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THE STATE OF SOUTH CAROLINA
In: The Supreme Court

S.C. Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable O. Davie Burgdorf, Master-in-Equity

Appellate Case No. 2013-001505

In Re: Estate of Atri Burns Livingston

Emma Lou Livingston Martin as Personal Representative of the Estate of Atri 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

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

- 1: Did the Court of Appeals err in concluding the Personal Representative of an Estate usurps the rights of an heir regarding the control of the real property while the estate is still being administered?
2. Did the Court of Appeals err in concluding each application with the USDA was a separate occurrence, such that the Statute of Limitations did not act as a total bar to recovery?
3. Did the Court of Appeals err in concluding the Probate Code is the applicable law to a partition action brought in the Probate Court in 2006?
4. Did the Court of Appeals err in concluding an heir-at-law is not entitled to retain funds in a share proportionate with his interest in an Estate, when those funds are garnered through improper means without first allowing the Estate to pay debts or claims against the Estate?

STATEMENT OF THE CASE

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, Petitioner Clyde B. Livingston (“Petitioner”) and Respondent Emma Livingston Martin (“Respondent”), 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. p. 377).

The Estate consists primarily of real estate. The property at issue in this matter consists of a 269-acre tract in Orangeburg County, TMS #0061-00-01-010. The parcel has an appraised value of \$400,000.00. (App. pp. 382—387).

Petitioner 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. pp. 184—189).

Petitioner was removed as Personal Representative, by Probate Court Order on January 18, 2002 for dereliction of duty. (App. pp. 379—381).

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

In April of 2002, Respondent received notice from the USDA that Petitioner had been receiving certain USDA subsidies as farm operator for the land subject to this action.

Seeking to generate some liquidity with which to close the Estate, Respondent, as Personal Representative, sought permission from the Probate Court to thin timber on the real property subject to this action. Respondent objected to this request, and instead sought immediate distribution of the Estate assets. (App. p. 378).

Respondent brought an action to compel Petitioner to reimburse the Estate for those USDA subsidies on May 30, 2006. Within this same action, Respondent sought a Court Order, pursuant to S.C. Code Ann. §62-3-911, to allow Respondent, as Personal Representative, to sell by partition the real estate which is the subject of this action, to aide in the administration of the Estate, since Petitioner would not cooperate with the thinning of the timber. (App. pp. 184—195). Following this filing, the Respondent, as Personal Representative, applied for the USDA farm subsidies for the Estate. The Estate has been receiving such payments since 2008.

Petitioner filed his Amended Notice of Interest to Purchase pursuant to S.C. Code Ann. §15-61-25 on January 21, 2009. On January 26, 2009, Respondent, individually and as Personal Representative, filed her Motion to deny Petitioner any right to purchase the real property being the subject matter of this action, on grounds of inequity and unconstitutionality. On February 11, 2009 the Court heard Respondent's Motion, and issued its Order denying Respondent the relief sought, and finding that S.C. Code Ann. §15-61-25 applies to this Probate matter. (App. 157—164).

Petitioner filed his Motion for Summary Judgment on the issue of the USDA subsidies on March 13, 2010. Upon hearing this Motion, the trial Court found that Petitioner 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 Court found the USDA subsidies were properly payable to the Estate. The Court found that the S.C. Code Ann. §15-3-530 limited recovery to those USDA payments that had been received by Petitioner to three years prior to the filing of this action, namely 2003. The recoverable amount received improperly is \$23,380.00.

The Court then found that Petitioner 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, pursuant to the Executor de son tort Statute. (App. pp.165—167). From this portion of the Order, Respondent appealed.

Respondent 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 Court issued its Order November 16, 2010, reiterating that S.C. Code Ann. §15-61-25 is applicable to this probate matter and that the statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (App. pp.168—173). From this Order, Respondent appealed.

Petitioner further appealed a number of issues, as described within his Final Brief to the Court of Appeals. (App. pp. 117—144).

The Court of Appeals affirmed as to all issues raised by Petitioner and reversed as to all issues raised by Respondent. The Court of Appeals published its opinion. *See*

Estate of Livingston v. Livingston, 404 S.C. 137, 744 S.E.2d 203 (Ct. App. 2013) (App. pp.1—12).

