THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough
Master-in-Equity

Appellate Case No. 2021-001296

Vanessa Williams, Vanessa Williams, as Conservator and Guardian of Sandra P. Perkins, and Vanessa Williams, as Personal Representative of the Estate of Sandra P. Perkins…….Respondent,

v.

Bradford Q. Jeffcoat, Jr. and Blue Heron Builders, Inc…….Defendants,
of whom
Bradford Q. Jeffcoat, Jr. is…….....Petitioner.

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

The Respondent disagrees with the following issues raised by the Appellant in this matter. The issues properly framed should be:

I. Did the Court of Appeals correctly determine that the Alabama Court had jurisdiction?

II. Did the Court of Appeals correctly apply the then existing law which did not require notice to Jeffcoat of the conservatorship proceedings.

III. Did the Court of Appeals correctly hold that Perkins and Williams used language in their deed to create a form of ownership which allows the interests of the joint tenant to be severed and alienated, thus destroying the right of survivorship and that S.C. Code Ann. § 27-7-40 was never intended to set forth all of the incidents of ownership of a joint tenancy.

IV. Did Jeffcoat properly raise and preserve his current claim that disputes of material fact prevented issuance of summary judgment.

V. Are there any issues of material fact which would justify reversing the decision of the Master-in-Equity and the Court of Appeals.

STATEMENT OF THE FACTS

Respondent, Vanessa Williams ("Williams" or "Respondent"), is the daughter of Sandra Perkins ("Perkins"). Prior to her move to Alabama, Perkins and the Appellant, Bradford Q. Jeffcoat, Jr. ("Jeffcoat" or "Appellant") had been roommates for approximately fifteen (15) years (App. pp. 146-147). On April 28, 2000, Jeffcoat bought ownership in a residential property in Charleston, South Carolina. (App. p. 69 lines 2-5; pp. 155-156 lines 2-6; pp. 93-97). Shortly after his purchase, on July 1, 2000, Jeffcoat conveyed a half interest to Perkins in exchange for a mortgage in the amount of $43,550.00. (App. p. 69, lines 2-5). It is undisputed that Perkins paid

all of the principal and interest (at 7.5% fixed rate for 15 years) on the mortgage and that the mortgage has since been released. (App. pp. 102-113; pp. 114-115). Accordingly, on or about June 1, 2015, Perkins held an unencumbered estate in fee simple in the subject property with Jeffcoat as joint tenants with right of survivorship and not as tenants in common.

Prior to her death in November of 2015, Perkins suffered from advanced dementia. (App. p. 145). Her condition began to rapidly deteriorate in the summer of 2015 and after being informed by Jeffcoat of her mother's infirmities, and at the request of Jeffcoat, Williams drove to Charleston in order to assess the situation. (App. p. 143). Upon observing her mother's condition and assessing the situation, she needed to provide ongoing care for her mother going forward. Williams left Charleston on or about June 16, 2015 and brought Perkins back to Alabama to live with her. (App. p. 143).

Jeffcoat's assertion of a loving, familial-like relationship between him and Perkins is disputed. There is information in the record that Perkins told her daughter that Jeffcoat had cheated on her in 2009 and that they were more so roommates after that point and were no longer romantically involved. (App. 147). Whatever the relationship between Jeffcoat and Perkins, it is clear: they were not married; he did not hold power of attorney; they kept separate bank accounts; Jeffcoat required Perkins to pay for her own share of household expenses; and Jeffcoat further required her pay for her half interest in the property in issue, even as she suffered through her terminal illness. (App. 146-147).

After consulting with legal counsel in Alabama, Williams concluded that the best way to provide for her mother was to become her Guardian and Conservator. Correspondingly, Williams petitioned the Probate Court of Baldwin County and was issued permanent Letters of Guardianship/Conservatorship on September 15, 2015. (App. p. 209).

Perkins resided with Williams in her home in Alabama from June 16, 2015 until her death on November 26, 2015. During this five-month period, Jeffcoat did nothing to assert he had any legal right to take care of Perkins. And Jeffcoat never challenged the guardianship or conservatorship in any way until at the Court of Appeals when counsel first advanced a subject matter jurisdiction challenge to the actions of the Alabama Probate court.

Thereafter, as fiduciary, Williams owed a duty to manage the estate of her ward with the skill of a "prudent person dealing with the property of another." Ala. Code § 26-2A-145 (1975). Considering the wishes of her mother, the fact that her mother had paid valuable consideration for her interest in the subject property, and that as conservator, she was required to retain and protect the assets of her mother and/or mother's estate by law, she consulted with the law firm of Clawson & Staubes, LLC in South Carolina. Based on the advice of counsel, Williams, as conservator, decided to pursue a partition action on behalf of Perkins against Jeffcoat. (App. p. 83, line 5).

