

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2012-213564

RECEIVED
JUN 12 2013

SC Court of Appeals

IN THE MATTER OF: Estate of Robert Ross Dinkins

Mae Lee Dinkins,..... Appellant,

v.

Synovus Trust Company, N.A., Respondent,

William C. Cantey, Jr, Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Mrs. Dinkins Properly Preserved Her Arguments That The Probate Court Erred In Requiring The Estate To Execute A Mortgage And That Synovus Trust's Fees Accrued Beyond The Proper Time.

A. Mrs. Dinkins properly objected to the Probate Court's Order that the Estate execute a mortgage on behalf of Synovus.

The Probate Court does not have the legal authority to force a party to litigation to execute a mortgage. Contrary to Synovus Trust's arguments, Appellant properly preserved the promissory note/mortgage issue, and the issue was raised on appeal. The South Carolina Court of Appeals identified "a ruling by the trial court or a post-trial motion as the two ways to preserve an issue for appeal." *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). Synovus Trust argues that "an issue must not only be raised to the trial judge, it must also be *ruled upon* in order to be preserved for appellate review." Synovus Trust did not take into consideration the fact that South Carolina courts have found that a trial court need not rule on a Rule 59(e) motion to preserve the issue raised therein as it is sufficient to preserve the issue raised in the motion "without a judicial decision on the issue." *Sierra Club v. S. Carolina Dept. of Health & Envtl. Control*, 387 S.C. 424, 434, 693 S.E.2d 13, 18 (Ct. App. 2010).¹

The issue of the mortgage was properly raised and ruled upon by the Probate Court, and a Rule 59(e) motion was timely filed by the Appellant with the Sumter County Probate Court on January 11, 2012. Synovus Trust requested in its prayer for relief its "Request for Compensation," and the Probate Court did rule on the issue by granting all relief requested by Synovus Trust. (Probate Order, R. ____). This issue was also raised during the hearing before the Probate Court where counsel for Synovus Trust specifically

¹ "[L]awyers cannot force trial courts to address an issue, and a proper Rule 59 request is sufficient without a specific judicial decision on the issue." *Sierra Club* at 434 (quoting *Pye* at 566, 633 S.E.2d at 511).

requested the security interest (Mortgage), and thereafter counsel for Mrs. Dinkins specifically stated that “We don’t think there’s any authority for the Court to impose essentially a mortgage or a security for fees in this situation.” (Prob. Hr’g Tr. p.289, ll. 12-24; and p. 290, ll.10-25; R. ____).

Additionally, in the Rule 59(e) motion, Mrs. Dinkins raised the issue of the Probate Court granting “unreasonable compensation” on page 3, paragraph 7. Black’s Law Dictionary defines “compensation” as “[r]emuneration and other benefits received in return for services rendered.”² The award of not only a fee amount but also a promissory note and mortgage securing payment of the fee amount would clearly fall under both the definitions of “remuneration” and “other benefits” and thus meet the definition of compensation. Therefore, the issue of both the fee amount and the promissory note and mortgage awarded to Synovus Trust were properly preserved as these issues were before and ruled upon by the Probate Court and clearly part of the timely filed Rule 59(e) motion.

Synovus Trust argues that the Rule 59(e) motion was not specific enough, but Synovus Trust considered all three components [(1) the fee amount; (2) the promissory note; and (3) mortgage] as part of the definition of “compensation” as Synovus Trust specifically filed a “Request for Compensation,” and the relief requested as compensation included all three components. Synovus Trust did not seek just the fee amount as compensation. Instead, it filed a request or petition for payment of personal representative commissions or fees and overreached by seeking the promissory note and mortgage as part of *compensation*. Synovus Trust purposefully chose to caption its petition as a “Request for Compensation.” Therefore, the Rule 59(e) motion addressing

² *Black’s Law Dictionary*, (9th ed. 2009).

the issue of “unreasonable compensation” was specific enough to address the compensation requested and awarded to Synovus Trust (the fee amount, promissory note and mortgage).

Synovus Trust also argues Mrs. Dinkins is judicially estopped from asserting that the “priority of the Probate Order’s command that the Estate execute a promissory note and mortgage was, in fact, raised to and ruled upon by the Probate Court.” This argument lacks merit. The Supreme Court stated that “[t]he doctrine of judicial estoppel is an equitable concept and should be applied sparingly, with clear regard for the facts of the particular case.” *Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004). The Court adopted the following elements necessary for the doctrine of judicial estoppel to apply: “(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.” *Id.* at 215-216. However, even if the Court held that the two positions were inconsistent, satisfying elements 1, 2, and 5, the Appellant did not prevail in the Circuit Court by asserting the positions Synovus Trust is attempting to attack. Additionally, element 4 has not been met as there is no evidence Appellant made an intentional effort to mislead the court. Therefore, this is not an appropriate case for judicial estoppel.