Petitioner requested a rehearing or a rehearing *en banc*. This petition was denied. (App. pp. 13—23; pp.38—40).

STANDARD OF REVIEW

“A partition action is an equitable action, heard by a judge alone and, as such, this Court on review may find facts in accordance with its view of the preponderance of the evidence.” *Ackerman v. Heard*, 287 S.C. 626, 340 S.E.2d 560 (Ct. App. 1986), cited affirmatively in *Anderson v. Anderson*, 299 S.C. 110, 113, 382 S.E.2D 897, 899 (1989).

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THE PERSONAL REPRESENTATIVE OF AN ESTATE USURPS THE RIGHTS OF AN HEIR REGARDING THE CONTROL OF THE REAL PROPERTY WHILE THE ESATE IS BEING ADMINISTERED.

Section 62-3-711, South Carolina Code, 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).

This Section contains an exception, which states that a Personal Representative may not sell real property of the estate except as authorized pursuant to S. C. Code §62-3-1301, et seq. *See S. C. Code §62-3-711(B)*. Further, subsection (C) states: “If the will of a decedent devises real property to a personal representative or authorizes a personal

representative to sell real property, (...), then subject to Section 62-3-713, the personal representative, acting in trust for the benefit of the creditors and others interested in the estate, may execute a deed in favor of a purchaser for value, who takes title to the real property in accordance with the provisions of Section 62-3-910(B).” *See S. C. Code §62-3-711(C)*.

The Will of Atn B. Livingston does not authorize the Personal Representative to sell real property. However, Decedent left the property to Petitioner and Respondent, in equal, undivided shares. (App. p. 393). Therefore, Respondent, as Personal Representative, under subsection (C) is authorized to sell the real property at issue, in accordance with the provisions of Section 62-3-910(B), South Carolina Code. Respondent concedes that she must obtain a Court Order to sell the real estate, and must comply with S. C. Code Ann. §62-3-1301, et seq., as well. Further, Respondent, as Personal Representative, has followed the required path in her effort to sell the property in Order to administer the Estate.

Currently, the Estate owes Personal Representative fees, attorney fees, administrative expenses, and property taxes, in addition to a 2006 Note and Mortgage in the amount of \$19,675.26, secured by the subject real estate. This Note was necessary to obtain some liquidity to pay just debts and administration expenses of the Estate. (App. pp. 330-331).

Section 62-3-910(B) authorizes a Personal Representative to sell real property to a purchaser for value, who in turn receives a deed from the Personal Representative, taking title to the real property free of rights of any heirs or devisees or other interested person

in the estate and incurs no personal liability to the estate or to any heir or devisee or other interested person in the estate. *See §62-3-910(B), South Carolina Code.*

These code sections describe the authority with which a Personal Representative may sell Estate real property. Explicitly, the power to sell, mortgage, or lease real property of the estate is expressly enumerated in §62-3-715(21), South Carolina Code.

In this action, Respondent as Personal Representative, attempted to comply with §62-3-1301, et seq., in filing a petition for sale and partition of the real estate in the Probate Court. Her pleadings reflect this intent. (App. pp.184—193). Respondent, as Personal Representative, had statutory authority, pursuant to the multiple code sections cited above, to seek Court approval for the partition sale of real estate, for the just and effective administration of the Estate.

Respondent, as Personal Representative, has full authority and a legal duty to administer the Estate, pursuant to the South Carolina Probate Code. The trial court erred in allowing Respondent to use S.C. Code Ann. §15-61-25, to thwart Respondent, as Personal Representative, in the exercise of her duties. The Estate owes just debts in an amount exceeding \$20,000. This amount will continue to grow until the Estate can be closed, and the assets therein distributed according to the Will of Atn B. Livingston.

