

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HONORABLE MARVIN I. LAWSON,
THE HONORABLE J. MICHAEL BAXLEY
DARLINGTON COUNTY
TRIAL COURT CASE NO. 2013-CP-16-431

APPELLATE CASE NO. 2014-000589

Wilkins Lee Byrd, Kay R. Larsen, John Norwood Klettner, Laura K. Bynum, Ann B. Crump, Robert Larsen, Joan Rutledge Gary, John Robert Stanton, John Robert Stanton, Charles E. Stanton, Byrd L. Thomson, and John Doe and Richard Roe as Representatives of all persons unknown claiming any right, title, estate, interest in or lien upon the real estate described in the Appeal herein, including but not limited to any unknown owners, unknown heirs, unknown devisees of S.W. Byrd, Mary Moore Byrd, Etta B. Klettner, S.J. Klettner, Sr., Susan Wilkins Byrd, Mary M. Byrd, Joseph D. Rutledge, John R. Larsen, Charles E. Byrd, Jewel Butler Byrd, Wilkins Norwood Byrd, Ruth Byrd, Marian Moore Byrd, Mary K. Stanton, S.J. Klettner, Jr., Mary R. Larsen, John Rutledge Gary, Jewel Elizabeth Byrd, or any other person, any unknown infants or persons under disability or persons in the military service designated in a class as Richard Roe, as to the property described in the Petition herein and designated as Tax Map No. 076-00-02-004, Appellants.

v.

E. Butler McDonald,Respondent.

INITIAL BRIEF OF APPELLANTS

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JAN 21 2015
SC Court of Appeals

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“(E) In the event that the non-petitioning joint tenants or tenants in common fail to pay the purchase price as provided in subsection (D) of this section, the Court shall proceed according to its traditional practices in partition sales.”

Thus, it is clear that the right of first refusal is intended to be resolved fully and thoroughly prior to ordering a public sale.

4. Did the Probate Court commit error by holding partition of the property by allotment was not practical and ordering the property sold by auction?

The Order from Probate Court provides, “Partition of the property described in paragraph 4 by physical partition is impractical and therefore should be sold at auction.” Such a ruling is unsupported by the evidence and against our court’s favored partition by allotment or partition in kind. Partition in kind involves dividing the property among all the owners. Partition by allotment is to “allot” a portion of the property to one of the owners, with the remainder held jointly by the other owners. *Zimmerman v. Marsh*, 365 S.C. 383, 618 S.E.2d 898 (S.C. 2005).

Our courts have long favored partition by allotment which is statutorily preferred along with partition in kind over a juridical sale of the property. *Cox v. Frierson*, 316 S.C. 469, 451 SE2d 392 (1994). The party seeking a partition by sale carries a burden of proof to show that partition by allotment is not practicable or expedient. *Zimmerman v. Marsh, Supra*.

The respondent failed to carry the necessary burden of proof. The only evidence presented on this issue was the respondent’s own testimony which

amounted to no more than an opinion. McDonald's testimony as found in the Transcript of Record, beginning on page 19, l. 22, includes the following:

“Q. Okay. And you have also requested the Court partition the property. Is that correct?

A. Yes, ma'am.

Q. In your opinion, is the property capable of being divided in kinds, so that ever person with an interest gets a little piece?

A. I – I don't think so.

Q. Okay.

A. I could be wrong, but I don't think so.

Q. And would you request that the – you're requesting the court sell it?

A. I requested.

Q. So, you wish it to be done by public or private sale or do you care?

A. Public sale ...

Q. Public Sale?

A. ...in front of the Courthouse.”

The testimony presented by the respondent on this question is no more than a statement in self-interest, and nothing in the record supports its reliability or the respondent's opinion. There is a complete lack of evidence which would justify our Court abandoning its preference for partition by allotment or partition in kind. Therefore, the Court's finding and ruling that the property should be sold by public auction is an error and should be reversed.