Synovus Trust also asserts the issues were “not listed in the Grounds for Appeal and, therefore, [were] not among the issues to be considered by the Circuit Court,” but

does not provide any authority to support this assertion. Synovus Trust correctly states that the grounds for appeal are required by S.C. Code Ann. Section 62-1-308(a), and Mrs. Dinkins timely filed her grounds for appeal on February 16, 2012. However, Section 62-1-308(a) does not direct what should be included in the Grounds for Appeal. It merely mandates the document must be filed and establishes the time limits and procedures involved.

Additionally, Synovus Trust relies on a string of cases concerning unappealed portions of the lower court's decision to make the argument that the promissory note and mortgage issue was not among the issues to be reviewed on appeal. This reliance is misplaced. There were four portions to the probate court's judgment: denial of the petition for removal of personal representative, granting the request for compensation, accepting the resignation of co-personal representative and the appointment of a successor co-personal representative and trustee. (Probate Court Order; R. ____). The promissory note and mortgage are both components of the compensation. Therefore, the portion of the judgment concerning the granting of compensation to Synovus Trust was properly appealed.

Because the issue of the fee amount, promissory note and mortgage were raised and ruled upon by the Probate Court, and a Rule 59(e) motion was filed addressing the issue of unreasonable compensation clearly addressing the *compensation* requested by Synovus Trust, this issue was preserved for appeal, was properly before the Circuit Court, and is now properly before this Court.

B. Mrs. Dinkins properly objected to the Probate Court's Order regarding the accrual of fees.

Synovus Trust charged fees for nearly a year and one-half beyond what it was entitled under its own fee schedule. Synovus Trust argues this issue was “never raised to or ruled upon by the Probate Court.” However, the issue with the fee schedule was raised in the Probate Court on multiple occasions. (Prob. Hr’g Tr., p.93, ll. 8-20; p.133, l.16 – p.134, l.20; R. ____). Synovus Trust also attached its fee schedules to its request for compensation and incorporated them by reference as evidence it should be paid the requested amount. (Request for Compensation; R. ____). Additionally, as noted above, a Rule 59(e) motion was timely filed and addressed the Probate Court’s awarding “unreasonable compensation” in excess of what was originally agreed upon. Therefore, because the issue was raised and ruled upon in the Probate Court and a motion for reconsideration was filed, this issue was preserved for appeal and is properly before this Court.

II. The Probate Court Did Not Have The Authority To Order The Estate To Execute A Promissory Note And Mortgage In Favor Of Synovus Trust.

There is no authority supporting the order requiring the personal representative of the estate to sign a promissory note and mortgage of real estate. The order of compensation to Synovus Trust violated the clear, unambiguous and plain language of Code Section 62-3-805 which states that “no preference shall be given in the payment of any claim over any other claim of the same class.” Synovus Trust argues that this issue is not a basis for reversal of the Probate Order as the court has “the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.”

The probate court is a court of limited jurisdiction. *Greenfield v. Greenfield*, 245 S.C. 604, 610, 141 S.E.2d 920, 923 (1965). It owes “its present existence to creation by statute, rather than the Constitution, and as such, can exercise only such powers as are directly conferred upon it by legislative enactment and such as may be necessary incident to the execution of the powers expressly granted.” *Id.* (quoting *McCullough v. McCullough*, 242 S.C. 108, 130 S.E.2d 77 (1963)). Synovus Trust has not cited any authority³ which gives the Probate Court the power to issue such an order.

The Probate Court erred by ordering compensation to Synovus Trust and violated the plain language of Code Section 62-3-805 by rewriting the statute to change the order of priority of payment of creditors’ claims and administration expenses. Therefore, the Probate Court’s order should be reversed as the probate judge does not have the authority to require the personal representative to execute a mortgage to guarantee the payment of Synovus Trust’s fees.