The Court of Appeals properly concluded, “[W]hen a PR asserts his or her authority over the property, the PR usurps the rights of the heirs regarding the control of the real property while the estate is still being administered.” *Estate of Livingston v. Livingston*, 404 S.C. 137, 744 S.E.2d 203 (Ct. App. 2013) (App. p. 7). As Respondent requires access to the assets of the Estate in order to settle claims and pay expenses, her access to the real estate takes precedence over any claims of Petitioner.

Neither Petitioner nor Respondent own the land free and clear until after the Deed of Distribution is issued and the Estate administration is concluded. This is hardly a novel issue as asserted by the Petitioner, and is rather the natural extension of the administrative provisions of the Probate Code. The Court of Appeals did not err in uniformly applying the Probate Code in this matter.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE STATUTE OF LIMITATIONS.

Petitioner argues the USDA benefits are not estate property because they were a product of a contract between himself and the USDA based on his status as a farm operator. Central to Petitioner's argument is his assertion that he is a cotenant entitled to possession of the whole parcel at the moment of his father's death, independent of any administrative needs or expenses of the Estate. The Court of Appeals correctly concluded, "Notwithstanding the immediate passage of title to heirs and devisees, the PR (Personal Representative) is entitled to possession of all real property during administration and has broad powers over real property during administration." S.C. Code Ann. §62-3-709 (2009); S.C. Code Ann. §62-1-201(33) (2009). This is a correct statement of South Carolina law, entirely consistent with the Probate Code, and with the typical process of administration utilized in Probate Courts across the state.

Petitioner initially, in 2000, contracted with the USDA in his capacity as Personal Representative of the Estate. As co-representative, Petitioner and Respondent were required to concur "on all acts connected with the administration...of the estate." S.C. Code of Laws, §62-3-717. Further, the USDA continued to list the owner of the real

estate as A. B. Livingston, acknowledging the Estate was still pending and title had not yet formally passed to the heirs. (App. pp. 407—432).

Despite having been formally removed as Co-Personal Representative, in 2002, Petitioner continued to sign as “Estate of A. B. Livingston” as recently as 2006. (App. p. 427). The funds received by Petitioner were properly payable to the Estate, as the real estate had not yet passed to Petitioner, despite his status as a named heir in the will. Therefore, Petitioner had no standing to enter into the USDA contract, and in fact did so only under the misrepresentation of his authority as signatory for the Estate. Each application signature, recurring each year, again confirmed Petitioner’s understanding that the Estate administration took precedence over whatever interest Petitioner might claim.

The Court of Appeals properly determined the statute of limitations was not a complete bar on the Estate’s claim to possession of the USDA benefits. Construing each application with the USDA as a separate renewal, the Court of Appeals correctly permitted the Estate to recover for the three years preceding the filing of the action, excluding those years more remote. *See Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996); *See also §15-3-350, S.C. Code of Laws, as amended.*

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THE PROBATE CODE IS APPLICABLE TO A PARTITION ACTION BROUGHT IN THE PROBATE COURT.

This action originated in Probate Court, to recover the USDA payments improperly made to Petitioner, individually, and to partition the real estate included within the estate. The case was removed to Circuit Court upon Respondent’s Motion for removal, pursuant to §62-1-302(d). (App. pp.174—177).

In an action removed to Circuit Court pursuant to S.C. Code Ann. §62-1-302, which remains an action governed by the Probate Code, the Probate Code continues to apply. *See Waddell v. Kahdy*, 309 S.C. 1, 419 S.E.2d 783 (1992)(rehearing denied).

Section 15-61-50, S.C. Code of Laws, states: “The Court of Common Pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties.”

This statute provides the Circuit Court with jurisdiction to hear a partition action, requiring that the division of partition sale proceeds be distributed according to the rights of the parties. However, in this case, under the terms of the Will, and the South Carolina Probate Code, the rights of each party as heirs-at-law of decedent’s estate are tempered by the superseding necessity of soundly administering the Estate of Atn B. Livingston. It is the express purpose of the Probate Code to expedite the settling of decedent’s assets, and to promote efficiency in making distributions. *See S. C. Code Ann. §62-1-102*. To that end, a Personal Representative is additionally tasked with a particular order of priority, within which she must attend to the expenses and claims presented in the administration of the Estate. *See S. C. Code Ann. §62-3-805*.

