THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

O. Davie Burgdorf, Master-in-Equity

Court of Appeals Case Tracking No. 201079986
Trial Court Case No. 2007-CP-38-826

In re: Estate of Atn Burns Livingston.

Emma Lou Livingston Martin as Personal Representative of the Estate of Atn Burns Livingston and Emma Lou Livingston Martin, ... Respondents,

v.

Clyde B. Livingston; Miller Communications, Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; and American First Federal, Inc.; Defendants,

Of whom Clyde B. Livingston is ..... Petitioner.

PETITION FOR WRIT OF CERTIORARI AND MEMORANDUM IN SUPPORT

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

Other counsel of record in appeal:

Richard B. Ness
Ness & Jett, LLC
Post Office Box 909
Bamberg, South Carolina 29003
(803) 245-5178
Attorney for Respondents

Petitioner Clyde B. Livingston, who was the Appellant/Respondent below and is hereinafter, sometimes, referred to as "Clyde," hereby moves and petitions this Court, pursuant to Rule 242, SCACR, as well as all other applicable law, for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case. Petitioner respectfully submits that this is a proper case for such review by this Court, as the decision of the Court of Appeals both addresses novel questions of South Carolina law and is in conflict with prior decisions of this Court and with the South Carolina Probate Code, as is noted in the memorandum below.

Basically, what happened in this case is that Clyde inherited a half interest in farmland from his father and then contracted with the United States Department of Agriculture to be paid subsidy benefits for operating a farm on that land. For Clyde receiving the money that the USDA contracted to pay him, his sister, who also happens to be the personal representative of their father's estate, sued him (she also sued him for partition). Despite there being no provision in any agreement between Clyde and the USDA for Clyde's father's estate to get paid any of the benefits, the master-in-equity ordered Clyde to pay the estate $11,690.00, half of the money that the USDA paid him under the contract for farm operation.

On appeal, the Court of Appeals effectively doubled the amount Clyde was ordered to pay the estate, finding that the master should not have offset the amount by Clyde's right to inherit and remanding the case. The Court of Appeals also reversed the master's finding that Clyde has a right to purchase the property under S.C. Code Ann. § 15-61-25 (which specifically states that it applies to partition actions among heirs and devisees and nowhere says it excludes partition actions under the Probate

Code), ruling that the statute did not apply to this case because the partition claim was brought pursuant to the Probate Code.

Reasons that this Court's review on certiorari of the Court of Appeals' decision is proper and needed may be summarized as follows:

a) The Court of Appeals' decision in this case is the first reported opinion of any South Carolina appellate court that decides any issue under or otherwise discusses S.C. Code Ann. § 15-61-25, a statute that took effect on May 25, 2006, and that alters the procedure for the disposition of partition actions. By its terms, this statute created new rights and can operate to affect the substantive outcome of partition cases. The Court of Appeals' interpretation of this statute and its decision that the statute does not apply in this case contravenes the plain terms of S.C. Code Ann. § 15-61-25 as well as long-established principles of statutory construction. Rather than effectuating the intent of the General Assembly, the Court of Appeals' decision frustrates it.

b) The South Carolina Probate Code explicitly provides in S.C. Code Ann. § 62-3-101 that, upon a decedent's death, title to his realty passes immediately to the decedent's heirs or devisees. This is entirely consistent with precedent of this Court, which held the same thing, that predates the adoption of the Probate Code. The Court of Appeals decided that title to the land at issue in this case passed at Atn Livingston's death to Emma Lou Livingston Martin (hereinafter, sometimes, "Emma") as personal representative of his estate instead of to his devisees, Emma and Clyde. The Court of Appeals' decision in this case is in direct conflict with controlling statutory law and this Court's precedent

c) The Court of Appeals' decision in this case determined what appears to be the novel issue under South Carolina law of whether payments by the United States Department of Agriculture to a person under a contract which pays that person for operating a farm are personal property of the payee under the contract or inhere in the land being farmed as a part of the property owned by the titleholder of the land. There is neither logical reason nor authority to support the position that such payments are anything other than the personal property of the payee, yet the Court of Appeals determined that such payments are part of the land.

