

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

SC Court of Appeals

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2020-001678

Michelle N. Gardner..... Respondent,

v.

Ernest J. Gardner, Jr., Individually and as Personal
Representative of the Estate of Jason F. Gardner Appellant.

PETITION FOR REHEARING

For the reasons set forth below, Appellant respectfully submits this Petition for Rehearing pursuant to Rule 221(a), SCACR, in response to this Court of Appeal’s Order dated March 15, 2023, affirming the Circuit Court’s Order (i) which overruled the Probate Court’s Order concerning the timeliness of Appellant’s creditor’s claim and granting partial summary judgment in favor of Respondent and (ii) which affirmed the Probate Court’s Order finding that the Respondent was not precluded from recovering against retirement accounts proceeds payable to the Estate of Jason F. Gardner and granting partial summary judgment in favor of Respondent.

STANDARD

“A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” Rule 221(a), SCACR.

DISCUSSION

Appellant (“Ernest Gardner”) hereby submits the following arguments raised by him were overlooked or misapprehended by the Court of Appeals, and respectfully asks the Court of Appeals to reconsider their Order affirming the Circuit Court’s rulings that (i) Ernest Gardner, individually, failed to timely file his creditor’s claim against Jason Gardner’s Estate and (ii) Respondent (“Michelle Gardner”) was not precluded from recovering from the retirement account proceeds payable to the Estate of Jason Gardner.

1. The Court of Appeals misapprehended the application of S.C. Code Ann. §§ 62-3-801 and 62-3-803 with respect to Ernest Gardner’s creditor claim against the Estate.

The Probate Court found that Ernest Gardner was a known creditor with actual notice as a result of his dual role of Personal Representative and creditor. (R. at 94 ¶17, 95 ¶18, 97). Furthermore, the Probate Court found Ernest Gardner to be a creditor who received written notice as a result of receiving a copy of the Affidavit of Publication of Notice to Creditors. (R. at 95 ¶20, 97, 284-292).¹ Accordingly, Ernest Gardner fell within the claims limitation framework of Sections 62-3-803(a)(2) and 62-3-801(b).

For its part, Section 62-3-803(a) reads, in relevant part, as follows (emphasis added):

- (a) All claims against a decedent’s estate, which arose before the decedent’s death, ..., if not barred by another statute of limitations or nonclaim statute, are barred against the estate,...; unless presented within the earlier of the following:
 - (1) one year after decedent’s death; or
 - (2) **the time provided by Section 62-3-801(b) for creditors who are given actual notice**, and within the time provided by Section 62-3-801(a) for all creditors barred by publication.

¹ No party has appealed these findings, and it is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding unappealed ruling is law of the case).

Meanwhile, Section 62-3-801(b) reads, in relevant part, as follows (emphasis added):

- (b) A personal representative may give written notice by mail or other delivery to any creditor, **notifying the creditor to present his claim within one year of the decedent's death, or within sixty days from the mailing or other delivery of such notice**, whichever is earlier, or be forever barred.

Critically, however, Ernest Gardner did not receive a written notice that indicated his claim would be barred within 60 days of delivery of the notice. As such, he did not receive “such notice” as specified in Section 62-3-801(b) (*i.e.*, “notifying the creditor to present his claim within one year...or within sixty days”). However, the failure to receive a written notice in compliance with Section 62-3-801(b) does not negate the fact that Ernest Gardner remains a creditor with “actual notice” under Section 62-3-803(a)(2). As the Probate Court ruled, and no party appealed, Ernest Gardner was creditor with actual notice through his unique perspective of being both a creditor and the Personal Representative administering the Estate, and Section 62-3-803(a)(2) does not require Ernest Gardner to have received written notice in order to be subject to the time frames established under Section 62-3-801(b). (R. at 94 ¶17, 95 ¶18, 97, 99).

Accordingly, the ultimate question becomes what to make of a creditor with “actual notice” who does not receive a “written notice” in compliance with Section 62-3-801(b)? The result implied by the Court of Appeal’s decision is that such creditor is barred after 60 days of actual notice even if that actual notice does not warn the creditor of the that 60-day limitation. Such a conclusion does meet the standards of Due Process established by in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). As explained in Ernest Gardner’s Brief of Appellant (pp. 7-11), it was this case that prompted South Carolina and many other states to amend their nonclaims statutes to comply with Due Process protections clarified by Tulsa. See 1990 Act No. 521, §§ 51 and 53. With that history in mind,

the South Carolina Legislature would most certainly not have intended a creditor with actual notice to be barred 60 days after such actual notice but without a written warning of the 60-day limitation. Rather, the only logical construction of the Legislature's framework for creditors with actual notice, but without written notice of the 60-day limit, is that the alternate deadline of one-year applies instead. See S.C. Code Ann. § 62-3-801(b). Ernest Gardner met that deadline.