In early November 2015, while counsel was working on drafting the complaint for this partition action, Williams received the unfortunate news that her mother's health had suddenly taken a turn for the worse, and death was imminent. (App. p. 83, lines 7-9; p. 175, lines 7-9). Given that the subject property was still in the names of Perkins and Jeffcoat and held as joint tenants with right of survivorship, the death of Perkins would result in Jeffcoat being the sole owner of said property. As a result, Williams, upon advice of counsel, decided that the best way to fulfil her duties was to sever her mother's joint tenancy and then pursue partition. (App. p. 83, lines 10-14; p. 175, lines 10-14).

Accordingly, pursuant to the advice of her Alabama and South Carolina counsel, Williams conveyed Perkins' interest in the subject property to herself on November 16, 2015, severing the joint tenancy and creating a tenancy in common with Jeffcoat. (App. pp. 120-121). Perkins died

on November 27, 2015. (App. p. 142). In conveying the subject property to herself, Williams acted in the only way possible to retain the asset on behalf of Perkins' estate until determining its ultimate disposition. She took this action in accordance with Ala. Code § 26-2A-152(c)(1) (1975). The conveyance was approved by order of the Probate Court of Baldwin County on January 15, 2016 while applying Ala. Code § 26-2A-152(c)(1) (1975). (App. p. 125). Having severed the joint tenancy with Jeffcoat by destroying the unity of time, Williams then sought judicial partition pursuant to S.C. Code § 15-61-10 et seq. (1986), by complaint filed on November 23, 2015. (App. pp. 7-16).

ARGUMENT

I. THE BALDWIN COUNTY PROBATE COURT HAD SUBJECT MATTER JURISDICTION OVER THE GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS REGARDING SANDRA PERKINS AND JEFFCOAT WAS NOT ENTITLED TO NOTICE.

Williams' authority to act as guardian and conservator was appropriately granted by the Baldwin County Probate Court after proper notice and an open hearing on the facts of the case. As a matter of law, decisions of another state are entitled to be recognized under the "Full Faith and Credit" Clause of the United States Constitution. Article IV, Section 1.

A court in another state may explore the jurisdictional basis of a foreign court's order, but only in a limited way. It is well established law that where "the judgment on its face appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or the record itself." Millikin v. Meyer, 311 U.S. 457 (1940); V.L. v. E.L., 577 U.S. 404, 136 S. Ct. 1017, 194 L. Ed. 2d 92 (2016).

The Alabama Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, Ala. Code §§ 26-2B-101 et. seq., provides Alabama Probate courts with exclusive jurisdiction to

appoint guardians or conservators for adults. See § 26-2B-202. Under this law, there are several scenarios by which a petitioner may invoke the subject matter jurisdiction of the Probate Court. The first way is if Alabama is the home state of the respondent. Ala. Code § 26-2B-203(a)(1). "Home State" is defined by Ala. Code § 26-2B-201(a)(2) as follows:

> The state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

There is no dispute that Alabama was not the home state of Perkins at the time of Williams' petition for guardianship and conservatorship and the adjudication of this matter.

The second way jurisdiction is invoked is through a significant connection to the state of Alabama as well as the following additional considerations promulgated in Ala. Code § 26-2B-201(B)

> (i) a petition for an appointment or order is not filed in the respondent's home state;
>
> (ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and
>
> (iii) the court in this state concludes that it is an appropriate forum under the factors set forth in Section 26-2B-206;

Moreover, in order to evaluate whether there is a "significant connection" the court is required by Ala. Code § 26-2B-201(a)(3) to consider the following factors:

> (1) the location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;
>
> (2) the length of time the respondent at any time was physically present in the state and the duration of any absence;
>
> (3) the location of the respondent's property; and

> (4) the extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

Accordingly, the determination as to subject matter jurisdiction with respect to "significant connection" requires an analysis by the Judge of Probate at the time of the hearing.

It is apparent that the Probate Court made a determination that there was a significant connection between Perkins and the state of Alabama to allow the Probate Court to exercise jurisdiction. Clearly such substantial connections include being physically located in the state at the time, having a bank account in the state, and her only family taking care of her in Baldwin County, Alabama.

