

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

O. Davie Burgdorf, Master-in-Equity

Supreme Court Tracking No. 2013-001505
Trial Court Case No. 2007-CP-38-826

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AUG 19 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.

PETITIONER'S REPLY
TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Clyde B. Livingston, who was the Appellant/Respondent below and is hereinafter, sometimes, referred to as “Clyde,” hereby submits this reply to the return (titled as a memorandum) of the Respondents (hereinafter, sometimes, “Emma”) to Clyde’s petition for a writ of certiorari in this case.¹

ARGUMENT

I. **Emma makes incorrect statements of law with no authority to support them.**

Emma makes several statements of law in her return that are simply wrong. The Court has surely noticed that Emma’s return is rather light on citations for the propositions of law it tries to advance. That is because there is nothing to which Emma can cite in support of those propositions.

A few examples from Emma’s return illustrate this. Emma contends in her return that the Court of Appeals’ decision “is entirely consistent with prior South Carolina jurisprudence, both statutory and common law” and “affirms well settled principals [sic] of the South Carolina Probate Code.” (Respondents’ Return to Petition for Certiorari p. 4.) Emma cannot make those statements true simply by making the statements. *How* is the Court of Appeals’ opinion supposedly consistent with South Carolina jurisprudence? Emma does not tell us. Clyde respectfully submits that is because she cannot. Emma cites no cases that are consistent with the Court of Appeals’ opinion, because there are not any. Her argument that the Court of Appeals’ decision is consistent with prior jurisprudence is not only wrong, it is abandoned because of her failure to cite any authority for it. See S.C. Dept. of Probation, Parole and Pardon Servs. ex. rel. State v. Reynolds, 343 S.C. 465, 540

¹ Emma’s return was served on August 8, 2013. Because August 18, 2013, was a Sunday, this reply is timely pursuant to Rules 242(g) and 263(a), SCACR.

S.E.2d 480, 482 n. 1 (Ct. App. 2000) (declining “to consider argument because there is no citation of authority, and it is so conclusory as to be an abandonment of this issue on appeal”).

As noted in Clyde’s petition to this Court seeking certiorari, as well as in his previous filings concerning potential rehearing by the Court of Appeals, Emma also cites Probate Code statutes for propositions other than those for which the statutes stand. As Emma basically just repeats the same statements of legal conclusions that are debunked in Clyde’s petition to this Court and his earlier filings with the Court of Appeals, Clyde simply incorporates his arguments in those filings here. There is no need to endlessly rehash the several reasons why Emma’s arguments about the meaning and effect of Probate Code sections are wrong. Suffice it to say this: in the Probate Code sections that deal with a personal representative’s power with respect to real and personal property, a distinction is made between personal property, to which title passes to the personal representative by operation of law, and real property the decedent owned at his death, to which title passes to the decedent’s heirs and devisees, over which the personal representative can exercise power only under specified circumstances, and to which an estate cannot hold title. S.C. Code Ann. §§ 62-3-101, 62-3-711. That distinction has been a settled part of this state’s law since long before the adoption of the Probate Code. See 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 v. Wroten, 187 S.C. 432, 198 S.E. 13, 15, 16 (1938). Emma’s arguments, and the Court of Appeals’ decision below, ignore that distinction.

II. Emma makes factual assertions that are variously immaterial, incorrect, or both.

Emma characterizes the suit she brought against Clyde as “an action to compel Clyde to *reimburse* the Estate” for the payments the USDA made to Clyde. (Respondents’ Return to Petition for Certiorari p. 2 (emphasis added).) The Estate never made the payments at issue to Clyde or anyone else. The payments were not made with Estate funds; they were made with money that belonged to the USDA until the USDA paid those funds to their next owner, Clyde. It would be impossible for Clyde to “reimburse” the Estate for the USDA payments.

Emma names the judges on the Court of Appeals who were on the panel that rendered the Court of Appeals’ opinion in this case, as though it matters which judges rendered the opinion. (Respondents’ Return to Petition for Certiorari p. 3.) It does not. If this an attempt by Emma to make a veiled argument that this Court should decide whether to issue a writ of certiorari based on the identity of the judges who were on the panel, this Court should be offended.

Emma asserts the following in her return:

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. Apps. [sic] 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.

(Respondents’ Return to Petition for Certiorari p. 6.) The truth, however, is that what Emma now cites as the presentation of evidence to the trial court are in fact only filings that were made in the probate court. These documents were never put in

evidence at trial. (App. pp. 275-376.) These supposed “estate expenses” are in reality just Emma’s claim to be owed money individually on a purported note and mortgage from herself (as personal representative) to herself (individually), which is very much contested and is an issue to be tried at a later hearing in this case. (App. pp. 162, 394-401.) It is difficult to imagine how this purported indebtedness could withstand the operation of S.C. Code Ann. § 62-3-713, but that is an issue for another day. In any event, Emma certainly did not prove that these “estate expenses” exist.

Emma states that Clyde contracted with the USDA without her consent. (Respondents’ Return to Petition for Certiorari p. 2.) Why would Clyde need Emma’s consent for Clyde to enter into a contract with someone? The answer is that he would not. It is simply immaterial whether Clyde had Emma’s consent for him to make a contract with the USDA.