5. Did the Probate Court commit error in treating the percentages of ownership as personal property rather than realty in accordance with § 62-3-101 and South Carolina common law?

The Probate Court determined the percentages of ownership of all parties who had an interest in the S. W. Byrd Farm. In his testimony, the respondent McDonald made reference to a family chart listing the owners and their percentages of ownership. Although the chart was discussed by the parties, the chart was not introduced as an exhibit. The respondent simply testified that he was in agreement with the chart although he admitted that one of the appellants, Wilkins Byrd, knew more about the heirs than he did. In its Order, the Probate Court adopted the chart, but the percentages of ownership were treated as personal property and passed under Georgia law rather than South Carolina law. The appellants disagreed and presented evidence to the contrary.

In his testimony, Wilkins Byrd explained the appellants' objections to the proposed percentages of ownership. The Transcript of Record, p. 65, l. 7 provides as follows:

“According to this chart, Mrs. Crump and Butler McDonald received their shares amounting to approximately 2%; and the chart also shows the devolution of similar amounts to the other cousins as providing under Georgia law. I would like to explain to the court that – that is one point with which I personally disagree with this chart. This is based on the theory that Betty Byrd’s interest in the S.W. Byrd Farm is personal property. In other words, that her interest in the farm was part of a partnership interest; and as a partnership interest, as personal property and passed on to Georgia law because it controlled her personal property. Now, I – do not agree with that; although it is contrary to my own interest; and regrettably, benefits Mr. McDonald. I believe that the property passage of Betty Byrd’s interest would be under South Carolina law. I do not believe the S.W. Byrd Farm – well the ownership of the S.

W. Byrd Farm was personal property. I believe it is was real property interest; and so, I believe it should pass into the applicable South Carolina statute.”

Mr. Byrd goes on to explain, on page 67 of the transcript, line 4 as follows:

“I – I was nearly at the end of kind of confusing issue. But, as I’m sure the Court is well aware, under South Carolina Intestate Distribution, an estate of a person in the position of my cousin Betty would be divided with no children, no spouse, no surviving parents, would be divided half (1/2) to the mother’s side, half (1/2) to the father’s side, and that would yield a higher percentage of ownership for Mrs. Crump, Mr. McDonald. It would also include, because South Carolina Law does not push overboard descendants of a first cousin who did not survive Betty; it would also include, in a small amount, my Klettner and Larsen cousins down there. Under this structure, it – it would exclude them and would diminish the interests of Mrs. Crump and Mr. McDonald by a small amount, about one percent (1%). As I say, that’s a statement against interest, but I feel that my duty to the – to the cousins requires me to state that in the respect, I differ with the characterization of Betty’s interest as a personal property interest.”

Byrd explained why the property passes under South Carolina Law. He did this in spite of the fact that it was against his interests in that it decreased his share and increased the share of the respondent McDonald. However, his testimony is legally correct, and the ruling of the Probate Court is wrong. It is well established by statute and case law the distribution of real estate in South Carolina is controlled by the law of the South Carolina. Real estate descends according to the law where the land lies. *Stent v. McLeod, et al*, 7 S.C. Eq. 354. Also, under §62-3-101 of the probate code, real estate devolves to the heirs of an intestate at the time of death. The real estate interest in the S.W. Byrd Estate passed at the time of his death to his heirs pursuant to well established South Carolina law. The Probate

Court committed error by ruling the shares of ownership passed as personal property under Georgia law.

6. ***Did the Probate Court commit error by ruling respondent is entitled to reasonable attorney fees and the cost of this action?***

The Probate Court Order held the respondent is entitled to reasonable attorney fees and the cost of this action pursuant to § 15-61-110 of the Code. This statute gives the Court the authority to award attorney fees “as may be equitable.” Our Courts have awarded attorney fees against parties who have acted in an inequitable manner.

