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 REPLY BRIEF OF APPELLANTS

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1. *The Probate Court had subject matter jurisdiction to hear this action.*

South Carolina Code §62-3-911 provides that partition can be had only in the Probate Court "prior to the closing of the Estate ..." Only if the property is part of an active estate does the Probate Court have concurrent jurisdiction to partition real estate. The S.W. Byrd Estate was probated and closed in 1948. Sixty-four years after it was closed, Respondent brings this partition action in Probate Court. Respondent contends that including a cause of action to determine heirs of S.W. Byrd "caused an active and open matter to be pending in the Probate Court thereby giving the Probate Court authority to partition the property."

There is no authority for Respondent's position. The purpose of §62-3-911 is to provide concurrent jurisdiction of the Probate Court but "only if the property is part of an active estate." The heirs of the S.W. Byrd Estate were established more than fifty years ago, and an attempt to judicate this issue again is now barred by *res judicata*.

It is well established that subject matter jurisdiction can be raised for the first time on appeal. *Simmons v. Bellamy*, 349 S.C. 473, 476, 562 S.E. 2d 687 (Ct.App. 2002). In this case, the Appellants raised the jurisdictional issue in their original Answer and Counterclaim and later filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Probate Court heard and denied Appellants' motion. Therefore, the lower court had opportunity to consider and rule on this jurisdictional question.

2. ***The issue of whether the Probate Court committed error by applying §15-61-25(A) is not properly before the Court.***

The Circuit Court affirmed the Probate Court based upon South Carolina Code § 15-61-25(A).

However, this would have been the wrong statute even if the Probate Court indeed did have jurisdiction. It is argued above that the Probate Court never did have jurisdiction, but if the Probate Court did have jurisdiction, it applied the wrong statute. If the Probate Court had had jurisdiction, the proper statute would have been South Carolina Code § 62-3-911.

In this context, it should be noted that during the time period at issue, South Carolina Code § 62-3-911 differs markedly from what it states now. In an Amendment effective January 2014, the code section tracks the language of South Carolina Code § 15-61-25. However at that time, effective June 2010, § 62-3-911 did not have the 10 day period of the South Carolina Code § 15-61-25. It merely stated:

> "When two or more heirs or devisees are entitled to distribution of undivided interests in any personal or real property of the estate, the personal representative or one or more of the heirs or devisees may petition the Court prior to the closing of the estate, to make partition. After service of summons of petition and after notice to the interested heirs of devisees, the Court shall partition the property in kind if it can be fairly and equitably partitioned in kind. If not subject to fair and equitable partition in kind, the Court shall direct the personal representative to sell the property and distribute the proceeds."

Thus, there was no 10 day period to violate. Even though the Circuit Court partition statute should have been applicable, that is irrelevant because if the Probate Court indeed had had jurisdiction to hear the case, then the Probate Court was required to

use the Probate Court partition statue as noted above in *Estate of Livingston v. Livingston, supra.*

3. *The Probate Court did not commit an error in finding the Appellant failed to comply with the Probate Court Order.*

The question here is whether the Appellants notified the attorney for Respondent of their interest to purchase Respondent's 2.04% interest in the property. On November 5, 2012, the Probate Court issued an Order advising Appellants of their Right of First Refusal and that any interested party should notify counsel for the Respondent by November 21, 2012. The Appellants complied with this notice requirement by letters from Appellants' counsel to Respondent's counsel. In Respondent's Initial Brief, there is no contention Appellants failed to notify Respondent of their interest in purchasing the property. However, Respondent attempts to change interest in buying the property to a "definite offer to purchase." Respondent's Initial Brief, page 5 includes the following:

> "A review of the transcript of testimony of the hearing in the Probate Court shows that no definite offer to purchase was made by the Appellants prior to the November 21st deadline (May 13, 2013 Probate Court Order p. 2). Although there were requests to settle the matter, no firm offer was timely made by any Appellant."

Neither the November 5, 2012 Order or South Carolina Code §15-61-25(A) requires a "definite offer," only an interest in purchasing the property. The Appellants repeatedly expressed interest in purchasing Respondent's interest.