Contrary to the allegations made by the Appellant, the emergency petition that was filed in this matter and the subsequent petition for permanent guardianship does not conceal the fact that South Carolina was Perkins home state. The emergency petition states in paragraph 2 "[t]hat SANDRA P. PERKINS has been residing in Baldwin County, Alabama for the last seven (7) days from the date hereof." Paragraph 3 states "[t]hat prior to residing in Baldwin County, Alabama, SANDRA P. PERKINS resided in Charleston, South Carolina." Paragraph 10 states "[a]dditionally and pursuant to Ala. Code. §§ 26-2B-201(a)(3), SANDRA P. PERKINS has significant connection with County of Baldwin, State of Alabama. SANDRA P. PERKINS's only child resides in Lillian, Alabama and a substantial amount of her assets are held in a brokerage firm in Foley, Alabama." (App. pp. 305-308). The petition further disclosed that "pursuant to Ala. Code § 26-2B-203, a petition for appointment of a guardian or order is not pending in a court in the State of South Carolina." (App. pp. 305-308). It is abundantly clear that the petition acknowledges South Carolina as Perkins' home state and further pleads that the court take jurisdiction pursuant to Perkins' significant connection to Alabama. (App. pp. 305-308).

Petitioner was transparent in her assertion: that Perkins had been moved from South Carolina to Alabama only seven days prior to the petition; that Williams was her only child; that Perkins was not married to Jeffcoat or anyone else; that Williams was appointed by Perkins when Perkins was competent as her first choice as attorney-in-fact which would come into effect in the event of disability or incapacity. All of these factors were considered by the Probate Court where Perkins was represented by a guardian *ad litem*. (App. pp. 319-326; pp. 327-339; pp. 310-312). The idea information regarding Perkins home state was withheld from the Probate Court of Baldwin County are simply incorrect and misleading.

The Appellants' argument that Jeffcoat was entitled to notice of the hearing in Alabama is equally baseless. The law in Alabama requires that if Alabama is not the home state of the respondent, then the petitioner must give notice to those persons who would be entitled to notice if the petition was brought in the respondent's home state. Ala. Code § 26-2B-208. Looking to S.C. Code § 62-5-309, the Appellants assert that Jeffcoat had "care and custody" of Perkins at the time of the petition. There can be no dispute that Perkins, not Jeffcoat, was in the care and custody of Williams at the time of the petition and hearing. Further, Williams was designated as Health Care Agent for Perkins pursuant to a Health Care Power of Attorney executed on November 19, 2009 when Perkins was competent. (App. pp. 319-326). Jeffcoat, while admittedly living with Perkins prior to the move to Alabama, never had care or custody of Perkins at the time of the petition or immediately before it. There is nothing in the record that indicates that Jeffcoat was under any obligation to care for Perkins, nor did he have a right to her custody. Despite the fact that Perkins lived with Jeffcoat for over fifteen years, there was no familial or legal relationship between him and her which would have required notice to Jeffcoat pursuant to S.C. Code § 62-5-309.

The contention by the Appellant that Williams failed to inform the Probate Court of the South Carolina partition proceedings is also untrue. This ignores the motion filed on January 11, 2016 which discloses the exact course of action taken by Williams in South Carolina and further explains the rationale of her decision to transfer Perkins' half interest in the property in question in order to preserve it for her estate. (App. pp. 313-317). The motion states that "in November 2015, the law firm of Clawson & Staubes LLC in South Carolina was assisting Perkins with drafting a complaint requesting that said Real Property be partitioned via sale and the proceeds from sale be divided between Perkins and Jeffcoat." (App. pp. 313-317).

A plain reading of the petitions filed in the Probate Court of Baldwin County shows that the decree granting Guardianship and Conservatorship to Williams was on its face rendered by a court of competent jurisdiction. Ruling otherwise requires a presumption that the court did not make the inquiries required of it. The court was clearly made aware of the fact that the petitioner sought to invoke jurisdiction through Williams significant connection to the state of Alabama, and it was within its power to find jurisdiction even if it did not publish those reasons in its Order granting Letters of Guardianship and Conservatorship. (App. p. 117-119). The material facts were presented to the court; all parties entitled to notice were in fact notified; and there is nothing in the record or extrinsic evidence that shows otherwise. This Court, therefore, has no grounds to further review the subject matter jurisdiction of Probate Court of Baldwin County, and should therefore not disturb its rulings.