Misapplying S.C. Code §15-61-25 for partition of estate lands during the administration of the estate, the trial court granted Petitioner the right of first refusal whereby he may “buy-out” whatever interest his sister may obtain in the real estate held

by the Estate at its closing. The trial court disregarded the effects of this action on the administration of the Estate. (App. pp. 157—164). This is prohibitively inefficient in practice, and patently inequitable in effect.

This conflict between the sound administration of the Probate Estate under the Probate Code, and the partition of the real property held by the estate by statute must be resolved in favor of the Estate's administration. Under the applicable Probate Code, partition sales must be conducted in accordance with S.C. Code Ann. §62-3-1301, et seq., exclusively. Any other procedure for partition is inapplicable to this matter, filed in 2006.

A. Section 15-61-25 Does Not Apply to Property Held by An Estate

Section 15-61-25 only applies to property owned by “joint tenants or tenants in common.” Prior to the closing of the Estate of Atn B. Livingston, and the issuance of a Deed of Distribution, Petitioner and Respondent are neither joint tenants nor tenants in common. Each party is an heir-at-law and beneficiary of the Estate of Atn B. Livingston, subject to the divestiture that may become necessary during the sound administration. *See S.C. Code Ann. §62-3-101*. Without first completing the administration of the Estate, it is unknown what portion of the real estate within the Estate will actually be formally distributed to either heir. While title to the property is not “up in the air,” it is currently held by Respondent, as Personal Representative, in trust for the beneficiaries of the Estate, pursuant to S.C. Code Ann. §62-3-711(a), subject to divestiture.

Petitioner and Respondent are not “joint tenants or tenants in common” for purposes of §15-61-25, and therefore the right of first refusal provisions contained therein are inapplicable to this case.

B. Section 15-61-25 is Inequitable as Applied in this Case

Petitioner asserts that he is entitled to purchase Respondent's one-half undivided interest in the subject property, pursuant to the statutory guidelines of S. C. Code §15-61-25. As Petitioner contends he is already vested with his own one-half undivided interest, he posits that he need only compensate the Estate for the value of the remaining one-half interest. (App. pp. 256—258). According to Respondent, the Estate should handle all administrative expenses, including just debts, attorney fees, and compensation for the Personal Representative, pursuant to S.C. Code §62-3-719, from the proceeds of the partition sale.

This arrangement would leave Petitioner with possession of his own one-half undivided interest, Respondent's one-half undivided interest, and the right to inherit one-half of the remaining assets of the Estate after the closing of the Estate. Respondent, who has dutifully served as Personal Representative, and brought the partition action to fulfill that obligation, will end up losing possession of her one-half undivided interest to the buy-out, will be denied the equal opportunity to buy-out Petitioner's portion, and will be charged as Personal Representative with the responsibility to use the remaining estate assets to settle the estate, including paying medical expenses, administrative fees, and just debts, all prior to receiving her portion of the estate assets. Respondent, as Heir-at-Law, will be penalized for attempting to settle the Estate pursuant to the South Carolina Probate Code, and for acting as Personal Representative of the Estate.

The inequity inherent to this application is obvious and severe. Pursuant to the South Carolina Probate Code, Respondent, as Personal Representative, is the only party authorized to seek partition of the property. In fulfilling this statutory requirement,

Respondent, as heir-at-law and Personal Representative, receives less than Petitioner from the estate, and is then forbidden the right of first refusal described within S.C. Code Ann. §15-61-25.

Petitioner would receive a windfall should the Court allow S.C. Code Ann. §15-61-25 to apply to this distinctly Probate matter. This windfall is inequitable, and would penalize Respondent for properly serving as Personal Representative. As Personal Representative, charged with the duty to administer the estate, and being the only party with the ability to bring a Petition for Sale in Aid of Assets, Respondent as heir-at-law is systematically and unjustly denied the rights available to other non-Personal Representative heirs of the open estate. Not only is Respondent denied access to the “buy-out” provisions of S.C. Code Ann. §15-61-25, but she also forced to carry the entire burden of administering the estate, while Petitioner takes his share without consideration for the expenses associated with administering an estate, including attorney’s fees, appraisals, court fees, and just debts.