d) The Court of Appeals applied a continuing nuisance or renewal of tortious activity analysis to its decision-making process concerning the application of the statute of limitations in this case; however, the only purported basis for concluding that Clyde had acted unlawfully toward the estate of his father did not exist at the times that the Court of Appeals concluded that his actions constituted new wrongs for which new rights of action by Emma accrued against him. Neither Emma, the lower court, nor the Court of Appeals stated any authority, factual or legal, to support a finding that Clyde committed any unlawful act toward the Estate by submitting renewal paperwork for his farm operator status in 2003, 2004, 2005, 2006, or 2007. The Court of Appeals' decision, perhaps unintentionally, seems to alter basic substantive legal principles (and the precedent of this Court's decisions) concerning when a duty exists under the guise of deciding a statute of limitations issue.

e) As the Court of Appeals noted, it appears that no South Carolina reported appellate opinion has dealt with the application of the statute of limitations to the receipt of USDA payments in this context.

f) The Court of Appeals' decision that the master-in-equity erred in offsetting the amount of the judgment against Clyde in light of Clyde's right to inherit as his father's devisee hinges upon what seems to be the Court of Appeals' perception that the master should have made assumptions based on things that were not in the evidence that was before him. This contravenes well-settled legal principles. Cases are supposed to be decided on the basis of evidence, not speculation.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on January 30, 2013. Counsel for the Petitioner certifies that the petition for rehearing was served and filed on February 14, 2013, and was finally ruled on by the Court of Appeals on June 12, 2013.

QUESTIONS PRESENTED

The questions presented for review in this case, while discussed in detail below, may be succinctly stated as follows: 1) Did the Court of Appeals err in determining that the USDA payments were property of the Estate and that Clyde is liable to the Estate for having received them? 2) If that decision was not error, did the Court of Appeals err in then determining that Emma's right to sue for them was not barred by the statute of limitations? 3) If that decision was not error, did the Court of Appeals err in then determining that the master-in-equity's decision to offset the judgment against Clyde by his right to inherit from the Estate as Atn Livingston's

devisee was error? 4) Did the Court of Appeals err in determining that S.C Code Ann. § 15-61-25 does not apply to this case?

STATEMENT OF THE CASE

This action concerns rural land in the vicinity of the town of North, South Carolina, that was owned by Atn Burns Livingston, who died in 1999 and was the father of Emma and Clyde. (App. p 169.) After Atn Livingston died, Emma and Clyde were appointed as the co-personal representatives of his estate. (App. p. 169.) Emma and Clyde are the sole and equal devisees of their father and, thus, the only two owners of the land at issue in this case. (App. p. 172.)

In the year 2000, Clyde applied for farm operator status for the land subject of this case with the United States Department of Agriculture and was from then until 2008 paid $29,902.00 in USDA subsidy payments as a farm operator. (App. p. 169.) The payments were made to Clyde as the farm operator under the contract with the USDA. (App. p. 321.) Neither the USDA nor Clyde contracted for the payments to be made to the Estate. (App. pp. 321, 349-75, 405-32.)

The probate court removed Clyde as co-personal representative of the estate, on the grounds that he and Emma could not cooperate as co-personal representatives, on January 18, 2002. (App. pp. 169-72, 380-81.) From then until the present day, Emma has been the sole personal representative of the estate of Atn Burns Livingston. (App. p. 170.)

This case, filed on May 30, 2006, is primarily a partition action by Emma against Clyde and others, but it includes a number of non-partition claims as well. (App. pp. 184-209.) The other parties are named because of judgment liens they have or may claim against Clyde. (App. pp. 169, 172, 185-89.)

The case was filed in the Orangeburg County Probate Court and was removed to the Court of Common Pleas by order of Probate Judge Pandora Jones-Glover filed April 12, 2007. (App. pp. 174-76.) The case was referred on August 19, 2008, to the Honorable O. Davie Burgdorf, Master-in-Equity for Orangeburg County, by the consent of all non-defaulting parties. (App. pp. 178-83.)

On January 21, 2009, pursuant to S.C. Code Ann. § 15-61-25, Clyde served notice of his interest in purchasing the property subject of this case. (App. p. 402.) Two days later, Emma served a motion "for an Order denying the Defendant, Clyde B. Livingston, of any right to purchase the real property being the subject matter of this action pursuant to the rights granted to a 'non-petitioning joint tenant' by S.C. Code Ann. §15-61-25[.]" (App. p. 215.) This motion was heard on February 11, 2009. (App. p. 249 ln. 1 through p. 274 ln. 7.)