For the first time in the petition for rehearing to the Court of Appeals, Jeffcoat argued he was entitled to notice by virtue of what is claimed by him to be "clarifying statutory intent" allegedly discerned through subsequent amendment to the South Carolina Probate Code that was not in effect at the time the Alabama proceedings were conducted. However, there is no indication

this was a statutory clarification; it was a change in the statute. The general rule with respect to the effect of subsequent amendments is that they are presumed to change existing law rather than clarifying it. Cotty v. Yartzeff, 309 S.C. 259, 422 S.E.2d 100 (1992). "Generally, the legislature's subsequent acts 'cast no light on the intent of the legislature which enacted the statute being construed.'" CFRE LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (S.C. 2011). The new statue (S.C. Code § 62-5-303(B)(4)(d)) provides that notice of an application for guardian shall identify in the petition and then provide notice as a "correspondent" under S.C. Code § 62-5-303A to "a person other than an unrelated employee or health care worker, who is known or reasonably ascertainable by the petitioner to have materially participated in caring for the alleged incapacitated individual for a six-month period preceding the filing of the petition." This was language added by 2017 Act No. 87 which was approved by the Governor on May 9, 2017 with an effective date of January 1, 2019. It is unreasonable to argue Williams and the Alabama probate court should have somehow applied a notice requirement the South Carolina Legislature had not enacted at the time. Indeed, given the rule that an amendment is presumed to change the law, this amendment really supports the Respondent's position that the then-existing notice criteria did NOT include persons who had materially participated in caring for the incapacitated person during the prior six months. The then-existing notice criteria only addressed those persons currently in possession of the allegedly incapacitated person with no look-back period. Clearly, at the time of the Probate petition, Jeffcoat did not have care or custody of Perkins.

Furthermore, Williams held a springing durable power of attorney (App. 327-338) which would have allowed her to undertake all of the same actions without court supervision if she was seeking to be deceitful. As the Appellant acknowledged in his own motion for summary judgment, there is no factual dispute to be litigated. (App. p. 235, line 21; p. 265, lines 2-5; p. 287, lines 18-

19). However, upon losing his arguments on summary judgment, the Appellant is now seeking to reopen factual inquiries that he previously viewed as immaterial.

II. WILLIAMS' TRANSFER OF REAL PROPERTY ON BEHALF OF HER WARD, PERKINS WAS LAWFUL.

A. A Joint Tenancy with right of survivorship is severed by a Tenant's conveyance of property interest to a third party.

Numerous cases, however, in common law jurisdictions refer to the form of severance contemplated by the Respondent in this case.[1] Furthermore, other academic and secondary source publications make reference to this common law property rule: "In the ancient language of the law, joint tenants were said to hold ***per my et per tout***".[2] The preceding phrase is defined as "[b]y the half and by the whole". It is further described as:

> [T]he estate [undivided share] held by joint tenants; by the half for purposes of survivorship, by the whole for purposes of alienation.[3]

Accordingly, the concept of joint tenancy under the common law allows each owner to hold an undivided share which vests in the survivor upon the death of the first joint tenant, but which is

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[1] Nunn v. Keith, 289 Ala. 518 (1972); Smith v. Kofstad, 206 P.3d 441 (Alaska 2009); Estate of England, 233 Cal.App.3d 1 (1991); Alexander v. Boyer, 253 Md. 511 (Md. 1969); Matter of Estate of Bates, 492 N.W.2d 704 (Iowa App. 1992); Harmes v. Sprague, 105 Ill.2d 215 (Ill. 1984); Home Trust Mercantile Bank v. Staggs, 714 S.W.2d 792 (Mo. App. E.D. 1986); Smith v. Tang, 100 Ariz. 196 (1996); Reicherter v. McCauley, 47 Kan.App.2d 968 (Kan. App. 2012); Estate of Knickerbocker, In re, 912 P.2d 969 (Utah 1996); Estate of Gulledge, 673 A.2d 1278 (D.C. 1996); Marchel v. Estate of Marchel, 349 Wis.2d 707 (Wis. App. 2013); Hoover v. El Paso Nat. Bank, 498 S.W.2d 276 (Tex. Civ. App. -- El Paso 1973); Ianotti v. Ciccio, 219 Conn. 36 (Conn. 1991); Edwin Smith LLC v. Synergy Operating LLC, 2012 -NMSC- 034 (N.M. 2012); Johnson v. Gray, 533 N.W.2d 57 (Minn. App. 1995); Valdez v. Occupants of 3908 SW 24th Street, 270 P.3d 143 (Okla. 2011); Williamson v. Williamson, 157 A.2d 110 (R.I. 1960); Lyon v. Lyon, 100 Wn.2d 409 (Wash. 1983); In re Estate of Bernecker, 654 A.2d 246 (Pa.Cmwlth. 1995); Foucart v. Paul, 516 So.2d 1035 (Fla. App. 5 Dist. 1987); Taylor v. Canterbury, 92 P.3d 961 (Colo. 2004); Shockly v. Halbig, 75 A.2d 512 (Del. Ch. 1950); Halleck v. Halleck, 216 Or. 23 (Or. 1959).