The Respondent's Brief also makes reference to statements at the hearing of December 5, 2012. Note the following:

> "In fact, the Appellants' attorney states prior to the hearing 'we don't want to purchase the property outright.'" (Probate Court Transcript of Record, P. 3, L. 23-24).

The Respondent takes this quote out of context. The Probate Court Transcript of Record, P. 3, L. 9 - P. 4, L. 5 provides as follows:

> "MR. JOHNSON: We – our contention – I have tried – I have asked to postpone the hearing, in hopes that we could agree on two (2) things: An appraiser to appraise the real estate; and someone to do timber cruise. I we got a notice from the Petitioner, through Ms. Ervin, of a First Right of Refusal; but, Mr. McDonald also owns a small portion of the property. What we would like to do – and what I think the Statutes allow us to – first of all have the property and the timber appraised; and then see if we can purchase his interest; and we do not think that the Petitioner has properly complied with the Statute regarding Right of First Refusal; because, they simply say, 'Your have a right ...' – their contention is, 'You have a right to purchase the property outright.' We don't want to purchase the property outright. We want to purchase his interest and in order to do that we need an appraiser and a timber cruise. So, I respectively submit that we decide on an appraiser and a timber cruise; adjourn this hearing, and then see if the Parties can reach an agreement regarding Mr. McDonald's interest in the property."

The Respondent quoting, "we don't want to purchase the property outright" is clearly taken out of context. In fact, the Appellants again expressed interest in buying Respondent's interest in the property.

The Respondent objects to letters from Appellants' counsel expressing interest in purchasing the property stating they are not admissible because they amount to offers to

settle pursuant to SCRE Rule 408. The letters are admitted to show Appellants' interest in purchasing the property. Rule 408, dealing with compromise and offers to compromise, contains the following:

> "This Rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromised negotiations. This Rule also does not require exclusion when the evidence is offered for another purpose ...."

The purpose of introducing the letters is to show Appellants' interest in purchasing Respondent's interest in the property. The evidence offered by Appellants is submitted "for another purpose" and should not be excluded as a compromise or offer to compromise.

Section 15-61-25(B) states that when the parties cannot reach an agreement, real estate appraisers should be appointed. In Respondent's Initial Brief, Respondent contends as follows:

> "However, a review of the statute shows that only once an offer has been made pursuant to Subsection (A) does Subsection (B) come into play. Subsection (B) applies only if an offer has been made and the parties are unable to agree on a price."

There is no requirement in Subsection (A) that an offer or definite offer must be made before appraisers are appointed. The word "offer" is not included in §15-61-25(A). Subsection (A) only makes reference to parties "who are interested in purchasing the property." There is no requirement that a definite offer be made.

At the hearing of December 5, 2012, counsel for the Respondent explains Respondent's erroneous position regarding a definite offer. The Probate Court Transcript of Record, P. 4, L. 7 - 20 provides as follows:

> "MS. ERVIN: Your Honor, if you'd look, the file will show that on November 8th that I served on everybody the Order and letter to notify Tenants in Common the right of First Refusal. They had – the Statute requires that they make a offer ten (10) days before the hearing; they had until November 21st. No one (1) has actually made an offer. I don't believe that my client should – plus they want client's share in the expense of the appraisal and the cruise. They are the ones who are interest in, perhaps, purchasing a piece of the property. I don't believe that they have complied with the Statute, nor that we should have to pay cost to help them figure out what they want to offer."

The Respondent contends, in effect, the Appellants waived or lost their right to purchase Respondent's interest because Appellants failed to make a definite offer to buy Respondent's interest. There is no authority that Appellants have waived their interest or lost their right to purchase the property. Judge Lawson's Order of November 5, 2012 provides, "parties interested in purchasing the property shall notify Respondent's attorney by November 21, 2012." This Order does not provide Appellants lose their right to purchase the property if the Appellants do not comply with the notice. Also, there is nothing in §15-21-25 which supports a position the joint tenants lose the right to purchase the property if no notice is given. This Statute goes on to provide as follows:

> "The nonpetitioning joint tenants or tenants in common shall be allowed to purchase the interest in the property as provided in this section whether default has been entered against them or not."