Through a written order filed June 8, 2009[1], the master denied Emma's motion and ruled upon several other matters, including Clyde's motion for a scheduling order. (App. pp. 157-64.) Because "this action presents numerous issues in which the various parties have varying degrees of interest and involvement[,]" the master trifurcated the action, providing for separate trials of "1) the non-partition and non-lien issues between [Emma] and [Clyde] (i.e., the issues between [Emma] and [Clyde] other than issues in which the Court must decide whether a lien exists upon the real property subject of this action and claims in which the Court must decide the extent, duration, or priority of a claimed lien upon the real property subject of this action), 2) the issues in this action that concern the validity, priority, extent, and amount of the alleged liens (or other disputed property interests), and 3) the issues as

[1] The clerk of court's office incorrectly clock-stamped the order with the date July 8, 2009, which seems to have been just a simple mistake in setting the clock-stamp machine. (App. p. 157)

to the disposition of the real property in this action or the disposition of the funds paid into the Court in accordance with S.C. Code Ann. § 15-61-25." (App. pp. 160-61, 162-64.) Emma served a motion to reconsider the ruling on her motion to deny Clyde his rights under S.C. Code Ann. § 15-61-25 (App. pp. 221-25.) This appeal arises from the denial of Emma's motion and the master's denial of the motion to reconsider, as well as his decision following the bench trial he held on March 24, 2010, of the non-partition and non-lien claims between Emma and Clyde. (App. pp. 165-68)

The claims in this action that fell into the appropriate category to be tried on March 24, 2010, were Emma's claim for recovery on two notes given by Clyde and Emma's claim that Clyde had misappropriated estate property by receiving $29,902.00 in United States Department of Agriculture subsidy payments as a farm operator with regard to the real property subject of this action. (App. p. 169.) Before the commencement of the trial, Emma withdrew the claims on the notes. (App. p. 169, p. 278 ln. 16-21.) The master then heard Clyde's previously served and filed motion for summary judgment on Emma's remaining claim against him concerning the USDA payments, but the master deferred ruling on that motion until after hearing the evidence at trial. (App. pp. 169, 172-73, 226-246, p. 278 ln. 1, 4-9, p. 282 ln. 18-25, p. 283 ln. 1 through p. 293 ln. 10.)

The claim of alleged misappropriation of USDA payments was the sole subject of the trial. (App. p. 169.) Emma testified and introduced USDA records and a summary of the benefit amounts paid as exhibits, then rested her case. (App p. 293 ln. 12 through p. 314 ln. 14.)

Emma testified that in April of 2002 – after she had become the sole personal representative of the estate – she received a letter from the USDA about Clyde being

a farm operator with regard to the land at issue and "that was the first [she] knew about it that farm service agency type payments [were] involved at all." (App. p 170, p. 296 ln. 9-12, 16-19) She testified that she "asked around in the community what that could possibly mean" and then contacted the USDA and inquired with that agency about Clyde's status as a farm operator of the land. (App. p. 170, p 296 ln. 24 through p. 297 ln. 1-5.) According to her testimony, that was when the USDA's Orangeburg Farm Services Agency office informed her that Clyde was and had been receiving the farm subsidy payments. (App. p. 170, p. 297 ln. 4-7.) Emma testified that she got "some copies and things from them at that time." (App. p. 297 ln. 7-8.)

In connection with being the personal representative of the estate, Emma was represented by attorney Cliff Moore of the law firm of Ellis, Lawhorne & Sims, P.A., at the time she said she discovered Clyde had been receiving farm subsidy payments. (App. p. 170, p. 297 ln. 9-11, p. 309 ln. 15-17.) She brought the information about Clyde receiving the USDA payments to her lawyer's attention and talked with her lawyer about "how should that be handled and how should we proceed." (App. p. 170, p. 297 ln. 9-13.) Her attorney began a dialogue about the payments with the lawyer who represented Clyde at the time. (App. p. 297 ln. 13-24.) Despite the fact that in April of 2002 Emma knew about Clyde receiving the USDA payments and even engaged an attorney to address the situation, she did not bring suit (this action) on the claim concerning the USDA payments until May 30, 2006, over four years later. (App. pp. 170, 184-193, p. 296 ln. 9-12, 16-19, 24, 25, p. 297 ln. 1-24)

On behalf of the estate, Emma applied for farm subsidy payments in 2008 and has received them since. (App. p. 170, p. 293 ln. 4-5.) No evidence was offered to the effect that she was prevented from making that application at any time. (App. p. 293 ln 11 through p. 314 ln. 14.)