[2] Wilkins v. Young (1895) 144 Ind 1.

[3] Black's Law Dictionary (10th ed. 2014), ("per my et per tout").

also a wholly owned share which may be completely alienated during the lifetime of the tenant.[4]

S.C. Code § 27-7-40 provides several non-exclusive mechanisms by which a joint tenancy with right of survivorship may be created and ended in South Carolina. Section 27-7-40 in its entirety states:

> (a) In addition to any other methods for the creation of a joint tenancy in real estate which may exist by law, whenever any deed of conveyance of real estate contains the names of the grantees followed by the words "as joint tenants with rights of survivorship, and not as tenants in common" the creation of a joint tenancy with rights of survivorship in the real estate is conclusively deemed to have been created. This joint tenancy includes, and is limited to, the following incidents of ownership:
>
> (i) In the event of the death of a joint tenant, and in the event only one other joint tenant in the joint tenancy survives, the entire interest of the deceased joint tenant in the real estate vests in the surviving joint tenant, who is vested with the entire interest in the real estate owned by the joint tenants.
>
> (ii) In the event of the death of a joint tenant survived by more than one joint tenant in the real estate, the entire interest of the deceased joint tenant vests equally in the surviving joint tenants who continues to own the entire interest owned by them as joint tenants with right of survivorship.
>
> (iii) The fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance.
>
> (iv) If all the joint tenants who own real estate held in joint tenancy join in an encumbrance, the interest in the real estate is effectively encumbered to a third party or parties.
>
> (v) If real estate is owned by only two joint tenants, a conveyance by one joint tenant to the other joint tenant terminates the joint tenancy and conveys the fee in the real estate to the other joint tenant.
>
> (vi) If real estate is owned by more than two joint tenants, a conveyance by one joint tenant to all the other joint tenants therein conveys his interest therein equally to the other joint tenants who continue to own the real estate as joint tenants with right of survivorship.
>
> (vii) Any joint tenancy in real estate held by a husband and wife with no other

[4] What acts by one or more of joint tenants will sever or terminate the tenancy 64 A.L.R. 2d 918 § 2 (Originally published in 1959); 1. C.J.S. Estates § 19; Joint Tenancy §§ 2, 4, 7-9.

> joint tenants is severed upon the filing of an order or decree dissolving their marriage and vests the interest in both the parties as tenants in common, unless an order or decree of a court of competent jurisdiction otherwise provides.
>
> (viii) The interest of any joint tenant in a joint tenancy in real estate sold or conveyed by a court of competent jurisdiction where otherwise permitted by law severs the joint tenancy, unless the order or decree of such court otherwise provides and vests title in the parties as tenants in common.
>
> (ix) If real estate is owned by two or more joint tenants, a conveyance by all the joint tenants to themselves as tenants in common severs the joint tenancy and conveys the fee in the real estate to these individuals as tenants in common.
>
> (b) The surviving joint tenant or tenants may, following the death of a joint tenant, file with the Register of Deeds of the county in which the real estate is located a certified copy of the certificate of death of the deceased joint tenant. The fee to be paid to the Register of Deeds for this filing is the same as the fee for the deed of conveyance. The Register of Deeds must index the certificate of death under the name of the deceased joint tenant in the grantor deed index of that office. The filing of the certificate of death is conclusive that the joint tenant is deceased and that the interest of the deceased joint tenant has vested by operation of law in the surviving joint tenant or tenants in the joint tenancy in real estate.
>
> (c) Except as expressly provided herein, any joint tenancy severed pursuant to the terms of this section is and becomes a tenancy in common without rights of survivorship. Nothing contained in this section shall be construed to create the estate of tenancy by the entireties. Nothing contained in this section amends any statute relating to joint tenancy with rights of survivorship in personal property but affects only real estate. The provisions of this section must be liberally construed to carry out the intentions of the parties. This section supersedes any conflicting provisions of Section 62-2-804.