Although this provision is not applicable to our facts, it is consistent with Appellants' position that Appellants do not waive their right to purchase the property in the event they fail to comply with notice of interest in purchasing the property.

To summarize this section, both the November 5, 2012 Order from the Probate Court and §15-61-25(A) speak of "interest in purchasing the property." There is no requirement of a definite offer to purchase, and there is no authority to support Respondent's position that Appellants lose the right to purchase the property if no definite offer is made.

4. ***The issue of whether the Probate Court committed error by ordering that partition by allotment was not practical and that the property be sold at auction is not properly before the Court.***

A party seeking a partition by sale carries a burden to show that partition by allotment or partition in kind is not practical or expedient. Appellants contend Respondent did not carry this burden of proof.

The only evidence presented on this issue was Respondent's own testimony in which he stated he did not think the property was capable of being divided in kind. Probate Court Transcript of Record, P. 19, L. 22. No additional evidence was offered. The Respondent offered no explanation or evidence whatsoever concerning why the property could not be partitioned in kind or by allotment.

In *Brown v. Brown*, 402 S.C. 202, 740 S.E.2d 507 (Ct.App. 2012), a master conducted a trial in a partition action and determined that equitably dividing the properties into smaller parcels would be impractical. Therefore, the master ordered the property sold at public

auction. An appeal followed, and the Court of Appeals considered the evidence presented to the master on whether the property could be partitioned by allotment, partitioned in kind, or sold by judicial sale. The Court of Appeals overturned the master's ruling citing the general authority regarding partition actions as follows:

> "A trial court may partition jointly held property in kind, by allotment, or by sale, S.C. Code Ann. §15-61-50 (2005). When 'a partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest,' the court may order the property sold and divide the proceeds according to the parties' rights in the property. *Id.* As the party seeking partition by sale, Gregory has the burden of proving that partition in kind is not practicable or expedient." *Anderson v. Anderson*, 299 S.C. 110, 114, 382 S.E.2d 897, 899 (1989).

The Court then considered the evidence considered by the master in ordering sale by public auction. Note the following:

> "The master's second reason was that 'valuation and partition in kind is rendered highly difficult in view of the fact that a large tract of the property is landlocked with access by an exclusive easement making all but one of the parcels created by a subdivision unmarketable and undevelopable because all but one would lack a legal right of access.' This finding is based on Gregory's testimony about the Dry Branch property. He testified, 'I have learned ... that the county will not approve land that's landlocked to be subdivided.' This statement is not sufficient to support the master's finding. Gregory made the statement in self-interest, and nothing in the record supports is reliability. Gregory never identified how or from whom he 'learned' that the county would not allow division, and the record contains no evidence of an ordinance, rule, or other authority supporting Gregory's testimony. [402 S.C. 210] Even if the county had such a policy in place, it would not preclude a state court from exercising its statutory authority to partition the property in kind. *See City of N. Charleston v. Harper*, 306 S.C.

> 153, 157, 410 S.E.2d 569, 571 (1991) ('Power granted pursuant to state law can be restricted only by state law. A local government may not forbid what the legislature expressly has licensed, authorized, or required.')."

In addition to the above evidence, the master considered the possibility a portion of the land being landlocked and the additional expenses associated with a Writ of Petition. In spite of this evidence, the Court of Appeals overruled the master holding there was insufficient evidence to warrant judicial sale.

In the case at hand, the Respondent presented far less evidence than that presented in *Brown*. Respondent simply stated he did not think the property could be partitioned in kind, and there was no testimony about allotment which in this case is the fair and equitable thing to do since the Respondent owns only 2.04% interest.

In Respondent's Initial Brief, the Respondent states, "the property was incapable of division in kind due to the number of heirs involved." There is no testimony in the record about number of heirs. The Respondent cannot attempt to add evidence which is not in the record, and the Respondent's opinion that the property could not be partitioned in kind is no more than a self-serving opinion with nothing in the record to support its reliability. (*See Brown* above).