Clyde testified that he and Emma had agreed that he would rent the land from her on the same terms as the previous tenant had rented the land from the decedent (App. p. 170, p. 317 ln. 13-24, p. 319 ln. 8-12, 19-25, p. 321 ln. 6-8.) He testified that the decedent's tenant had been a farm operator of the land and had collected the USDA farm subsidy benefits himself. (App. p. 170, p. 324 ln. 4-11.)

All the testimony and USDA documents admitted at the trial were to the effect that the USDA paid Clyde the farm subsidy payments because he had a contract with the USDA under which the USDA was obligated to make the payments to him by virtue of Clyde's status as a producer/farm operator. (App. p. 293 ln. 11 through p. 314 ln. 14, p. 317 ln. 10 through p. 324 ln. 12, p. 324 ln. 24 through p. 325 ln. 24, pp. 349-75.) The estate had no contract with the USDA until 2008, and it was not a party to the USDA's contract with Clyde. (App p. 14, p. 157 ln. 4-5.) As Clyde testified on cross-examination, the USDA payments "were not estate funds. They were paid to a farm operator. Me." (App. p. 321 ln. 22-23.)

Clyde moved for an involuntary nonsuit on the grounds that the USDA payments were not property of the estate and that the statute of limitations in S.C. Code Ann. § 15-3-530 would bar the claim in any event. (App. p. 170, p. 314 ln. 15 through p. 317 ln. 4.) The master deferred ruling on this motion and requested that Clyde present his case. (App. p. 170, p. 317 ln. 5.) Clyde testified, and Emma was again called as a reply witness. (App. p. 317 ln 10 through p. 325 ln. 24.) Counsel and the master discussed some of the issues, and the master requested that counsel for both Emma and Clyde submit proposed orders. (App. p. 326 ln 6 through p. 340 ln. 5.)

In an order filed November 17, 2010, the master granted Clyde's motions for summary judgment and involuntary nonsuit in part and denied them in part. (App.

pp. 172-73.) The master concluded that the USDA payments were part of the Estate of Atn Burns Livingston and found Clyde liable for receiving them; however, he limited Emma's recovery to $11,690.00. (App. pp. 171, 172.) The master concluded that "[t]he statute of limitations limits the plaintiff's recovery, on behalf of the estate, to the USDA payments that were made within three years before this action was commenced[,]" noting that "[f]rom 2003 forward, [Clyde] was paid $23,380.00 in farm subsidy benefits. Accordingly, the recoverable portion of [Emma]'s claim concerns this $23,380.00." (App. p. 171.) The master also concluded that, since Clyde is the devisee entitled to one half of the estate, Emma's recovery had to be further reduced by half because of the impact of S.C. Code Ann. § 62-3-619, the executor de son tort statute, which "provides that recovery by an estate is limited by the principle that the tortfeasor is entitled to an offset for the amount he is or was supposed to receive from the estate of the property that has come into his possession." (App. pp. 171-72.) The master denied Emma's request for prejudgment interest because she did not plead that prejudgment interest should be awarded. (App. p. 172.)

The master ordered Clyde to pay $11,690.00 to the Estate of Atn Burns Livingston within 30 days of his counsel's receipt of a clocked copy of the order, ruling that, if Clyde did not do so, the order would constitute a judgment against him and in favor of the estate in the amount of $11,690.00. (App. p. 173.) The master made no ruling as to the nature of the cause of action that was tried or whether it was legal or equitable. (App. pp. 168-73.) Clyde and Emma both appealed.

The Court of Appeals affirmed as to all issues raised by Clyde and reversed as to two issues raised by Emma. (App. pp. 2, 4, 7, 9, 11.) The Court of Appeals concluded that the USDA payments were part of the land and that the Estate was

entitled to them, reasoning that "[b]ecause Emma retained the authority over the estate as the PR, the property did not pass to Clyde despite his status as a named heir in the will." (App. pp. 4, 7.) The Court of Appeals also held that the statute of limitations did not bar Emma's claim, as Clyde had argued it did, and further held that the master should not have offset the award against Clyde. (App. pp. 7-9, 11.) The Court of Appeals also held that S.C. Code Ann. § 15-61-25 was not applicable to the instant partition action. (App. pp. 9-11.)