In *Marichris, LLC vs. Derek*, 384 S.C. 345, 682 S.E. 2d 301, (Ct. App. 2009), the court found the conduct of one of the co-purchasers was inequitable and awarded attorney’s fees to another co-purchaser.

Respondent McDonald presented no evidence or testimony regarding attorney fees but instead simply requested the court award fees under the above statute. The appellants not only contend there is no evidence to support an award of attorney fees, but on the contrary, his conduct has been inequitable.

At the hearing of December 5, 2012, the Appellants presented the testimony of Ms. Crump, one of the appellants. Ms. Crump testified that she had dealt with respondent McDonald for a number of years, and when Mr. McDonald petitioned the court to be appointed sole executor of another relatives’ estate, Ms. Crump sought out another individual to serve as co-personal representative of the estate. Ms. Crump testified Mr. McDonald’s involvement in the S.W. Byrd matter

prolonged the strife associated with owning property as co-tenants. Mr. McDonald's attorney objected to this on the basis of Ms. Crump's problems with McDonald did not involve the S. W. Byrd estate and was not relevant.

In the case at hand, the respondent owns 2.04% interest in the property, and his actions indicate he is simply using this partition action out of spite. His intentions in bringing this suit are clearly revealed by his failure to respond to a cash buyout of his interest or a deed of property adjacent to another tract of land in which McDonald owns a much larger interest. The respondent is using his 2.04% interest in an attempt to force an unwanted sale of the Byrd's property which has been in the Byrd family for over 200 years.

Prior to the hearing of December 5, 2012, the appellants urged the respondent to agree on an appraiser in hopes the appellants and the respondent could reach an agreement by which the appellants would buy respondents interest. The appellants also suggested a continuance of the December 5, 2012 hearing and urged the parties to agree on an appraiser. Mr. McDonald opposed a continuance, but through his attorney, in a letter of November 30, 2012, only days before the hearing wrote as follows:

“... at this time, Mr. McDonald is not interested in continuing the hearing as this matter has been an ongoing problem for a number of years. He is of the opinion that we should go forward with the hearing and the court should determine who will appraise the property and who will be responsible for the payment of the same if such an appraiser is necessary.”

The respondents seemed amenable to having the property appraised. However, at the December 5, 2012 hearing, his position changed. Mr. McDonald

contended the appellants had failed to comply with the statute dealing with the Right of First Refusal, and by not submitting an offer to purchase the property, the appellants had foregone their right to do so and the property had to be sold by public auction. In other words, the appellants had waived their right to purchase McDonald's 2.04% interest.

When McDonald refused to share the expenses of an appraiser and a timber cruise, the appellants agreed to do so on their own. After obtaining an appraisal and a timber cruise, the appellants submitted a cash buyout proposal to Mr. McDonald prior to the Court issuing its Order. When the respondent did not respond to the buyout offer, they offered to deed Mr. McDonald's interest in the S.W. Byrd Farm to him. Again, Mr. McDonald did not respond.

Mr. McDonald's purpose is to use his 2.04% interest to force a public sale against the will of the appellants. The Transcript of Record, page 51, l. 16 provides as follows:

“Q: Finally, Mr. McDonald do you object to the respondents ... the other owners buying you out?

A: I just like to get this settled, however, we get it settled. And I think the way to get it settled is get it before the courthouse square and let them sell it - - sell the property.”

The actions of Mr. McDonald reek of abuse of process, and appellants respectfully submit he is not entitled to attorney fees and costs under Marichris.

CONCLUSION

The Probate Court lacks subject matter jurisdiction to hear this partition action. The respondent brought this partition action of the S.W. Byrd Farm in Probate Court. A Probate Court only has jurisdiction to partition property if the property is part of an active estate. The S.W. Byrd Estate was closed in 1948, and there has been no activity in the estate since that time. Therefore, a partition action involving the S.W. Byrd Farm must be brought in the Court of Common Pleas, and the Probate Court lacks subject matter jurisdiction.

