

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

O. Davie Burgdorf, Master-in-Equity

Appellate Case No. 2013-001505  
Trial Court Case Number 2007-CP-38-826

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AUG - 9 2013

**S.C. Supreme Court**

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

RESPONDENTS' MEMORANDUM IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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On January 30, 2013, the Court of Appeals issued its opinion in this matter, finding in favor of Respondent/Appellant below, Emma Lou Livingston Martin as Personal Representative of the Estate of Atn Burns Livingston and Emma Lou Livingston Martin individually (Emma), on all matters on appeal. Petitioner Clyde B. Livingston (Clyde), who was the Appellant/Respondent below, filed his Petition, pursuant to Rule 242, SCACR, for the issuance of a writ of certiorari.

#### BACKGROUND INFORMATION

Atn B. Livingston died October 25, 1999. His Will, dated January 28, 1983 and duly probated, leaves his entire estate evenly, in fee simple, between his children, Clyde and Emma, both of whom survived their father. Within his Will, Atn B. Livingston appointed his two children to serve as Co-Executors of his Estate. By Order of the Orangeburg Probate Court, the siblings, Clyde Livingston and Emma Lou Livingston Martin, were appointed Co-Personal Representatives on December 10, 1999. App. 377.

The Estate consists primarily of real estate, namely a 269-acre tract of land in Orangeburg County, TMS #0061-00-01-010 (The Farm). The parcel has an appraised value of \$400,000.00. App. 382.

Clyde has several monetary judgments of record against him, individually. These are of record with the Orangeburg County Clerk of Court, and are documented within the Summons and Complaint. App. 184.

Clyde was removed as Personal Representative, by Probate Court Order on January 18, 2002 for dereliction of duty. App. 379.

In the year 2000, without the consent of Emma, individually or as co-Personal Representative, Clyde applied for farm operator status with the United States Department of Agriculture (hereafter USDA). From 2003 until 2008, Clyde, individually, was paid \$29,902.00 in USDA subsidy payments. The land associated with this contested farm operator status is exclusively the land subject to this action. App. 169.

On or around October 28, 2003, seeking to generate some liquidity with which to pay due expenses and close the Estate, Emma, as Personal Representative, sought permission from the Probate Court to thin timber on The Farm. Clyde objected to this request, and instead sought immediate distribution of the Estate assets. App. 378.

Later, on May 30, 2006, Emma brought an action to compel Clyde to reimburse the Estate for those USDA subsidies. Within this same action, Emma sought a court Order, pursuant to S.C. Code Ann. §62-3-911, S.C. Probate Code, to allow Emma, as Personal Representative, to sell The Farm by partition, to aide in the administration of the Estate. App. 184. Following this filing, on behalf of the Estate, Emma, as Personal Representative, applied for the USDA farm subsidies. The Estate has been receiving such payments since 2008.

Following Emma's filing, Clyde filed his Amended Notice of Interest to Purchase per S.C. Code Ann. §15-61-25 on January 21, 2009. On January 26, 2009, Emma, individually and as Personal Representative, filed her Motion to deny Clyde any right to purchase the real property being the subject matter of this action. On February 11, 2009 the trial court heard this Motion, and issued its Order denying Emma the relief sought, finding Clyde may purchase the real property from the Estate pursuant to S.C. Code Ann. §15-61-25. App. 168. Emma appealed this Order.

Clyde filed his Motion for Summary Judgment on the issue of the USDA subsidies on March 13, 2010. Upon hearing this Motion, the lower court found that Clyde breached his duty to the Estate as Co-Personal Representative in pocketing the USDA subsidies and failing to apply them to the Estate. Further, the trial court found the USDA subsidies were properly payable to the Estate. The court found that S.C. Code Ann. §15-3-530 limited recovery to those USDA payments that had been received by Clyde three years prior to the filing of this action, namely 2003. The recoverable amount received improperly is \$23,380.00. App.173. Clyde appealed this ruling.

The trial court then found that Clyde is only required to reimburse the Estate in the amount of \$11,690.00, holding he is entitled to a one-half offset in the total amount, by operation of the Executor de son tort Statute. App. 168. From this Order, Emma appealed.