Clyde petitioned for rehearing or rehearing *en banc*. (App. pp. 13-23.) The Court of Appeals requested a return by Emma to the petition, which she submitted. (App. pp. 24-31.) Clyde replied to that return. (App. pp. 32-37.) The Court of Appeals denied the petition by summary order. (App. pp. 38-40.)

ARGUMENT

I. The Court of Appeals' holding that the Estate owns the land in question contravenes this Court's precedent and statutory law.

As part of its reasoning that the USDA payments at issue belonged to the Estate of Atn Livingston (hereinafter "the Estate"), the Court of Appeals reasoned that because Emma "retained the authority over the estate as the [personal representative], the property did not pass to Clyde despite his status as a named heir in the will." (App. p. 7) This is an illogical statement. *Authority* (or, more properly, *power*) and *title* are different concepts, different things. The Court of Appeals has equated the proverbial apples and oranges, and its conclusion contravenes both statutory law and existing precedent of this Court. If the Court of Appeals' decision stands, it threatens to undermine a well-settled, established principle of real estate law, one on which attorneys for countless South Carolinians rely in real estate matters.

While the Court of Appeals correctly noted that S.C. Code Ann. § 62-3-101 provides that, upon a decedent's death, title to his realty passes to the decedent's heirs or devisees, the Court of Appeals then undertook to strip that statute of its meaning by stating that "the property did not pass to Clyde despite his status as a named heir in the will." (App. p. 7.) Further, the Probate Code sections cited by the Court of Appeals for the proposition that title to realty passes to the personal representative until the estate is no longer being administered do not stand for that proposition; rather, they deal with *powers* a personal representative has with respect to land. (App. pp. 5-7.) The sections of the Probate Code cited by the Court of Appeals do nothing to undo the operation of S.C. Code Ann. § 62-3-101 This petition examines each of those Probate Code sections.

Section 62-3-709 of the Probate Code provides a personal representative with the power to take "possession or control of" real property a decedent owned when, "in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration." It deals with the *power* of the personal representative to take *possession* or *control* of real property, not with the personal representative taking or receiving *ownership* of the property. The personal representative's power is to invade the real estate in furtherance of administration of the estate. It is something akin to a lien on the realty. See Black's Law Dictionary 419 (2d pocket ed. 2001) (defining "lien" as "[a] legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied"). Further, there is no evidence in the record that, during the time Clyde received USDA payments, Emma had taken possession or control of the real estate at issue or had made a request to do so.

Section 62-3-711(a) of the Probate Code also addresses the powers of a personal representative, not ownership of anything by an estate or personal representative. Specifically, it addresses the personal representative's "power over title to property *of the estate*[ ]" S.C Code Ann. § 62-3-711(a) (emphasis added). As S.C. Code Ann. § 62-3-101 states, real property a decedent owned during his life is not property of his estate but, rather, property of his heirs or devisees. In any event, all this statute speaks to is a personal representative's power, not ownership of anything.

Section 62-1-201(33) of the Probate Code simply defines the term "property" as used in the Probate Code and nowhere purports to vest a personal representative with ownership of anything. This statute does not bolster the Court of Appeals' reasoning.

Sections 62-3-709 and 62-3-711 also address the personal representative's power, possession, and control and nowhere purport to vest ownership of realty in a personal representative or a decedent's estate. *Ownership* of realty (i.e., title to real estate) that had been owned by a decedent is addressed by S.C. Code Ann. § 62-3-101 and existing precedent of this Court. The decisions of this Court bind the Court of Appeals as precedents. S.C. Const. Art. V, § 9; Daniels v. City of Goose Creek, 314 S.C. 494, 497, 431 S.E.2d 256, 260 (Ct. App. 1993). This Court has stated the following:

> By the common law, and under the statutes in most of the states, the title to real property vests in the heir or heirs immediately on the death of the intestate, subject in most jurisdictions, as in South Carolina, to the exercise of such special powers as may be conferred upon the administrator by statute, such as the right to sell for payment of debts. A different rule prevails with reference to personal property. Title to real estate cannot remain in abeyance; it must be vested in

> someone. When, therefore, a person seized of real estate dies intestate, the title to such estate vests at once in his heirs, if he leaves any.

