

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SALUDA COUNTY  
Court of Common Pleas

Kathy O. Rushton, Special Referee

APPELLATE CASE NUMBER: 2012-208166

BOBBY JO CLARK

Respondent

v.

FAIRY BELL IRVING, ANDREW IRVING A/K/A/ ANDREW ERVING, ALFONZO IRVING A/K/A/ALFONZO ERVING, JOHN D. IRVING A/K/A JOHN D. ERVING, WILLIAM T. IRVING A/K/A WILLIAM T. ERVING, ROBERT IRVING, SR., A/K/A ROBERT IRVING,SR., SALLY MAY MORGAN, F/K/A SALLIE MAY IRVING, MINNIE LEE BUTLER, F/K/A MINNIE LEE IRVING, JOYCE THELMA TAYLOR, F/K/A JOYCE THELMA IRVING, MARY IRVING A/K/A MARY ERVING, MAMIE IRVING, A/K/A/ MAMIE ERVING, JESSIE INA IRVING A/K/A JESSIE INA ERVING, JULIOUS IRVING, A/K/A JULIOUS ERVING, RASHELL IRVING, A/K/A RASHELL ERVING, FAIRY MAY IRVING, THELMA IRVING, ANELL I RAY JULIOUS IRVING, JR., ALFREDA IRVING, THELMA CARTLELE, BENNIE WARREN BUTLER, AND PERSONS CLAIMING ANY RIGHT, TITLE ESTATE, INTEREST IN OR LIEN UPON THE REAL ESTATE DESCRIBED IN THE COMPLAINT HEREIN, ANY UNKNOWN ADULTS BEING A CLASS DESIGNATED AS JOHN DOE; AND ANY UNKNOWN MINORS OR OTHER PERSONS UNDER LEGAL DISABILITY BEING A CLASS DESIGNATED AS RICHARD ROE, DEFENDANTS,

Of whom Joyce Thelma Irving .....

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APR 25 2013

INITIAL BRIEF OF APPELLANT

SC Court of Appeals

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## STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE APPELLANT FILE A MOTION TO SET ASIDE THE SPECIAL REFEREE'S DECEMBER 9, 2011 ORDER, IF SO, WAS SAID FILING TIMELY
- II. DOES THE ABSENCE OF A COURT REPORTER'S TRANSCRIPT RENDER AN ORDER OF PARTITION VOID?
- III. IS THE OPPORTUNITY TO BE HEARD AN ESSENTIAL ELEMENT OF DUE PROCESS?
- IV. DOES SOUTH CAROLINA OF LAWS, § 15-61-25 ("RIGHT OF FIRST REFUSAL") REQUIRE NOTICE, EVEN IF THE PARTY IS IN DEFAULT?

## STATEMENT OF THE CASE

### Procedural History of this Case

The Appellant, Joyce Thelma Irving, a resident of the State of Illinois, files this Appeal upon an Order of Honorable Kathy Rushton dated December 9, 2010. Appellant received written notice of the entry of this order on February 26, 2011. A Motion to Set-Side the Order was filed on June 15, 2011, pursuant to SCRCP rule 60(b) alleging that the Order was void because of the absence of a contemporaneous transcript of record. The Motion was denied and this appeal follows. Respondent filed a motion to Dismiss the Appeal on dated October 4, 2012 and the Appellant filed a memorandum in support of the Appeal, dated October 4, 2012. By order of this Court dated February 8, 2013. Appellant was given leave to proceeded with the Appeal

## FACTS

Appellant filed a Motion to set-aside an Order of the sale of approximately 100 acres of land in Saluda County, South Carolina dated June 15, 2011. The Appellant is an heir to the deceased title-holder. No probate administration was started on the estate of the deceased title-holder within Ten (10) years after his death thus requiring judicial intervention to determine the heirs of

his estate and to vest title in those persons who are the lawful heirs of the decedent and , as prayed for in Respondent’s complaint, to partition the property. A hearing was held to November 15, 2011, before the Honorable Kathy Rushton, with the Respondent, his counsel, the Guardian ad litem and Respondent’s counsel.

#### STANDARD OF REVIEW

In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330 (1976& Supp. 2005), and S.C. Code Ann § 14-8-200 (Supp. 2005)); *Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 372, 532 S.E. 2d 269, 272 (2000) (same); [370 S.C. 467] *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000)(same). The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would be bet comport with the law and pubic policies of this state and the Court’s sense of law, justice, and right. *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005) *Antley v. New York Life Ins. Co.*, 139S.C. 23,30,137S.E. 199, 201 (1927) (“In [a] state of conflict between the decisions, it is up to the court to “choose ye this day whom ye will serve”; and, in the duty for this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right “)

#### ARGUMENTS

- I. DID THE RESPONDENT FILE A MOTION TO SET ASIDE THE SPECIAL REFEREE’S DECEMBER 9, 2011 ORDER, IF SO, WAS SAID FILING TIMELY?

Thelma Joyce Irving (hereinafter referred to as “Appellant”) thru her counsel properly filed a Motion to set aside the Order, dated June 15, 2011 of the Special Referee, Kathy O.