Emma filed her Motion for Reconsideration as to the issues addressed within the June 3, 2009 Order of Special Referee Burgdorf on June 18, 2009. The trial court issued its Order November 16, 2010, reiterating that S.C. Code Ann. §15-61-25 is applicable to this purely probate matter. App. 165. From this Order, Emma likewise appealed.

The Court of Appeals found for Emma on all matters on appeal. The opinion of the court, written by Justice Konduros, was joined by both Justice Short and Justice Lockemy, concurring.

On July 12, 2013, Clyde filed his Petition for Writ of Certiorari and memorandum in support. Emma opposes this Petition.

## STANDARD OF REVIEW

Rule 242(b), SCACR states, in relevant part: “A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general, indicate the character of reasons which will be considered: (1) Where there are novel questions of law; (2) Where there is a dissent in the decision of the Court of Appeals; (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.”<sup>1</sup>

Pursuant to the Rule 242, SCACR framework, this case does not warrant further review. First, this case presents no novel question of law, but rather affirms well settled-principals of the South Carolina Probate Code. Second, the Court of Appeals issued a singular opinion following the hearing of this matter, and summarily rejected Clyde’s Petition for Rehearing and his request for an En Banc review. Finally, the Court of Appeals decision is entirely consistent with prior South Carolina jurisprudence, both statutory and common law.

Under Rule 242, SCACR, these factors are certainly not controlling, however, they do indicate that the issues presented in this case simply do not merit additional inquiry. Emma respectfully requests the Court reject Clyde’s Petition for Writ of Certiorari, and remand this case back to the lower court, for resolution of the Estate.

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<sup>1</sup> Rule 242(b)(4) and (5) are not at issue in this case.

## LEGAL ARGUMENT

### ***THE PERSONAL REPRESENTATIVE OF AN ESTATE IS ENTITLED TO POSSESSION OF ALL REAL PROPERTY DURING ADMINISTRATION OF AN OPEN ESTATE***

Section 62-3-101, South Carolina Code, describing devolution of title, states:

“The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are *subject to the restrictions and limitations contained in this Code* to facilitate the prompt settlement of estates, including the exercise of the powers of the personal representative. Upon the death of a person, his real property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving...circumstances affecting the devolution of testate estates...”

(emphasis added).

Section 62-3-711, South Carolina Code, further describes the powers of a Personal Representative. In general, “Until termination of his appointment... a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust, however, for the benefit of the creditors and others interested in the estate.” S.C. Code Ann. §62-3-711(A).

In its opinion, *In Re Estate of Atn Burns Livingston*, S.C. Court of Appeals, Opinion Number 5078, January 30, 2013, citing S.C. Code Ann. Sections 62-3-709 and 62-1-201(33) (2009), the Court of Appeals correctly held: “Notwithstanding the immediate passage of title to heirs and devisees, the PR is entitled to possession of all real property during administration and has broad powers over real property during administration.” This holding is a correct statement of South Carolina law, and is consistent with both statute and precedent.

The Court of Appeals, applying numerous consistent provisions of the S.C. Probate Court, correctly held that title to real property devolves at death or thereafter to heirs or devisees, subject to sound administration of the estate, which takes priority. Citing the Reporter's comments to Section 62-3-709, S.C. Code of Laws, the Court affirmed: "If the Personal Representative considers it advisable he may take possession and his judgment is made conclusive." *See Livingston*.

In this case, Emma has the authority and obligations as PR to manage the real property, under Sections 62-3-703—711, S.C. Code of Laws, during the pendency of the Estate, and if necessary, to sell or mortgage the property to generate liquidity with which to properly administer the Estate. As the administration takes priority, any assumption of ownership by either Clyde or Emma is unwarranted until the administration of the Estate is complete.

Emma presented the Probate Court and the Master with significant evidence regarding the expenses of the Estate. Emma presented the trial court with evidence of a personal mortgage she gave to the Estate to aid in its administration, as well as the underlying expenses relating to attorney's fees, ad valorem taxes, and maintenance of the real estate. App. 389; 394—95. Emma's difficulty in producing liquidity to cover these necessary expenses, owing to Clyde's resistance, is the cause of the difficulty administering this Estate. App. 378—81.