Carter v. Wroten, 187 S.C. 432, 198 S.E. 13, 15 (1938) (internal citations omitted) Per this Court, the highest court in this state, an estate *cannot* hold legal title to land. Taylor v. Jennings, 233 S.C. 600, 607, 106 S.E.2d 391, 395-96 (1958); Fischer v. Bennett, 202 S.C. 534, 25 S.E.2d 746, 748 (1943); Carter, 198 S.E. at 16. The adoption of the Probate Code did not change this; indeed, the section of the Probate Code that speaks to this issue, S.C. Code Ann. § 62-3-101, is expressly consistent with it. While the Court of Appeals paid lip service to the validity of this principle, it then rendered a decision on this issue that is entirely based upon a repudiation of it. Under the South Carolina Constitution, this result cannot stand, as it is repugnant to precedent of this Court. S.C. Const. Art. V, § 9.

Though this is not explained in the opinion, it seems from the Court of Appeals' opinion that the Court of Appeals sees the right to receive USDA subsidy payments as a profit of land ownership, i.e., a right inherent in land ownership. (Clyde disagrees with this position, as discussed below and in his briefs in this case.) For example, the Court of Appeals stated that Clyde "suggests he is a cotenant entitled to possess the whole of the land, which includes the USDA benefits."[2] (App. p. 4.) This Court has addressed the question of whether those who inherit real property are immediately entitled to the land's rents and profits, and this Court held that rights to rents and profits pass to heirs or devisees along with the land at the moment the decedent dies. Burkhalter v. Townsend, 160 S.C. 134, 158 S.E. 221, 223

[2] The Court of Appeals engaged in many mischaracterizations of Clyde's arguments. Clyde never argued that the USDA benefits are a part of the land, but he did point out that he is cotenant of the land involved in the underlying case, with the right to full use of the land (as noted in his briefs). (App. pp. 57, 142-43.)

(1931). Accordingly, even if the right to receive the USDA payments were a right that inhered in the real estate, which it is not, it would belong to Clyde as a tenant in common, not to the Estate Id.

Title is the status of ownership. Cf. Stokes v. Murray, 102 S.C. 395, 401, 87 S E. 71 (1915) (discussion embracing concepts of actual title as opposed to "paper title"). Nowhere do any of the Probate Code sections cited by the Court of Appeals purport to vest a personal representative of an estate with title to land the estate's decedent owned. Indeed, to conclude they do (as the Court of Appeals did) would render meaningless the specific statute that addresses this point, S.C. Code Ann. § 62-3-101 The Court of Appeals' decision is in conflict with, and threatens to undermine, this statute and this Court's precedent.

II. Clyde's contract with the USDA provided only for Clyde, the farm operator, to receive the payments, not for the Estate to receive them.

While Clyde may have signed documents with the USDA on behalf of himself and the Estate[3], the contract was for Clyde, not the Estate, to be paid the USDA payments. (App. pp. 349-75.) No one in this case, including the Court of Appeals, has suggested otherwise. Ordinarily, the only parties who have any rights under a contract are the promisor and the promisee. See Professional Bankers Corp. v. Floyd, 285 S.C. 607, 612, 331 S.E.2d 362 (Ct. App. 1985). The only parties who were in the positions of promisor and promisee under the contract were Clyde and the USDA. (App. pp. 349-75.) Clyde's contract with the USDA was not a third-party contract for the benefit of the estate; thus, this general principle applies here. Cf. id. The USDA's obligation to pay Clyde money was based solely on its contract with him as a farm operator, not on the basis of who owned the land. (App. pp. 349-75.) The

[3] While this is not entirely clear, it is also not at all the point.

estate was not a party to that contract and had no interest in the payments. (App. pp. 349-75) If the Clyde-USDA contract had been breached or was even fraudulently entered into, any claims or rights that would arise thereby would run between Clyde and the USDA, not anyone else. (App. p 249 ln. 2-9.) The Estate would simply be a passive observer to such a dispute, with no interest in its outcome. Indeed, the "lease statement" Clyde signed with the USDA states that, if he has made a misrepresentation to the USDA, he "must *refund* all PFC payments received[.]" (App. p. 349.) It does not say that he is to pay them to the owner of the land on which he operated the farm.

If A enters into a contract with B to pay B, even if that contract were expressly based on the assumption or representation that B owns some piece of land, if it is later determined that C owns the land, that does not mean that the money A paid B now belongs to C. That flawed logic, however, is precisely the reasoning the Court of Appeals applied in this case.