The Probate Court committed error by applying § 15-61-25(A) rather than § 62-3-911. If the Probate Court had subject matter jurisdiction, it should have applied the probate statute governing partition of the real estate as provided by the Probate Code which is § 62-3-911. During the time period at issue, SC Code § 62-3-911 differs markedly from what it states now. During the time period at issue there was no ten day period to violate in regards to a first refusal to purchase. The statute was amended effective January 2014 to include the ten day period. Even if the Probate Court had jurisdiction, it should have applied the probate statute governing partition actions, not § 15-61-25(A).

The Probate Court committed error in finding the appellants failed to comply with the Probate Order. The Circuit Court found there is sufficient evidence to support the Probate Court's alleged decision that the appellants failed to timely comply with the dictates of SC Code § 15-61-25(A). The initial Probate Order of November 5, 2012 did not cite §15-61-25(A). It simply stated that if

anyone was interested in purchasing the property, he or she should notify Ms. Ervin as attorney for McDonald by November 21, 2012. When the Probate Court issued its order on the merits on May 13, 2013, there was no finding that any time period in § 15-61-25 had not been complied with. In addition, the Probate Court order provided no interested party had notified Ms. Ervin of their wish to purchase the same. Such a finding is clearly erroneous in that the appellants, by letter, clearly expressed interest in purchasing the property, tried to reach an agreement regarding an appraiser, and moved to continue the scheduled hearing in order to obtain an appraisal. Appellants clearly complied with the order of the Probate Court by notifying Ms. Ervin of their interest to purchase respondent's interest in the property. There can be no question that the appellants had made known their interest in purchasing the property to respondent McDonald even before the first Probate Court Order.

The Probate Court committed error by holding partition of the property by allotment was not practical and ordering the property sold by auction. Partition in kind and partition by allotment are favored by our courts over judicial sale. The party seeking a partition by sale carries a burden of proof to show that partition by allotment is not practical or expedient. In this case, respondent McDonald failed to meet this burden of proof. The only evidence presented was McDonald's opinion that the property could not be partitioned in kind or by allotment. This testimony is no more than a statement in self-interest and unsupported by additional evidence. The fair and equitable manner to partition the S.W. Byrd

Farm is by allotment which would involve the appellants purchasing McDonald's 2.04% interest or conveying his interest to him by deed. The appellants do not want to sell the property and are perfectly content to continue their joint ownership.

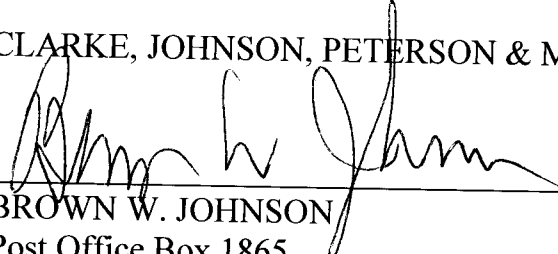
The Probate Court committed error by treating the percentages of ownership as personal property rather than realty in accordance with § 62-3-101 and well established South Carolina Common law. The Probate Court determined the percentages of ownership of all parties in the S.W. Byrd Farm. However, the percentages were determined based on personal property rather than realty. Real estate descends at the time of death and according to the law where the land lies.

The Probate Court committed errors by awarding attorney fees to the respondent pursuant to § 15-61-110 of the Code. The court has authority to award attorney fees "as may be equitable." However, our courts have refused to award attorney fees when a party has acted in an inequitable manner. Appellants contend respondent McDonald has in fact acted in an inequitable manner. McDonald first refused to share the expenses of an appraisal but then led the appellants to believe the court should appoint an appraiser. However, at the hearing, McDonald took the position the appellants had waived their right to purchase the property by not submitting an offer under § 15-61-25(A). Appellants then obtained an appraisal and submitted an offer to buy McDonald interest and later offered to convey by deed McDonald's interest in the property. McDonald refused both offers, a clear indication that he is simply using his 2.04% ownership to force an unwanted sale.