Ruston, in the Office of the Clerk of Court for Saluda County. Said Motion was dated June 15, 2011 and was supplemented by a Memorandum in Support of the Motion. Both the Motion and the Memorandum stated that the purpose of the Motion was to ask the Court to set-aside the Order, of Sale, dated June 1, 2010. Although the Motion failed to state the date of the Order at issue, the Memorandum in Support of the Motion defined the issues objected to by the Respondent. Respondent received a copy of the filed Motion from the Saluda County Clerk of Court and was there was never any indication from the Clerk's office that the filing fee for the Motion was not paid.

II. DOES THE ABSENCE OF A COURT REPORTER'S TRANSCRIPT RENDER AN ORDER OF PARTITION VOID?

The South Carolina Rules of Civil Procedure, Rule 71(Foreclosure and Partition) requires in Section 71(4)(e), that in all actions where title is at issue a transcript of record is required. In pertinent part the rules mandate the proper procedure as follows:

Actions When Title Is at Issue. In foreclosure or partition actions when title to real property is at issue the court or master to whom the action is referred shall take testimony and receive evidence as to the title and interest in the premises of the several parties. In all such actions the judge or master shall ascertain the rights and interests of the several parties and set forth in the report or order of judgment the conveyances or probate estates, if any, through which the rights or interests were acquired. In all such actions a transcript of record shall be made and preserved in the case file in the office of the clerk of court.

Given the language of Rule 71(4)(e), is it mandatory or permissive that a transcript of record be made of the proceedings in question? The South Carolina Appellate Court case of Linda Mc Company, Inc. v. Shore, 653 S.E.2d 279, 375 S.C. 432 (Ct. App. 2007), in addressing the language in SCRPC Section 15-35-360, requiring an affidavit setting forth the exact amount

due in a money judgment, as being permissive or mandatory. The Sloan Court interpreted the Rule as being permissive because of the use of the term “may”. The Court opined in *Linda Mc Company, Inc. v. Shore*, 653 S.E.2d 279, 375 S.C. 432 (Ct. App. 2007):

+The language in 71(4)(e) states that the transcript requirement is mandatory in its use of the word “shall” rather than “may” indicating a requirement that a transcript of record must be taken of the proceedings in partition actions.

The question then follows whether the absence of a transcript of the proceedings renders the Order void. The Court’s position at the hearing is that a record of the hearing is required but that record is not required to be made contemporaneously with the proceedings.

III. DOES SOUTH CAROLINA OF LAWS, SECTION 15-61-25 (“RIGHT OF FIRST REFUSAL”) REQUIRE NOTICE, EVEN IF THE PARTY IS IN DEFAULT?

The Statutory Right of First Refusal as enumerated in Section 15-61-25 of the South Carolina Code of Laws states in pertinent part:

Right of first refusal of joint tenant or tenant in common to purchase property prior to partition;:

- (A) For the purposes of this section “joint tenants and tenants in common” include heirs or devisees. Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the non-petitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case. The non-petitioning joint tenants or tenants in common shall be allowed to purchase the interest in the property as provided in this section whether default has been entered against them or not. (Emphasis added).

The Court in its Order, declared that Respondent was in default and therefore not to be accorded any further notice nor any other rights as enumerated in Section 15-61-25. The right of first refusal, by its very terms, specifically provides for survival of that right even if the party is in default.

V. WAS THE APPEALANT'S PROPERTY INTERESTS HARMED BY THE COURTS ORDER?

Appellant's absences coupled with the lack of an opportunity to be heard greatly prejudiced her rights in regards to this action, The counsel for the Appellant cannot testify on behalf of the Appellant but Appellants counsel did indicate to the Court that there were some subsequent marriages of some of the now deceased heirs. There was testimony as to the ability of the subject parcel of land to be partitioned in kind and there were procedural objections made by Appellant's counsel that are not found in the Order. Appellant's interest therefore are adversely effected by the absence of a court reporter to properly ascertain what transpired at the hearing and to determine the proper course of action thereafter to protect her property interest. The requirements of due process require the courts in defending individual property rights. The court in *Sloan v. South Carolina Bd. Of Physical Therapy Examiners*, 636 S.E.2d 598 (S.C. 2006) 26209, opined:

The requirements of procedural due process, usually deemed to apply in a contested case or hearing which [370 S.C. 485] affects an individual's property or liberty interest, generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review,

CONCLUSION

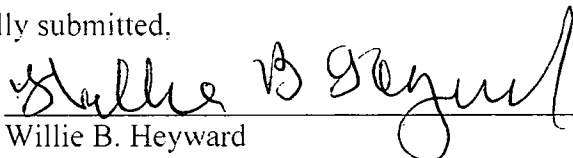
The property interest of the Appellant in this matter has been greatly compromised by the denial of Appellant's motion to set-aside the order of sale. The ability of the Respondents to compose an Order of this degree of complexity without contemporaneous record keeping much less a transcript of the proceedings by a court reporter, as required by statute, hinders the Appellant's ability to reconstruct accurately what transpires and the hearing and ascertain their rights in respect to their property interest. The lower court's order is not one of finality but is

subject to appeal to a higher tribunal. The lack of an accurate transcript from the proceeding below makes that possibility all but impossible.

Appellate asks that she be allowed the opportunity to be heard and an opportunity to confront witnesses and that a contemporaneous record be made of the proceedings.

April 19, 2013

Respectfully submitted,



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