Respondent further contends the Appellants did not preserve this issue because it was not pled. As noted in *Brown*, the Court may partition jointly held property in kind, by allotment, or by sale. This rule of law applies in all partition actions and does not have to be pled.

5. ***The Court did not treat the percentages of ownership as personal property rather than realty.***

The Probate Court determined the percentages of ownership of all parties who had an interest in the S.W. Byrd Farm. In his testimony, Respondent made reference to a family chart listing the owners and their percentages of ownership and stated that he agreed with the chart. The chart was never introduced as an exhibit, and the Respondent presented no evidence as to how the percentages of ownership were determined.

The Appellants disagreed with the percentages of ownership determined by the Probate Court because the family chart considered the property personal property rather than real estate.

The Appellants presented the testimony of Wilkins Byrd, one of the Appellants. Mr. Byrd explained in detail his objections to the Court's percentages of ownership. Mr. Byrd made reference to the well established rule that distribution of real estate in South Carolina is controlled by South Carolina law. Real estate ascends according to the law of the situs or where the land lies. Also, §62-3-101 of the Probate Code provides real estate devolves to the heirs of an intestate at the time of death. Therefore, the property in question passed at the time of the owner's death. In his testimony, Mr. Byrd explained that the property was treated as personal property rather than real estate and thereby, two Byrd cousins were omitted. Also, treating the property as personal property rather than real estate actually increases the ownership of the Respondent Butler McDonald and decreases the ownership interest of Wilkins Byrd. Even though it decreased the ownership interest of Mr. Byrd, treating the

property as real estate rather than personal property is correct. There is no evidence that the property is anything but real estate, therefore, the property should pass as real estate, not personal property.

6. ***The Probate Court did not commit error by finding the Respondent was entitled to reasonable attorney fees and the costs of this action.***

The Probate Court Order awarded attorney fees to the Respondent pursuant to §15-61-110 of the Code, which gives the court authority to award attorney fees "as may be equitable." The Appellants contend Respondent is not entitled to attorney fees because Respondent's conduct has been "inequitable." In *Marichris, LLC v. 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 fees to another co-purchaser.

In Respondent's Initial Brief, the Respondent submits, "there is no evidence introduced of improper behavior by the Respondent in this case." Appellants contend there is an abundance of evidence proving inequitable conduct on behalf of the Respondent. In particular, the Respondent only brought this partition action out of spite and to force an unwanted sale by the remaining owners.

The Respondent brought this partition action in the S.W. Byrd Farm in which he has a 2.04% interest. The Appellants expressed interest in buying him out early in the proceedings. Prior to a hearing scheduled for December 5, 2012, the Appellants requested a continuance in order that an appraiser could be appointed in hopes the parties could work out a purchase of Respondent's interest. The Respondent would not agree to a continuance.

At the hearing, the Appellants again moved before the court for a continuance in order that an appraisal could be obtained and in hopes the parties could reach a settlement agreement. The Respondent again opposed a continuance and took the position the Appellants had waived their right to buy his interest, and the property should be sold by public auction. Also, during the hearing of December 5, 2012, the Appellants repeatedly expressed their interest in buying his interest in the property, but the Respondent wanted the property sold by auction.

The Probate Court Transcript of Record, P. 51, L. 15-22 provides as follows:

> "Q. Finally, Mr. McDonald, do you object to the Respondent's – the other owners, buying you out?
>
> A. I'd 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.
>
> MR. JOHNSON: Thank you. That's all I have."

After the hearing, the Appellants hired their own appraiser and submitted an offer to buy the Respondent's 2.04% interest based on the appraisal. When the Respondent did not reply to the buy out offer, the Appellants submitted a proposal to deed his interest in the property adjacent to the C.E. Byrd Farm in which Respondent owns more than a 40% interest. Again, the Respondent did not reply.

The only explanation for the Respondent not accepting a buy out or not accepting a deed is that he is using this partition action out of spite or to force an unwanted sale of the property by the Appellant Byrds, who have owned the property for almost 200 years. The

actions by the Respondent amount to his holding the Appellants hostage with his 2.04% interest amounts to abuse of process. Appellants contend his actions amount to "inequitable" conduct, and the Respondent should not be awarded attorney fees and costs.

