispository paragraph with the renumbering "7th" penciled in above the stricken word; a single horizontal line through the word "ninth" in the ninth dispository paragraph with the renumbering "8th" penciled in above the stricken word; a single horizontal line through the word "tenth" in the tenth dispository paragraph and the redesignation "ninth" penciled in above the stricken word; a single horizontal line through the word "eleventh" in the eleventh dispository paragraph with the redesignation "tenth" penciled in above the stricken word; a single horizontal line through the word "twelfth" in the twelfth dispository paragraph with the redesignation "thirteenth" (sic) penciled in above the stricken word; a single horizontal line through the word "thirteenth" in the thirteenth dispository paragraph with the renumbering "14" (sic) penciled in above the stricken word, and one or more horizontal lines through the provision in paragraph thirteen appointing Carolyn Elizabeth Etgen as executrix of decedent's will and appointing her brother, Michael W. Etgen, as alternate executor, with the letters "or" penciled in above the stricken letters "rix" of the word "executrix"; a single horizontal line through the word "fourteenth" in the fourteenth dispository paragraph with the

renumbering "15" (sic) penciled in above the stricken word. No other lines or marks appeared on the will admitted to probate.

7. That no marks or lines appeared on the copy of the will at the time decedent signed the will and at the time witnesses attested to his signature.

8. That since the copy of the will was found among the personal effects of decedent immediately following his death, there arises a rebuttable presumption that decedent himself made the marks on the will striking out certain words and clauses.

9. That the burden is upon the opponents of this probated will to rebut this presumption that the marks on the will were the sole and intentional act of decedent and that the opponents of this will have failed to carry their burden.

10. That under the circumstances of this case, and based upon the Stipulation of Facts agreed to by counsel for petitioner and by all counsel for respondents (but to which Counsel for respondent Carolyn Elizabeth Etgen, now takes exception), the Court ruled by letter opinion dated November 4, 1981, that decedent intended to effect a partial revocation of his will by striking out and thus cancelling all provisions in his will in favor of Ms. Etgen, the Court finding that Ms. Etgen had cohabited with decedent but shortly prior to his death when their relationship had been severed and Ms. Etgen moved out of his home. The Court finds that there was no intention on the part of testator to revoke the entire will, but finds an intent to effect only a partial revocation so as to eliminate Ms. Etgen as a beneficiary.

11. That subsequent to the ruling of this Court, on January 18, 1982, a second safe deposit box formerly rented by

Frank I. Whitten, Jr., was discovered and broken open and therein was found the original, executed and attested copy of decedent's will. This original copy bore no marks upon it;

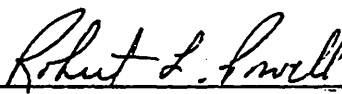
12. That the subsequent discovery of the original will has no effect on this Court's ruling of November 4, 1981, and that testator intended to and did effect an equivalent partial revocation of the original copy of his will by partially revoking the executed copy of that same will in his immediate possession.

13. That, therefore, consistent with and under the provision of Virginia Code Section 64.1-58 permitting partial revocation of an attested will by cancellation, decedent intended to and did effect a partial revocation of his will which eliminated Ms. Etgen as a beneficiary.

14. That Frank I. Whitten, Jr., died testate and that the unrevoked balance of his will was properly admitted to probate.

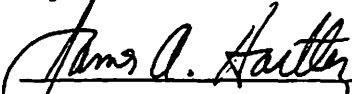
THEREFORE, it is ORDERED, ADJUDGED, and DECREED that petitioner, J. Grant Corboy, administrator and administrator with the will annexed of the estate of Frank I. Whitten, Jr., shall administer said estate and shall make distribution of said estate in conformity with this decree and with the unrevoked provisions of the will of Frank I. Whitten, Jr., as admitted to probate.

Entered this 7 day of ^{September}~~August~~, 1982



Judge

Requested:



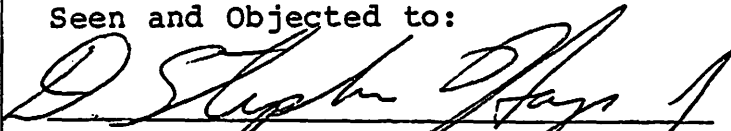
James A. Hartley
Counsel for Petitioner

Seen and Agreed to:



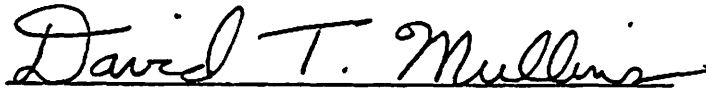
Gary C. Hancock
Counsel for Respondents,
The Nature Conservancy and
Chris Flester

Seen and Objected to:



D, Stephen Haga, Jr.
Counsel for Respondent
Carolyn Etgen

Seen and Objected to:

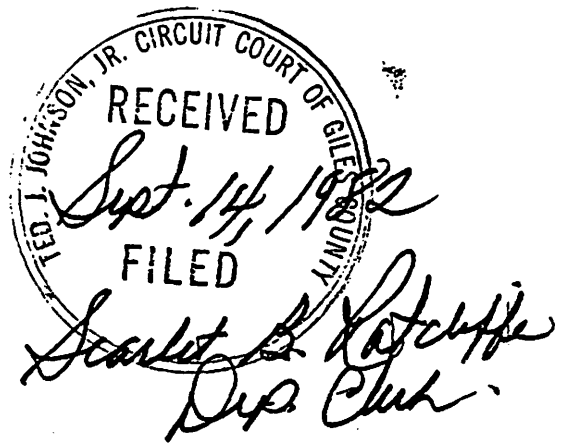


David T. Mullins
Counsel for Respondents
Intestate Heirs of Frank I. Whitten, Jr.

Seen and Objected to:



William O. Smith, Counsel for Respondents
Intestate Heirs of Frank I. Whitten, Jr.



NOTICE OF
APPEAL --

NOTICE IS HEREBY GIVEN YOU, of the intention of the Respondent, Carolyn Elizabeth Etgen, to appeal the adverse final ruling of the Honorable Robert Powell, Circuit Court for Giles County, Virginia, entered on September 7, 1982 herein.

The Clerk is therefore respectfully requested to compile the record for submission as appropriate.

CAROLYN ELIZABETH ETGEN

D. Stephen Haga, Jr.
Counsel for the Respondent/Appellant
P. O. Box 338
Christiansburg, Virginia 24073
(703) 382-4401

C E R T I F I C A T E

I, D. Stephen Haga, Jr., hereby certify that I have this 13th day of September, 1982, mailed or delivered a true copy of the foregoing Notice of Appeal, to all counsel of record herein, as listed in the said Notice.

D. Stephen Haga, Jr.

ASSIGNMENTS OF ERROR

I. The Court erred in refusing to reopen the fact issue as to the presumption of authorship of the pencil marks upon the production and introduction of afterdiscovered evidence, which was not originally available through no fault of the Respondent/Appellant Etgen.

II. The Court erred in ruling that a partial revocation of the terms of the will resulted from the discovery of the pencil interlineations on the copy of the will previously admitted to probate.