Emma notes an older proceeding in the probate court in which she sought to thin timber on Clyde and Emma’s commonly inherited land, saying that “Clyde objected to this request, and instead sought immediate distribution of the Estate assets.” (Respondents’ Return to Petition for Certiorari p. 2.) First, so what? That has nothing to do with the issues in this case. Second, this statement belies a later assertion of Emma’s in her return, that “Clyde has repeatedly sought to frustrate the Personal Representative in her duties[.]” (Respondents’ Return to Petition for Certiorari p. 12.) A personal representative’s duty is “to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and [the Probate] [C]ode, as expeditiously and efficiently as is consistent with the best interests of the estate.” S.C. Code Ann. § 62-3-703(a). What Clyde sought is for Emma to perform her duty.

Emma attempts throughout her return to paint Clyde as a bad person. He is not a bad person, but even if he were, that would not matter a bit with regard to the answers to the questions presented in this case. To paraphrase an old friend of the undersigned, Clyde is not running for Jesus. He is not seeking beatification or the brother-of-the-year award. What he does seek, however, is for this Court to undo the Court of Appeals' and the master's incorrect rulings that he is obligated to pay the Estate money because he was paid money by a third party. The job of this Court is not to like or dislike Clyde; rather, it is to apply the law to his case. When that is done, it makes plain that the Court of Appeals erred and that Emma cannot prevail.

III. The notion that Clyde's USDA farm operator payments are or were estate property is doubly flawed.

There is no need here for Clyde to state again the arguments set forth in his petition and earlier filings about the two flawed premises that underlie Emma's arguments and the Court of Appeals' ruling that the USDA payments were property of the Estate. Clyde simply incorporates them into this reply.

The USDA payments are Clyde's personal property, paid to him under a contract to perform farm operation. Emma has never offered any legal authority or factual evidence tending to show some basis for her contention that the USDA payments always were or somehow became property of the Estate. Both legal authority and logic are against the notion that the contractual payments to Clyde really belonged to the Estate instead. See Professional Bankers Corp. v. Floyd, 285 S.C. 607, 612, 331 S.E.2d 362 (Ct. App. 1985). Any problems with Clyde's entry into or performance under his contract with the USDA would create a set of rights and liabilities that would run between Clyde and the USDA. The Estate would not, as they say, have a dog in that fight.

Even if the USDA payments were somehow a profit of land ownership or otherwise part of the land (which they are not), they would still belong to Clyde, as an owner of the land by operation of S.C. Code Ann. § 62-3-101, and not to the Estate. Burkhalter v. Townsend, 160 S.C. 134, 158 S.E. 221, 223 (1931). Emma has never presented any argument to the effect that Burkhalter has been overruled or abrogated, because it has not.

IV. The legislative history of S.C. Code Ann. § 15-61-25 is immaterial.

Emma argues that the legislative history of S.C. Code Ann. § 15-61-25 reveals that the General Assembly did not intend it to apply in partition actions brought pursuant to the Probate Code. (Respondents' Return to Petition for Certiorari pp. 9-10.) In light of the unambiguous language of the statute, the legislative history of S.C. Code Ann. § 15-61-25 is irrelevant; however, it does not support Emma's argument. (Respondents' Return to Petition for Certiorari pp. 9-10.) Most likely, the General Assembly did away with the proposed change to S.C. Code Ann. § 62-3-911 because it was superfluous in light of S.C. Code Ann. § 15-61-25's applicability to all partition actions. The General Assembly did not need to change S.C. Code Ann. § 62-3-911 to make S.C. Code Ann. § 15-61-25 applicable to partition actions brought under the Probate Code.

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).

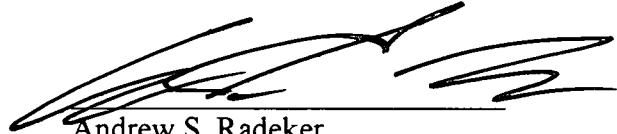
“When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). The words of S.C. Code Ann. § 15-61-25 provide that it applies 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. Under its plain language, S.C. Code Ann. § 15-61-25 applies to this partition action.

V. Even the Court of Appeals acknowledged this case involves novel questions of law.

Emma argues in her return that “this case presents no novel question of law[.]” (Respondents’ Return to Petition for Certiorari p. 4.) While Emma can say that, saying it does not make it true. The fact of the matter is that, before the opinion of the Court of Appeals in this case, there had never been a reported appellate opinion in this state that even discussed S.C. Code Ann. § 15-61-25. The Court of Appeals itself noted that and also remarked that no prior South Carolina appellate opinion had ever dealt with issues concerning USDA benefits and the statute of limitations in a context like the one involved here. (App. pp. 8, 11.) If these are not novel questions of law, it is difficult to conceive of what would be.

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,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', written over a horizontal line.

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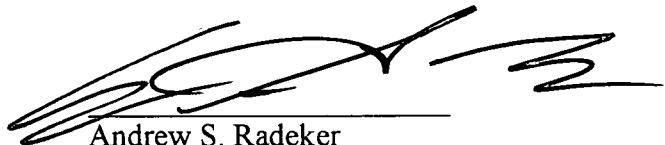
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PROOF OF SERVICE

I certify that I served the foregoing reply to return to petition for writ of certiorari 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:

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