III. There Is No Evidence In The Record Supporting The Award Of The Full Fee Amount To Synovus Trust.

In granting the full fee amount to Synovus Trust, the Probate Court found that “Synovus has performed all the duties of its office in a capable and competent manner. Indeed, Synovus has provided extraordinary services above and beyond those typically required for an estate the size of the Estate.” (Probate Order, ¶10; R. ____). The Probate Court also found that “[t]he Synovus Co-Executor Compensation Schedule in effect on the date of the Decedent’s death is the schedule referred to by the parties as the April 2008 PR Fee Schedule.” (Probate Order, ¶13; R. ____). The Probate Court also found

³ Mrs. Dinkins has likewise not discovered any authority giving the Probate Court authority to order a personal representative to execute a note and mortgage.

that Synovus Trust “did not ... fail to perform any duty pertaining to its office.” (Probate Order, ¶9; R. ____). These findings are not supported by the evidence.

There is no evidence to support the Probate Court’s finding that Synovus Trust performed its duties in a “capable and competent manner” nor was there any evidence that Synovus Trust “did not ... fail to perform any duty pertaining to its office.” It is clear from the record that Synovus Trust, a fiduciary, breached the fundamental duty pertaining to its office, the duty of loyalty. It is also clear from the record that Synovus Trust put its own interest above that of all other creditors and beneficiaries of the Estate.

There is also no evidence to support the Probate Court’s finding that Synovus Trust “provided extraordinary services above and beyond those typically required for an estate the size of the Estate.” For example, even though Synovus Trust employees testified that they worked excessively on the decedent’s estate, Synovus Trust failed to submit any written evidence documenting work done on the estate. (Prob. Hr’g Tr., p.254, ll. 8-13; p.256, ll. 5-20; R. ____).

Because there is no evidence supporting the Circuit Court’s affirmation of the Probate Court’s findings, an award of the full fee amount requested by Synovus Trust is not proper, and the Circuit Court Order and Probate Court Order should be reversed.

IV. Synovus Trust Is Not Entitled To Receive Compensation For Its Real Estate Management Services.

Synovus Trust cannot charge the decedent’s estate an additional fee to manage the real estate because it is not licensed to do so. The charging of fees for managing real estate for another is governed by Code Sections 40-57-20, 40-57-30 and 40-57-220. These code sections provide that only licensed property managers may charge a fee for the management of property. However, neither Synovus Trust nor any of the employees

who worked on the estate administration are licensed to manage real estate. (Prob. Hr'g Tr., p.102 – p.103; R. ____). Nonetheless, *in addition* to personal representative fees, Synovus Trust charged \$27,106.09 in real estate management fees.

South Carolina Code Section 40-57-240(1) provides an exception to these statutes stating “real estate licensure statutes [commanding a license to charge a fee] do not apply to ‘the sale, lease, or rental of real estate by an unlicensed *owner* of real estate who *owns* any interest in the real estate if the interest being sold, leased, or rented is identical to the owner’s legal interest” (emphasis added). S.C. Code Ann. §40-57-240(1) (2012). However, this exception does not apply to Synovus Trust. While Synovus Trust, as Co-Personal Representative, had the same *power*⁴ as an absolute owner, it did not *own*⁵ any interest in the estate’s real estate. Thus, South Carolina Code Section § 40-57-240(1) does not apply, Synovus Trust did not have a right to charge the extra real estate management fees, and the Probate Court erred when it awarded these fees to Synovus Trust.

V. This Appeal Should Not Have Been Dismissed By The Circuit Court.

Synovus Trust argued this appeal should have been dismissed by the Circuit Court because Mrs. Dinkins “never filed or served a ‘notice of intention to appeal’ identifying Synovus Trust, a separate and distinct entity from Synovus Bank, as a Respondent” and relies on the *Conner* case to make the argument. *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). Synovus Trust compares itself to the dismissed parties in *Conner* stating “[it] was never served with a Notice of Appeal (to the Circuit Court)

⁴ Section 62-3-711(a) provides that “a personal representative has the same power over the title to property of the estate that an absolute owner would have[.]”

⁵ Section 62-3-101 of the South Carolina Code states that “[u]pon the death of a person, his real property devolves to the persons to whom it is devised by his last will...” S.C. Code Ann. § 62-3-101 (2012).


naming it as a Respondent.” However, the *Conner* case is distinguishable from the current matter on appeal. Appellant filed her notice of appeal on January 9, 2012. The Civil Action Coversheet attached the Notice of Appeal named “Synovus Trust Company” as the Defendant.⁶ (Notice of Appeal; R. ____).