The reference in the Court of Appeal's decision to the Reporter's Comments to Section 62-3-803 does not alter the foregoing analysis. As quoted by the Court of Appeals: "Claims arising before death, unless barred by other statutes of limitation, are barred unless presented as follows: (1) for those creditors not barred by publication within the earlier of one year following date of death or sixty days from any actual notice...." However, with all due respect to the talented persons who painstakingly draft the Reporter's Comments, their summarization fails to capture the nuance of the actual statutory framework promulgated by the South Carolina Legislature, and it is that statutory scheme which controls. At the risk of redundancy, Section 62-3-801(b) does not provide a 60-day limit upon "actual notice" as suggested by the Reporter's Comments, but rather a 60-day notice upon mailing or delivery of a "written notice" that informs the recipient of the applicable 60-day period. Ernest Gardner did not receive "such notice." Accordingly, all that remains is the one-year period with which he did comply.

Finally, the South Carolina Legislature has also mandated that the Probate Code must be liberally construed and applied to promote its underlying purposes, including "to discover and make effective the intent of a decedent in the distribution of his property" and that principles of equity supplement the entire Probate Code unless specifically displaced. S.C. Code Ann. S.C. Code Ann. §§ 62-1-102(b)(2) & -103. In this case, no one disputes Jason Gardner's intent for

Ernest Gardner to, at a minimum, be repaid for the loan that Ernest Gardner gave to Jason Gardner so that he could afford to divorce Michelle Gardner in the first place.

In summary, and as rightly concluded by the Probate Court charged with jurisdiction over the administration of estates of decedents,² “[g]iven the facts in this case, [Ernest Gardner] was not required to file his claim any earlier than within one year of [Jason Gardner]’s death and he did so (R. at 99).”

2. The Court overlooked that Michelle Gardner waived all claims against Jason Gardner’s retirement accounts even if paid to Jason Gardner’s Estate as well as the precedent of Stribling v. Stribling, 369 S.C. 400, 632 S.E.2d 291 (Ct. App. 2006).

The Court of Appeals did not address Michelle Gardner’s waiver and release of “**any and all** right, title, interest or claim she has, had, **or may have** to Husband’s retirement accounts,” pursuant to her divorce settlement agreement with Jason Gardner. (R. at 21 ¶5) (emphasis added). The Court of Appeals and the South Carolina Supreme Court have issued numerous decisions applying waiver within the context of divorce or separation property settlement agreements. “Waiver is a voluntary and intentional abandonment or relinquishment of a known right.” Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). “The parties may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily and reasonably”. Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983). “Where an agreement is clear and capable of legal construction, the court’s only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it.” Ebert v. Ebert, 320 S.C. 331, 465 S.E. 2d 121 (Ct. App. 1995). “Unambiguous marital agreements will be enforced according to their terms ..., regardless of the contract’s wisdom or folly, or the parties’ failure to guard their rights carefully.” Davis v. Davis, 372 S.C. 64, 75, 641 S.E.2d 446, 451-52 (Ct. App. 2006).

² S.C. Code Ann. § 62-1-302(a)(1).

In the case of Michelle Gardner’s waiver (and Jason Gardner’s reciprocal waiver of claims against Michelle Gardner’s retirement accounts) the waivers did not contain any contingency for the death of the other party, nor did Michelle Gardner attempt to provide any evidence of an intent to limit the retirement account waivers with respect to death. Furthermore, the mutual waivers of their respective retirement accounts were the only provision in the divorce agreement including the broad language of specifically waiving “any and all right, title, interest or claim” that each “has, had, or may have” in the future. (R. at 19, 21). In contrast, the other waivers as provided in the initial divorce agreement did not specifically include a waiver of “claims” that either may have in the future:

- Michelle Gardner’s residence (R. at 17 ¶1).
- Both parties’ vehicles (R. at 18 ¶2, 20 ¶1).
- Jason Gardner’s boat and trailer (R. at 20 ¶2).
- Both parties’ bank accounts (R. at 18 ¶3, 21 ¶3).
- Both parties’ investment accounts (R. at 19 ¶4, 21 ¶4).
- Both parties’ Marriott and Delta rewards points (R. at 19 ¶6, 22 ¶6)
- Both parties’ miscellaneous tangible personal property (R. at 19 ¶7, 22 ¶7).
- Both parties’ other miscellaneous property (R. at 20 ¶8, 22 ¶8).
- Michelle Gardner’s 529 plans for benefit of the children (R. at 20 ¶9)

Ultimately, the drafters of the retirement account waivers would have been hard pressed to come up with a more expansive waiver of future claims without advance knowledge of the peculiar and unforeseeable series of circumstances resulting in the present litigation. Nevertheless, presumably, the Court of Appeals believes that Michelle Gardner’s clear and unequivocal waiver of future claims against Jason Gardner’s retirement accounts does not apply to the funds actually in those accounts if they happen to go to Jason Gardner’s Estate where he named his Ernest Gardner as sole beneficiary.³ However, such conclusion runs contrary to the

³ As the Court correctly notes in its Order dated March 15, 2023, whether the Estate is in fact beneficiary of Jason Gardner’s retirement accounts has not yet been determined. Michelle

Court of Appeal's precedent established in Stribling v. Stribling, 369 S.C. 400, 632 S.E.2d 291 (Ct. App. 2006) (authored by current Chief Justice Beatty).