McDonald's actions reek of abuse of process, and he is not entitled to attorney fees.

Respectfully Submitted,

CLARKE, JOHNSON, PETERSON & MCLEAN, PA



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MAY 28, 2014

Florence, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HONORABLE MARVIN I. LAWSON,
THE HONORABLE J. MICHAEL BAXLEY
DARLINGTON COUNTY
TRIAL COURT CASE NO. 2013-CP-16-431

APPELLATE CASE NO. 2014-000589

Wilkins Lee Byrd, Kay R. Larsen, John Norwood Klettner,
Laura K. Bynum, Ann B. Crump, Robert Larsen, Joan
Rutledge Gary, John Robert Stanton, John Robert Stanton,
Charles E. Stanton, Byrd L. Thomson, and John Doe and
Richard Roe as Representatives of all persons unknown
claiming any right, title, estate, interest in or lien upon the
real estate described in the Appeal herein, including but not
limited to any unknown owners, unknown heirs, unknown
devisees of S.W. Byrd, Mary Moore Byrd, Etta B. Klettner,
S.J. Klettner, Sr., Susan Wilkins Byrd, Mary M. Byrd, Joseph
D. Rutledge, John R. Larsen, Charles E. Byrd, Jewel Butler
Byrd, Wilkins Norwood Byrd, Ruth Byrd, Marian Moore
Byrd, Mary K. Stanton, S.J. Klettner, Jr., Mary R. Larsen,
John Rutledge Gary, Jewel Elizabeth Byrd, or any other
person, any unknown infants or persons under disability or
persons in the military service designated in a class as
Richard Roe, as to the property described in the Petition
herein and designated as Tax Map No. 076-00-02-004,

..... Appellants,

v.

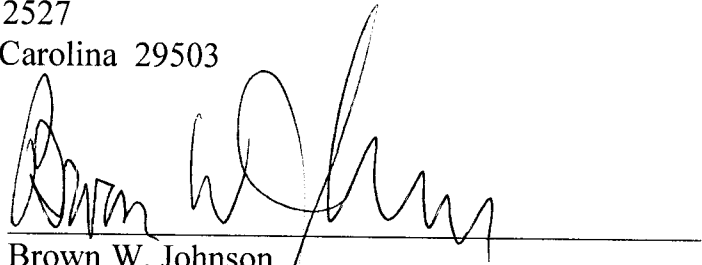
E. Butler McDonald, Respondent.

PROOF OF SERVICE

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SC Court of Appeals

The undersigned hereby certifies that a copy of Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal have been served upon the following via first class mail, postage pre-paid this 28 day of May, 2014:

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A handwritten signature in black ink, appearing to read "Brown W. Johnson", is written over a horizontal line. The signature is fluid and cursive.

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May 28, 2014

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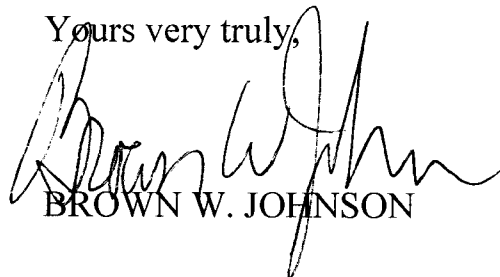
RE: Wilkins Lee Byrd, et al v. E. Butler McDonald
Appellate Case No. 2014-000589
Our File No. 12-061

Dear Ms. Carter:

Please find enclosed for filing the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service for the above referenced case.

By copy of this letter to counsel for Respondent, I am hereby serving this document upon her as well.

Yours very truly,



BROWN W. JOHNSON

BWJ:lpl
Enclosures
cc: Gena Phillips Ervin, Esquire

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MAY 29 2014

SC Court of Appeals

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