The Court of Appeals misunderstood what the nature of the USDA payments was. They were payments to Clyde for farm operation. Neither Emma, the lower court, nor the Court of Appeals ever stated any authority, factual or legal, to the contrary. Accordingly, the Court of Appeals' opinion fails to explain why it is that it concluded that the USDA payments were property of the Estate. That is because they were not.

III. The Court of Appeals' opinion conflates renewal of Clyde's contract with the USDA with an unlawful act of Clyde toward the Estate.

The Court of Appeals, in deciding that the statute of limitations did not bar Emma's claim, decided that "because each application with the USDA was for a fixed duration, it required a separate renewal each year and the benefit was contingent upon

an offer and acceptance by the USDA. Therefore, the master properly determined that statute of limitations was not an absolute bar on Emma's rights to collect a portion of the USDA benefits." (App. p. 9.)

The only act Clyde did with regard to contracting for and receiving USDA payments that the lower court found gave rise to liability was that "[w]hen [Clyde] entered into his agreement with the USDA, he breached his duty to the estate as co-personal representative" because Clyde "occupied dual roles" (as an individual and a co-personal representative) when he made that agreement. (App. p. 171.) Clyde was removed as Personal Representative of the Estate by court order in 2002. (App. pp. 169, 380-81.) Accordingly, at no time during the three years preceding this filing of this action did Clyde have *any* duty to the Estate or Emma; he was not a personal representative of the Estate. Clyde did *not* "occup[y] dual roles" when he submitted renewal paperwork for his farm operator status in 2003, 2004, 2005, 2006, or 2007. Neither Emma, the lower court, nor the Court of Appeals stated any authority, factual or legal, to support a finding that Clyde committed any unlawful act toward the Estate by submitting renewal paperwork for his farm operator status in 2003, 2004, 2005, 2006, or 2007.

IV. The Court of Appeals' analysis of the interplay between S.C. Code Ann. § 15-61-25 and S.C. Code Ann. § 62-3-911 runs counter to this Court's precedent concerning statutory interpretation.

The Court of Appeals held that "[b]ecause the action remains primarily an action governed by the probate code, we find the probate code should have continued to be applied after the removal to the master. Waddell[v Kahdy, 309 S.C. 1, 4, 419 S.E.2d 783, 785 (1992)] Furthermore, because a partition statute is provided in the probate code, the master should have relied upon that statute in addressing the

partition issue. Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ('Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.')." (App. p. 11.) The Court of Appeals' decision appears to assume that because the Probate Code applies to this partition action, S.C. Code Ann. § 15-61-25 does not. Rather than effectuating the will of the legislature, the Court of Appeals' opinion frustrates it.

Waddell does not say that the Probate Code *and no other law* is applicable in an action removed from the probate court. 309 S.C. at 4. Regardless of how one reads Waddell, however, simply because a court determines that the Probate Code governs in this partition action does not mean that S.C. Code Ann. § 15-61-25 does not apply. The plain words of S.C. Code Ann. § 15-61-25 make it applicable to "a petition for partition of property owned by joint tenants or tenants in common." S.C. Code Ann. § 15-61-25(A). No distinction is made between petitions for partition brought pursuant to the Probate Code and those brought otherwise. Id. In fact, the statute specifically states that "[f]or the purposes of this section, 'joint tenants and tenants in common' include heirs and devisees." Id. The statute unambiguously says it applies to "a petition for partition of property owned by joint tenants or tenants in common[,]" including property of heirs and devisees. S.C. Code Ann. § 15-61-25(A).

"When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When a court interprets a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's

operation." Id. at 499. A court "must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citation and quotation marks omitted).

The terms of S.C. Code Ann § 15-61-25 are clear: the statute applies to any "petition for partition of property owned by joint tenants or tenants in common." S.C. Code Ann. § 15-61-25(A). Accordingly, it applies equally to partition actions brought in the probate court and those brought in the circuit court.

The Court of Appeals' decision contradicts this Court's precedent concerning statutory interpretation. "Generally, specific laws prevail over general laws, and later legislation takes precedence over earlier legislation." Langley v Pierce, 313 S C. 401, 403, 438 S.E.2d 242, 243 (1993), State v. Sullivan, 310 S.C 311, 314, 426 S.E.2d 766, 768 (1993) (same). Where there is a conflict between statutes, the more recent and specific legislation controls. Porter v. S.C. Pub. Serv. Comm'n., 327 S.C. 220, 224 n. 3, 489 S.E.2d 467, 469 n. 3 (1997).