While Clyde argues the Estate does not have "title" to the real estate, Emma's responsibilities as Personal Representative compel her to retain control over the real estate, pending the sound administration of the Estate.

***CLYDE IS NOT ENTITLED TO RECEIVE USDA FARM SUBSIDY PAYMENTS  
PRIOR TO THE ADMINISTRATION OF THE ESTATE***

The Court of Appeals, citing Sections 62-3-709 and 62-1-201(33), properly held: “In this case, the estate is still being administered; thus, Emma has the authority to retain and control the property in her capacity as PR. Emma’s right to retain the authority over the estate supersedes Clyde’s argument that he was acting within his authority as cotenant of Emma’s based on his status as an heir.” *See Livingston.*

In his Petition for Writ of Certiorari, Clyde argues the Estate cannot be a party to a contractual arrangement between the USDA and Clyde, individually. This statement ignores the fact that the Estate is still open, Clyde’s interest is subject to the administration of the Estate, and when Clyde filled out the initial application for the USDA subsidy, Clyde noted that the Estate owned the land, not him as heir. App. 349

The Court of Appeals, considering these factors, held: “Without express authority through ownership or contract, Clyde did not have the authority to enter a contractual relationship with the USDA.” *See Livingston.*

Clyde, in signing the USDA documents as Personal Representative, clearly recognized the paramount position of the Estate. He had no authority to contract as farm operator without first demonstrating ownership of the land. Moreover, while Clyde claims in his Petition that he was paying rent to the Estate to be the Farm Operator for USDA purposes, the Master did not find any evidence of any such agreement, nor does the Probate Court have any record of the Estate receiving such rental income. The Master is in the best position to make judgments as to the credibility of testimony and evidence, and his Order indicates that he found this testimony to be unbelievable. App.

168-73. *See Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001); *Dorchester County Dep't of Soc. Servs. v. Miller*, 324 S.C. 445, 477 S.E.2d 476 (Ct.App.1996)(broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses). Clyde has presented no supplemental evidence of this alleged agreement, and Emma maintains that none exists. Apps. 295—96; 303; 318—21.

The Estate alone has the authority to enter into any agreements to produce income from the real estate, whether it be through renting, leasing, clearing timber, or farming the land. In this case, the Estate presently receives those USDA subsidies at issue, on behalf of the beneficiaries of the Estate. *See §62-3-711, S.C. Code of Laws, as amended.*

As Clyde, individually, lacked the authority to so contract to receive the USDA farm subsidies, the Court of Appeals correctly dismissed Clyde's argument that he alone was entitled to the proceeds.

#### ***THE COURT OF APPEALS PROPERLY APPLIED THE STATUTE OF LIMITATION***

The Court of Appeals correctly applied the applicable statute of limitations. As each USDA application was for a fixed term, each annual application should be treated as an isolated and discrete event, triggering its own statute of limitation. *See Knight v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 20, 22-23, 374 S.E. 2d 520, 522 (Ct. App. 1988). The Discovery Rule does not operate to prohibit the continuing nuisance of annual application for USDA benefits, especially where Clyde continued to apply as Personal Representative years after his discharge from that office for dereliction of duty. *See*

*Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 355-57, 559 S.E.2d 327, 336 (Ct. App. 2001); App. 421; 427.

The Court of Appeals correctly applied Section 15-3-530, S.C. Code of Laws, holding any claims for USDA application benefits from 2003-2007 were appropriately before the lower court.

***THE PROBATE CODE APPLIES TO PROBATE MATTERS, INCLUDING  
PARTITION***

In his Petition for Writ of Certiorari, Clyde urges the Court to reconsider Section 15-61-25, S.C. Code of Laws, as the appropriate partition statute to use in this purely probate matter. The Court of Appeals correctly held Section 62-3-911, S.C. Code of Laws, is the applicable partition statute to use in the probate setting: “Because 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.” *See Waddell v. Kahdy*, 309 S.C. 1, 419, S.E.2d 783 (1992).