As argued in Williams' motion for summary judgment, the statute acknowledges common law methods for creating a joint tenancy with right of survivorship, to wit: "[i]n addition to any other methods for the creation of a joint tenancy in real estate which may exist by law." The statute plainly envisions there are other ways to create a joint tenancy in South Carolina. Accordingly, statutory creation of a joint tenancy is not exclusive and common law rules for the creation of a joint tenancy are still recognized. The Court of Appeals affirmed this rule in Estate of Sherman ex rel. Maddock v. Estate of Sherman ex rel. Snodgrass, 359 S.C. 407, 597 S.E.2d 850, 851 (Ct.

App. 2004), opining:

> Appellant asserts that, at most, Rosemary's 1985 deed created a tenancy in common. "The common law method of creating a joint tenancy requires a conveyance to have four unities: unity of interest, unity of title, unity of time, and unity of possession." Smith v. Rucker, 357 S.C. 532, 593 S.E.2d 497, 499 (Ct. App. 2004) (citing Jenkins v. Jenkins, 8 S.C.L. (1 Mill Const.) 48, 52 (1817)).

Therefore, a joint tenancy with right of survivorship is established where the grant or devise conveys unity of title, unity of interest, and unity of possession to two or more tenants at the same time.

By implication, statutory severance is likewise not the exclusive mechanism for destroying a joint tenancy. The common law rules for severance still apply and the destruction of one of the required unities of title destroys the joint tenancy and renders property holders "tenants in common." In Smith v. Cutler, 366 S.C. 546, 623 S.E.2d 644, 647 (S.C. 2005), then Chief Justice Toal held that in South Carolina, "unlike a tenancy in common with a right of survivorship, a joint tenancy with a right of survivorship is capable of being defeated by the unilateral act of one joint tenant."

The Petitioner attempts reads into the statute that destruction of the joint tenancy is limited to the ways enumerated in S.C. Code § 27-7-40 (a). But the statute does not state that the means set forth are the exclusive ways in which to destroy the joint tenancy. In fact, the statute sets forth various incidents of ownership: "[J]oint tenancy includes and is limited to, the following incidents of ownership:" and then goes on to list eight ways in which an interest of a joint tenant may vest upon the death, conveyance, divorce, or judicial sale. Clearly there are other incidents of ownership of a joint tenancy that are not referenced. Further, the legislative history of this section, suggests that there was no intention of subsuming the common law on the issue of severance.

S.C. Code § 27-7-40(a) was introduced for the first time in March of 2000. The bill

underwent several revisions before its adoption. Most notably, in the original bill, § 27-7-40(a)(iii) & (iv) read as follows:

> (iii) The fee interest in real estate held in joint tenancy may not be encumbered **or conveyed** to a third party or parties by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance **or conveyance**.
>
> (iv) If all the joint tenants who own real estate held in joint tenancy join in an encumbrance **or deed of conveyance**, the interest in the real estate shall be effectively encumbered **or conveyed** to a third party or parties.[5]

Subsequent revisions, however, resulted in the current language of the statute that removes the language contemplating unilateral conveyances, and those sections now read as follows (with previous language struck):

> (iii) The fee interest in real estate held in joint tenancy may not be encumbered ~~**[or conveyed]**~~ by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance ~~**[or conveyance]**~~.
>
> (iv) If all the joint tenants who own real estate held in joint tenancy join in an encumbrance ~~**[or deed of conveyance]**~~, the interest in the real estate is effectively encumbered ~~**[or conveyed]**~~ to a third party or parties.

The implication of the Legislature removing language that would undeniably prohibit the unilateral severance of a joint tenancy seems to be that it did not intend to proscribe this common law method of severing joint tenancies. Furthermore, it is clear that "encumbrance" and "conveyance" are not synonymous for the purposes of this statute. Given the legislative history and the plain meaning of encumbrance, conveyances are excluded from the definition. According to Black's Law Dictionary, encumbrance means:

> encumbrance n. (16c) A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest. • An encumbrance cannot defeat the transfer of possession, but it remains after the property or right is transferred. — Also spelled incumbrance. — encumber, vb
>
> or:

[5] S.C. Gen. Assemb. Act No. 398, Section 2. Reg. Sess. 1999-2000 (2000).

> Encumbrance' means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.[6]

The intent of S.C. Code § 27-7-40 was to eliminate the need for one or more persons owning a property to convey the property to a strawman to create a joint tenancy with another. As accurately stated by the Court of Appeals "Prior to the enactment of this statute, parties solely in possession of a property had to make an intervening conveyance to a 'strawman' to effectively create a joint tenancy between themselves and additional cotenants in the previously owned property. See John V. Orth, The Perils of Joint Tenancies, 44 Real Prop. Tr. & Est. L.J. 427, 431 (2009). Over the years, states have enacted statutes to allow for the creation of such joint tenancies without the need for an intervening transfer. See e.g., Cal. Civ. Code § 683 (West 2017); Colo. Rev. Stat. Ann. § 38-31-101 (West 2008); 765 Ill. Comp. Stat. Ann. § 1005/1b (West 2004). We find such was the purpose and intent behind section 27-7-40." Williams v. Jeffcoat, 434 S.C. 461, 863 S.E.2d 822 (Ct. App. 2021).