Additionally, even if the Court considers an error has occurred, the error is clearly technical as discussed in *Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899). In *Moody*, the Court found that a mere technical error which did not prejudice or mislead will not defeat the appeal. Synovus Trust’s name was on the Civil Coversheet, Synovus Trust was served with all relevant documents, and Synovus Trust was in correspondence with Appellant’s counsel. As in *Moody*, there cannot be any doubt that Synovus Trust had notice of Appellant’s intention to appeal and was in no way prejudiced or misled.

CONCLUSION

Mrs. Dinkins respectfully asks this Court to reverse the Probate Court’s Order awarding the promissory note and mortgage, and reverse the Probate Court’s Order awarding the full fee amount requested by the Respondent Synovus Trust.

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June 12, 2013

⁶ The Court warns “Parties who assail others upon the purely technical grounds should be careful to see that their mode of attack is itself technically accurate.” *Moody*, at 526 (quoting *Ware v. Miller*, 9 S.C. 16).

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PROOF OF SERVICE

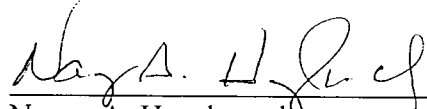
I certify that I have served the Initial Reply Brief of Appellant Mae Lee Dinkins on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on June 12, 2013, addressed to attorneys of record as follows:

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**DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellant respectfully designates the following materials to be included in the Record on Appeal:

1. Conditional Statement of Resignation filed February 23, 2011 (including exhibit);
2. Request for Compensation filed June 1, 2011 (including exhibits);
3. Transcript of hearing held July 7, 2011, pages 1-3, 15-17, 19-22, 28, 36-38, 40, 49, 51, 53-54, 56, 68-69, 70-87, 89-91, 93, 97-98, 100, 102-103, 106-108, 111, 117-119, 122-124, 127-128, 131-134, 138-147, 149-150, 152-159, 161-162, 167-175, 180-182, 186-188, 192, 196-199, 214-218,

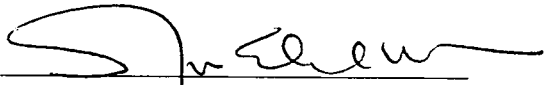
221-236, 239, 244-246, 249-250, 254-256, 259-263, 269-272, 289-290, including Exhibits 1, 3, 4, 5, and 7;

4. Order Denying Petition for Removal of Personal Representative, Granting Request for Compensation, Accepting Resignation of Co-Personal Representative, and Appointing Successor Co-Personal Representative and Trustee, January 3, 2012;
5. Proof of Delivery of Order Denying Petition for Removal of Personal Representative, Granting Request for Compensation, Accepting Resignation of Co-Personal Representative, and Appointing successor Co-Personal Representative and Trustee dated January 6, 2012 (excluding attachments);
6. Notice of Appeal, January 9, 2012;
7. Motion for Reconsideration and/or Motion to Amend Judgment, January 11, 2012;
8. Ground for Appeal, February 16, 2012;
9. Motion to Dismiss filed by Synovus Bank dated March 7, 2012 (excluding exhibits);
10. Brief in Support of Appeal filed by William C. Cantey, Jr., dated June 7, 2012, pages 1 and 9;
11. Brief in Support of William C. Cantey's Motion to Intervene dated June 21, 2012 (excluding exhibits);
12. Petitioner Mae Lee Dinkins' Brief on Appeal dated June 25, 2012, pages 1 and 4 (excluding exhibits);
13. Exhibits 3 and 4 of Petitioner Mae Lee Dinkins' Brief on Appeal, June 25, 2012;
14. Order Granting Synovus Bank's Motion to Dismiss, Granting William C. Cantey, Jr.'s Motion to Intervene, Denying Petitioner's Appeal, and Affirming the Probate Court's January 3, 2012 Order, September 28, 2012;

15. Motion for Reconsideration and/or Motion to Amend Judgment, October 10, 2012; and
16. Order entered November 30, 2012, denying Motion for Reconsideration and/or Motion to Amend Judgment.

I certify that this designation contains no matter which is irrelevant to this appeal.

MOORE, TAYLOR & THOMAS, P.A.

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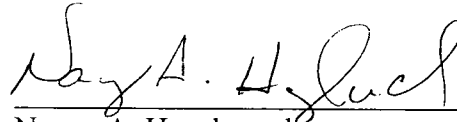
I certify that I have served the Designation of Matter to be Included in the Record on Appeal of Appellant Mae Lee Dinkins on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on June 12, 2013, addressed to attorneys of record as follows:

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