CONCLUSION

South Carolina Code §62-3-911 provides that partition can be had only in the Probate Court "prior to the closing of the Estate ...." The S.W. Byrd Estate was closed in 1948. Respondent contends including a cause of action to determine heirs "caused an active and open matter to pending in the Probate Court, thereby giving the Probate Court authority to partition the property." There is no authority for Respondent's position, and this partition action cannot be brought in an estate that was closed in 1948.

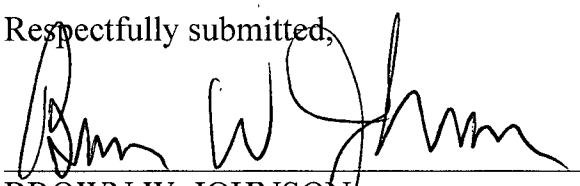
The Circuit Court ruled there is sufficient evidence to support the Probate Court's alleged decision that the Appellants failed to timely comply with the dictates of South Carolina Code §15-61-25(A). However, the initial Probate Court Order of November 5, 2012, did not cite South Carolina Code §15-61-25(A). It simply stated that if anyone was interested in purchasing the property, he or she should notify Gena Ervin as attorney for Respondent by November 21, 2012. The Appellants repeatedly expressed interest in buying the Respondent's interest. Prior to the December 5, 2012 hearing, the Appellants suggested an appraiser and asked the Respondent to share in the cost. The Respondent refused. The Appellants then requested a continuance and suggested the Probate Court appoint an appraiser. The Respondent refused.

Respondent further contends no definite offer was made by Appellants to purchase Respondent's interest, and, therefore, Appellants waived or lost their right to buy Respondent's 2.04% interest. Neither the Probate Court's Order of November 5, 2012 or §15-61-25(A) makes reference to an offer, only interest in purchasing Respondent's interest. The Appellants repeatedly expressed interest in purchasing the Respondent's interest.

Our courts have long favored partition by allotment which is statutorily preferred along with partition in kind over a judicial sale of the property. A party seeking partition by sale carries a burden of proof to show that partition by allotment or in kind is not practical or expedient. The Respondent failed to carry this burden of proof. The only evidence presented by the Respondent was that in his opinion the property could not be partitioned in kind. Such testimony is not evidence but merely the Respondent's self-serving opinion unsupported by the record.

For these reasons and those set forth in Appellants' principal brief, the Appellants again ask the Court to reverse and dismiss.

Respectfully submitted,



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August 15, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HONORABLE MARVIN I. LAWSON,
THE HONORABLE J. MICHAEL BAXLEY
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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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of **Initial Reply Brief of Appellants** has been served upon the following via first class mail, postage pre-paid this 15th day of August, 2014:

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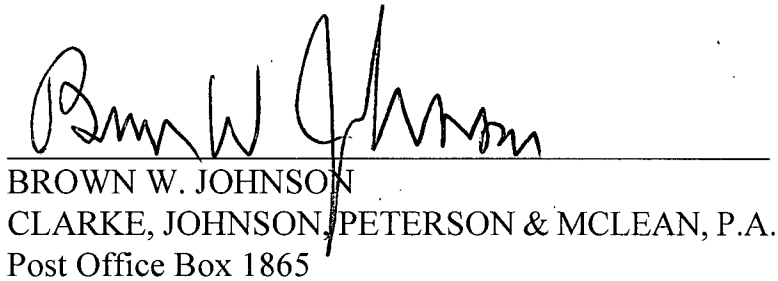

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August 15, 2014

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

Dear Ms. Carter:

Please find enclosed the one copy of Initial Reply Brief of Appellants and Certificate of Service in the above referenced matter.

Yours very truly,

BROWN W. JOHNSON

BWJ:lpl
Enclosure

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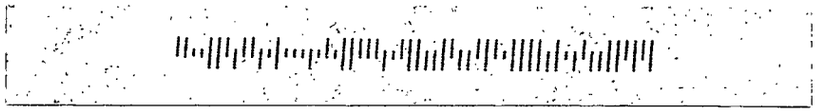

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