Applying the law to the facts of the case at bar results in a tenancy in common with Williams and Jeffcoat each holding a one-half interest in the subject property. The subject property was conveyed from Sandra P. Perkins, who held the property as a joint tenant with rights of survivorship with Bradford Q. Jeffcoat, Jr., to Vanessa Williams on November 16, 2015. This conveyance severed the unity of time requirement with respect to the new tenancy, which in turn severed the joint tenancy with right of survivorship. The Supreme Court in Smith v. Cutler set forth exactly what language to include in the granting clause and habendum clause of a deed to create an indestructible tenancy in common:

"[w]e hold that the use of the phrase "for and during their joint lives and upon the

[6] Black's Law Dictionary (10th ed. 2014), encumbrance

> death of either of them, then to the survivor of them" indicates an intention of the parties to share a tenancy in common for life, with cross remainders for life, with remainder in fee to the ultimate survivor." 366 S.C. at 551, 623 S.E.2d at 647.

Had Perkins and Jeffcoat used the language above, then the conveyance by Williams on behalf of Perkins would have failed. This Court should respect that Jeffcoat and Perkins did not include this language in the conveyance of a half interest from Williams to Perkins for consideration. Having opted instead for joint tenancy which could be severed by conveyance, the Court should not upend the rights of Perkins and countless others to convey their interests. Indeed, as addressed by the Court in Smith v. Cutler, 366 S.C. 546, 623 S.E.2d 644 (2005) and following the earlier precedent of Free v. Sandifer, 131 S.C. 232, 126 S.E. 521 (1925) the modern trend is to limit rights of survivorship as they often operate to defeat the owner's ability to convey the property. A rule that locks owners into ownership with rights of survivorship that cannot be severed should only be followed where the language of the deed reflects this is the clear intent of the parties. It should require more than the simple "rights of survivorship" language found in the present deed.

B. Alabama Law permits a Conservator to Collect, Hold, and Retain property in another state.

The Appellant argues that Alabama Law does not permit a conservator to transfer property to herself without court approval. Ala. Code § 26-2A-152(d)(3) (1975) proscribes the disposal of real property for cash or credit. The Respondent, by contrast, sought to protect a valuable asset of Perkins' estate by conveying it to herself as fiduciary. As fiduciary, Williams owed a duty to manage the estate of her ward with the skill of a "prudent person dealing with the property of another." Ala. Code § 26-2A-145 (1975). Considering the wishes of her mother, the fact that her mother had paid valuable consideration for her interest in the subject property, the fact that her mother named her as power of attorney, and the fact that as a conservator, she was required to retain and protect the assets of her mother and/or mother's estate by law, Williams consulted with

legal counsel in Alabama and South Carolina in order to determine how to sever the joint tenancy. This was not an act of "bad faith" or one of "self-dealing." It was done in consultation with professionals in both states in a manner that was designed to follow the law of both states.

Without the conveyance, a valuable asset of the estate would have been lost to the survivorship clause in the July 1, 2000 deed in contradiction of Williams duties under Alabama law. Alabama Code § 26-2A-152(c)(1) provides that a conservator may act without court authorization to:

> Collect, hold, and retain assets of the estate including land in another state and stocks of private corporations, until determining that disposition of the assets should be made, and the assets may be retained even though they include an asset in which the conservator is personally interested.

Thus, it is appropriate and permissible for a conservator to hold property in her own name in order to determine the final disposition of said property. The statute manifestly provides for conservators to act in the very manner that Williams did in this scenario, just as her ward could have done had she had the mental capacity to do so. It is likewise impossible for this statute to have any meaning with respect to land if it does not allow for conveyances such as this one as it is futile to attempt a transfer of property without a deed.