A partition action brought by a Personal Representative pursuant to §62-3-911, Code of Laws of South Carolina, is governed exclusively by the rules and regulations described within the Probate Code. As this action was filed in 2006, extending the application of S.C. Code §15-61-25 to this instance violates the substance of the Probate Code.

The Court of Appeals correctly concluded when an action remains primarily an action governed by the probate code, the probate code continues to apply, even after removal to the master. *See 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.” *Estate of Livingston v. Livingston*, 404 S.C. 137, 744 S.E.2d 203 (Ct. App. 2013), citing *Capco of Summerville, Inc. v. J. H. Gayle Constr. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). In this matter, the only partition process to be considered or employed is that process described within the South Carolina Probate Code. The Court of Appeals did not err in so finding.

IV. THE COURT OF APPEALS DID NOT ERR IN CONCLUDING AN HEIR-AT-LAW IS NOT ENTITLED TO RETAIN FUNDS IN A SHARE PROPORTIONATE WITH HIS INTEREST IN AN ESTATE, WHEN THOSE FUNDS ARE GARNERED THROUGH IMPROPER MEANS WITHOUT FIRST ALLOWING THE ESTATE TO PAY DEBTS OR CLAIMS AGAINST THE ESTATE.

The November 17, 2010 Order of the Master-in-Equity states that Petitioner is entitled to retain one-half the value of his debt to the estate for the improper withholding of Estate assets in the form of USDA subsidies, pursuant to S.C. Code Ann. §62-3-619, also known as the “Executor de son tort” statute. This ruling allows Petitioner to retain one-half the gross value of the Estate receivables. Pursuant to the ruling, the other half must be returned to the Estate, and may then be utilized to pay the just debts of the Estate, including medical bills, taxes, administration fees, and payment on the outstanding Note and Mortgage. Under this ruling, post-closing, Respondent, as heir-at-Law, would be entitled to only this diminished amount. Respondent, as heir-at-Law, would shoulder the entire burden of administering the Estate, and her portion would be reduced the full measure.

“Executor de son tort” is a legal concept by which persons wrongfully holding estate property are called upon to account for and restore the property to the duly

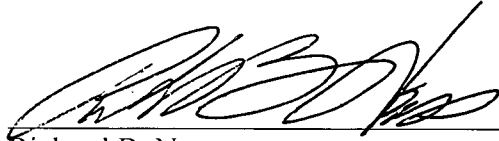
appointed personal representatives, withholding from repayment only so much as is owed to the holder as an estate creditor and such sums as should have been paid by the personal representative but were paid by the holder for the benefit of the estate. *See S.C. Code §§62-3-619 and 62-3-620.* The law provides that the Court “shall require of him a discovery and account” of the estate property in his possession, and “shall proceed to decree against him for the value of the estate and effects” he has taken, wasted or lost. *See S.C. Code §62-3-620. See also Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (2011).*

Nowhere does the South Carolina Probate Code provide for such person, if an heir or devisee, to withhold his “share” (be it half or otherwise) from his obliged repayment. Indeed, an estate with debts exceeding assets would consume in its administration all sums repaid by an “executor de son tort.” Thus, the Master-in-Equity was simply wrong in concluding Petitioner would have received half the USDA subsidies. The Estate was entitled to all of those payments, and Petitioner’s “half” share of the Estate would be half of the funds remaining, if any, after the administration was complete.

Under the Master-in-Equity’s ruling, Petitioner would receive a windfall for his improper conduct. This inequity is not anticipated by the Probate Code, and should not be allowed. The Court of Appeals correctly concluded that the process proposed by Petitioner would result in an abandonment of the distribution scheme and order of abatement outlined within the probate code. The Court of Appeals correctly applied §62-3-619, and did not err in so concluding.

CONCLUSIONS

For the reasons stated above, the decision of the Court of Appeals should be affirmed in its entirety.

A handwritten signature in black ink, appearing to read 'R. B. Ness', is written over a horizontal line.

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December 22, 2014