Here, between S.C. Code Ann. §§ 15-61-25 and 62-3-911, § 15-61-25 is the more specific statute, and it is certainly the more recent. There is no fundamental conflict between the Probate Code and S C. Code Ann. § 15-61-25, as the Court of Appeals apparently perceived. Just like S.C. Code Ann. § 15-61-25 slightly altered the partition action disposition rubric under Chapter 61 of Title 15, so it also slightly altered the disposition rubric for partition actions under the Probate Code. By the plain terms of the statute, that is what it was supposed to do. "Where there is one statute addressing an issue in general terms and another statute dealing with the

identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Capco of Summerville, 368 S.C. at 142

V. The Court of Appeals' analysis of the *executor de son tort* statute overlooked that Emma never presented any evidence that the Estate has any claims to pay or expenses related to administration.

The Court of Appeals' opinion states that "Section 62-3-902 of the South Carolina Code (2009) specifically states the order of abatement in which testamentary gifts are reduced to pay debts or other claims against the estate. By allowing Clyde to retain one-half of the value of the estate benefits, the master ignored the plain language of the abatement statute and completely disregarded the possibility that the assets of the estate were insufficient to pay all debts, claims, and devises." (App. p. 11.)

Emma never presented to the lower court any evidence that the Estate has any claims or expenses to pay. Our law requires that cases be decided upon a factual record composed of evidence, not possibilities. See Trivelas v. S.C. Dept of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) (arguments of counsel are not evidence); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997) (same); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994) (same); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986) (same). Further, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR.

In the absence of evidence that such claims or expenses exist, it would be proper for the lower court to offset any judgment against Clyde in the Estate's favor

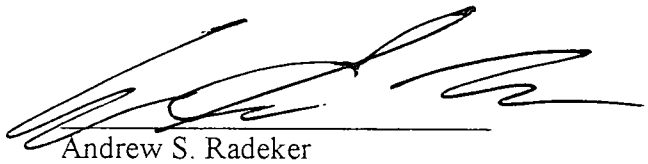
by taking into account that Clyde is entitled to a distribution of half of all the Estate's assets The Court of Appeals reversed the master on this point on the basis of conjecture, not the record

VI. This case involves novel questions of law and a legal principle important to the public.

As discussed above, it appears that the opinion issued in this case is at odds with existing precedent of this Court in several respects. Furthermore, as the Court of Appeals noted in its opinion, no appellate case in this state before the instant one has addressed S.C. Code Ann. § 15-61-25, nor has any South Carolina case directly discussed USDA benefits and the statute of limitations in this context. (App. pp. 8, 11.) Also, the Court of Appeals' decision makes something that was once clear – that title to realty passes immediately to a decedent's heirs or devisees upon death – now unclear, and its opinion casts into uncertainty something upon which lawyers in real estate matters could previously rely without hesitation. This is a case in which certiorari is warranted.

WHEREFORE, the Petitioner prays for an Order granting a writ of certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Petitioner

July 12, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 12 2013
S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

O. Davie Burgdorf, Master-in-Equity

Court of Appeals Case Tracking No. 201079986
Trial Court Case No. 2007-CP-38-826

In re: Estate of Atn Burns Livingston.

Emma Lou Livingston Martin as Personal Representative of the Estate of Atn Burns Livingston and Emma Lou Livingston Martin,.....Respondents/Appellants,

v.

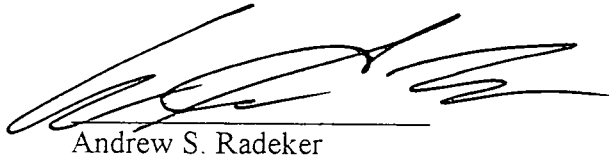
Clyde B. Livingston; Miller Communications, Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; and American First Federal, Inc.; Defendants,

Of whom Clyde B. Livingston is.....Appellant/Respondent.

PROOF OF SERVICE

I certify that I served the foregoing petition for writ of certiorari and memorandum in support, as well as a copy of the appendix, on counsel for the Respondents by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Richard B. Ness, Esq
Ness & Jett, LLC
P.O. Box 909
Bamberg, SC 29003



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant/Respondent

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