Furthermore, the allegations that Williams engaged in an act of "granny snatching" Perkins are spurious and insensitive. The very phrase suggests the false notion that Jeffcoat had some legal rights to keep Perkins. Jeffcoat was not Perkins' spouse, nor did he possess any heath care power of attorney, general power of attorney, or any other status which would make him a person from whom Perkins could be "snatched." On the other hand, Perkins had when competent named her only daughter as her durable springing power of attorney and Health Care Agent for Perkins pursuant to a Health Care Power of Attorney executed on November 19, 2009. (App. pp. 319-326; pp. 327-339). Williams actions were disclosed and were undertaken under the supervision of the

Probate Court of Baldwin County, Alabama. Despite the purported affection Jeffcoat claims was present between him and Perkins, she did not name Jeffcoat as an agent or fiduciary. He had absolutely no rights to act on behalf of Perkins or to be informed of her status or otherwise. And Williams had every legal right to attempt to prevent a valuable asset from being given to Jeffcoat where the terms of the deed reflected an intent to have a severable interest and where Perkins paid valuable consideration for her half interest.

Jeffcoat also takes this opportunity to claim Williams violated her duties as a fiduciary by asserting that she misappropriated funds for her own benefit. He suggests that somehow this is unclean hands that would prevent a partition. However, this ignores the point that Jeffcoat was not and would never be a beneficiary of Perkins money. Jeffcoat has no right or standing to complain about the disposition of Perkins' money. Williams was able to utilize the power of attorney to do her best to care for her mother and to address those things which her mother would have done if she were competent.

III. JEFFCOAT'S ARGUMENTS THAT THERE ARE MULTIPLE ISSUES OF MATERIAL FACT ARE INCORRECT AND INCONSISTENT WITH THE POSITION TAKEN BY HIM AT THE TRIAL COURT AND WERE NOT PROPERLY PRESERVED.

If Williams had a lawful right to take her mother to Alabama to be cared for pursuant to a Health Care Power of Attorney as well as her status as her daughter, if the laws supports her right to be appointed as Guardian without notice to Jeffcoat, and if Williams had a legal right to sever the joint tenancy with rights of survivorship, then there are no material disputes of fact. There would be no claim of a cloud on title. There would be no meaningful claims of fraud. On the other hand, if the legal question central to this case were decided against Williams, then the conveyance could have been set aside by the lower court and the essential issue of this case would be resolved by that decision. That is how this matter was presented to the Master-in-Equity,

deciding the matter on cross-motions for summary judgment. (App. p. 235, line 21; p. 265, lines 2-5; p. 287, lines 18-19). Unlike the superficial emphasis on counterclaims and affirmative defenses found in his motion for summary judgment, Jeffcoat now argues that the factual allegations advanced on his counterclaims were actually material underpinnings to the alleged unlawful transfer of real property. This is clearly a different position than the one advanced in Jeffcoat's motion for summary judgment, and it is plain that Jeffcoat expected the entire matter of the transfer of real property to be decided as a question of law. (App. pp. 225-236). Further, Jeffcoat made no motion under Rule 59 or any other rule to address what was allegedly not addressed by the Master-in-Equity's order.

As a general rule, the losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. I'On, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). Issues that are overlooked or not decided must be raised pursuant to a timely motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. Id. ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review."). Only issues that are preserved should be considered by the appellate court. Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("If our review of the record establishes that an issue is not preserved, then we should not reach it."); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (The Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court.). But, an appellate

court may affirm for any reason appearing in the record. Kreutner v. David, 320 S.C. 293, 465 S.E.2d 88, 90 (1995) ("This Court may affirm, however, for any reason appearing in the record.").

Even if the issues were properly preserved, Jeffcoat's contentions that somehow allegations of self-dealing or breach of fiduciary duty would undermine the decision are incorrect. They are not material facts. To the extent that there was any breach of fiduciary duty or self-dealing, those duties were owed to Perkins and Perkins's heir, who happens to be Williams herself. Jeffcoat should not be able to raise those issues. He was not owed any fiduciary duties by Williams. He was not entitled to any money of Perkins. Whether she should have spent money on one thing or another is not at all a concern of Jeffcoat. Notably, Perkins had signed a springing durable power of attorney which gave her daughter the right to make gifts consistent with Perkins prior desires, including to Williams herself if the primary purpose of the transfer including gifts to Williams herself was for the primary purpose of coordinating the preservation of assets. (App. p. 332). Williams concedes Jeffcoat has the limited ability to contest the jurisdiction of the Alabama probate court and that he has the right to challenge whether the conveyance did end the right of survivorship by severing the joint tenancy. But Jeffcoat should not be heard to raise issues as to assets that he has no interest in and to raise issues as to duties which are not owed to him as a defense to any action at law or equity.

CONCLUSION

Based on the forgoing arguments, Vanessa Williams prays this Honorable Court affirm the decision of the Court of Appeals dated July 14, 2021.

(Signature Page to Follow)

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