Furthermore, because a specific partition statute is provided in the probate code, applicable only within the Probate context, the Master should have relied upon that more specific 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.”).

The application of the Probate Code to this purely Probate matter is consistent with the prior rulings of this Court, as well as the legislative intent of its drafters. During

the 2005-2006 Legislative Session (Session 116), the Senate introduced a bill (S0925), which considered a proposed amendment to extend the 'buy-out' provisions of §15-61-25, S. C. Code of Laws, into the Probate context, effectively modifying and subrogating §61-3-911, S.C. Code of Laws, and imposing upon beneficiaries of an Estate the same rights claimed by Clyde in the lower court. On April 27, 2006, the Senate elected to remove all proposed language affecting § 61-3-911, S.C. Code of Laws, and did not extend the right of first refusal to purchase estate property prior to judicial partition into the Probate context.

The Probate Code governs this purely probate matter, and §15-61-25, S. C. Code of Laws, is inapplicable.

***THE Executor De Son Tort STATUTE IS INEFFECTIVE DURING THE ONGOING ADMINISTRATION OF AN ESTATE***

The Court of Appeals correctly ruled that the *Executor De Son Tort* statute cannot be applied until the final administration of the Estate. This is necessary to give meaning to the order of abatement prescribed within the South Carolina Probate Code.

The Court of Appeals properly found: "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. Without considering the estate as a whole from the purview of the probate court, there is no conceivable method by which the master could divide the subsidy award in half." *See Livingston.*

All property, both real and personal, is subject to the abatement statute within the Probate Code, regardless of the named beneficiaries of the will. *See §62-3-902, S.C. Code of Laws, as amended.* Allowing the *Executor De Son Tort* statute to preempt the just administration of the Estate would be improper and would usurp Emma's statutory and fiduciary obligations, as personal representative: "...every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration." *See §62-3-709, S.C. Code of Laws, as amended.* As the Estate is still being administered, and continues to accrue expenses related to attorney's fees, insurance, taxes, and the like, Emma, as personal representative, retains authority over the property, and is entitled to utilize the value of the assets of the Estate, including the amounts owed to the Estate by Clyde, in full.

The Court of Appeals correctly overruled the Master in this regard.

### CONCLUSION

The Court of Appeals correctly applied South Carolina law to the facts of this matter. Within his Petition for Writ of Certiorari, Clyde seeks to complicate what is really a quite simple question of the proper application of the Probate Code. Upon opening an Estate and appointing a Personal Representative, the beneficiaries of the Estate are prohibited from exercising any authority over the real estate, subject to the sound administration of the Estate. Rather, "a personal representative has the same power over

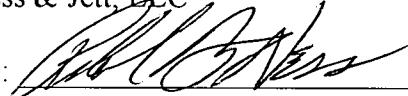
the title to property of the estate that an absolute owner would have, in trust, however, for the benefit of the creditors and others interested in the estate.” §62-3-711(a), S.C. Code of Laws, as amended. The Probate Code compels the Personal Representative to manage any available assets, and if necessary, to sell, mortgage, lease, or convey those assets to produce liquidity as required to manage the outstanding debts of the Estate. In this case, Clyde has repeatedly sought to frustrate the Personal Representative in her duties, as is born out again and again within the Record.

Emma requests that the Court reject Clyde’s Petition for Writ of Certiorari.

August 8, 2013

Bamberg, SC

Respectfully submitted,  
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I, Alison Dennis Hood, attorney for Respondents/Appellants in the appeal of *Estate of Livingston v. Livingston, Clyde*, Docket No. 2007-CP-38-826, do hereby certify that my agent has served the foregoing copies of RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by mailing a copy of the same, with postage prepaid, by United States mail to be attorney(s) at the address(es) indicated as follows:

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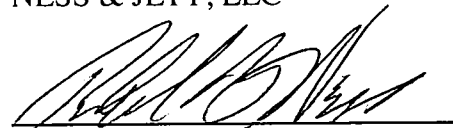
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