In Stribling, a husband and wife entered a divorce settlement agreement whereby the wife agreed to waive her interest in the husband's retirement accounts. However, after entry of the divorce and settlement, the ex-husband failed to remove the ex-wife as beneficiary of his retirement account before his subsequent death. Like Michelle Gardner in the present matter, the ex-wife argued that the mechanical application of the retirement account beneficiary designation entitled her to the retirement account funds, notwithstanding the fact that she had previously waived her rights to the retirement accounts.⁴

In rejecting the ex-wife's form-over-substance argument, the Court of Appeals found as a threshold matter that "the language of the Decree unambiguously provides Wife waived any interest in all of Husband's retirement accounts."⁵ Id., 369 S.C at 404, 632 S.E.2d at 293. From that factual determination, the Court of Appeals ruled that a spousal waiver of a retirement account in a divorce settlement was not limited to the retirement funds while the account owner was living, but also included the waiving spouse's general "expectancy interest" in the retirement accounts funds after death. Id., 369 S.C at 405-07, 632 S.E.2d at 294-95.

Gardner concedes she would have no claim if Jason Gardner had simply named Ernest Gardner as direct beneficiary of the retirement accounts. (R. at 571 l. 18-25, 572 l. 1-7, 587 l. 7-12).

⁴ The South Carolina Legislature subsequently provided by statute that divorce or annulment automatically severed certain spousal interests, including retirement account beneficiary designations. See S.C. Code Ann. § 62-2-507 (effective as of January 1, 2014). However, that statute does not supplant the general ruling of Stribling, but rather affirms it, nor did the Legislature attempt to address the novel question of retirement accounts payable to an estate.

⁵ The sentence relied on by the Court of Appeals stated simply "[t]he parties further acknowledge they are waving any interest they may have in the other party's retirement." Id., 369 S.C at 402, 632 S.E.2d at 292. This waiver is noticeably less robust than the Michelle Gardner's waiver of "any and all right, title, interest or claim she has, had, or may have to [Jason Gardner's] retirement accounts." (R. 21 ¶5).

Michelle Gardner attempts to distinguish Stribling because the ex-wife in that case was the direct beneficiary of the account and not a creditor of the ex-husband's estate. However, the Court of Appeal's ruling was not so limited. The fundamental issue before the Court of Appeals was whether the waiver of a retirement account interest remained in effect after the account owner's death (the "expectancy interest"), not the mechanics of whether that interest may have passed directly to a beneficiary or indirectly. If anything, the ex-wife in the Stribling matter had a superior claim to the funds in that she remained her ex-husband's direct beneficiary until death, which the ex-husband could have changed at any time before death, whereas here the record shows that Jason Gardner at least attempted to name Ernest Gardner as beneficiary of his retirement accounts (if not actually accomplishing that as to be determined), and also named Ernest Gardner as sole beneficiary of his Estate.

Similarly, Michell Gardner argues "[w]e are not seeking a claim against an IRA asset. We are seeking to be paid out of estate assets in general of which the proceeds of this IRA is one." (R. at 587 l. 18-21). However, this is a distinction without a difference under the Stribling decision, which upheld the ex-wife's waiver not merely against the ex-husband's actual retirement accounts, but also the funds which flowed to the ex-wife pursuant to the beneficiary designation. Necessarily then, the "expectancy interest" protected under Stribling applies to the retirement funds themselves even when paid from the retirement accounts. Otherwise, the Court of Appeal's Stribling decision is rendered meaningless.

In summary, the Court of Appeals has previously rejected the argument that a spousal waiver of a retirement account in a divorce settlement may be ignored simply based on how the funds are transferred pursuant to the terms of the retirement account. See Stribling v. Stribling, 369 S.C. 400, 632 S.E.2d 291 (Ct. App. 2006). This same legal principal and holding now

compel the Court of Appeals to rule that Michelle Gardner may not recover against Jason Gardner's retirement account funds even if ultimately deemed paid to Jason Gardner's Estate.

CONCLUSION

For the reasons stated above, Appellant respectfully submits this Petition for Rehearing asking the Court of Appeals to overrule the order of the Circuit Court dated November 23, 2020, affirm the portion of the order of the Probate Court dated December 10, 2019 regarding the timeliness of Appellant's creditor claim, and reverse the portion of the same order regarding Respondent's waiver of claims against Jason Gardner's retirement accounts.

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